

No. A09-1061

STATE OF MINNESOTA

IN COURT OF APPEALS

Irwin I. Thompson,

Relator,

v.

Commissioner Department of Health,

Respondent.

RELATOR'S BRIEF

JONATHAN GEFFEN, ESQ.
Atty. Reg. No. 0276753

LORI SWANSON
ATTORNEY GENERAL

ARNESON & GEFFEN, PLLC
333 WASHINGTON AVE N
SUITE 202
MINNEAPOLIS, MN 55401
(612) 465-8580

AUDREY K. MANKA, ESQ.
Atty. Reg. No. 0067179

ATTORNEY FOR RELATOR

ASST. ATTORNEY GENERAL
445 MINNESOTA ST.
SUITE 1200
ST. PAUL, MN 55101-2130
(651) 297-5930

ATTORNEYS FOR RESPONDENT

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STATEMENT OF LEGAL ISSUES

1. Relator Irwin Thompson was arrested and charged with a felony drug crime in 1995. Mr. Thompson never entered into a plea and his case was routed through pre-trial diversion and was later dismissed without any finding of guilt. The Minnesota Department of Health (“MDH”) relied on police reports from 1995 and concluded that based on the preponderance of the evidence, Mr. Thompson engaged in acts amounting to Felony Drug Crime and as such it disqualified him from working in a direct care position for 15 years. Was the Commissioner's decision supported by substantial evidence and not arbitrary and capricious?

The Commissioner of Human Services determined that his decision was supported by substantial evidence and that it was not arbitrary and capricious.

Relevant authority:

Minn. Stat. § 245C.14 subd. 1(2) (2008)

Minn. Stat. § 245C.15 subd. 2 (2008)

2. Relator Irwin Thompson obtained a Bachelors and Master's Degree in Social Work and desires to work as a social worker. After MDH disqualified Mr. Thompson from providing these services, Mr. Thompson requested reconsideration of the disqualification and separately requested a set-aside because he was not a risk of harm to those he wished to serve. MDH granted Mr. Thompson a facility specific set-aside, but denied his request for reconsideration on the issue of the correctness of the disqualification and asserts Mr. Thompson has no fair hearing right on this issue. Did the Commissioner violate Mr. Thompson's right to procedural due process as guaranteed by the Minnesota and United States Constitutions?

The Commissioner of Human Services determined that it was not permitted to grant him a fair hearing based on the explicit language of Minnesota Statutes section 245C.27, subdivision 1.

Relevant authority:

Minn. Stat. § 245C.27, subd. 1

Matthews v. Eldridge, 424 U.S. 319 (1976)

Goldberg v. Kelly, 397 U.S. 254 (1970)

Fosselman v. Comm'r of Human Services, 612 N.W.2d 456 (Minn. App. 2000)

Minn. Const. Art. I, sec. 7

3. The Minnesota Department of Health's decision not to rescind its finding that Mr. Thompson committed a disqualifying act did not address any possible mitigating factors or other analysis recently articulated by the Minnesota Court of Appeals in *Dobie v. Ludeman*, No. A08-1546 (Minn. App. June 16, 2009). Did the Commissioner's failure to analyze Mr. Thompson's case under the *Dobie* factors violate the law?

The Commissioner failed to address this issue.

Relevant authority:

Dobie v. Ludeman, No. A08-1546 (Minn. App. June 16, 2009)

STATEMENT OF THE CASE

This matter arose from the Minnesota Department of Health's ("MDH") decision to disqualify Relator Mr. Thompson from positions involving direct care to individuals in facilities licensed by MDH. In a notice dated January 31, 2008, the Department of Human Services ("DHS") disqualified Mr. Thompson from employment with the University of Minnesota School of Social Work alleging that a preponderance of the evidence indicated that he committed a violation of Minn. Stat. §152.023, a felony drug offense, in September 1995.¹ Appendix ("App.") 1-2. Mr. Thompson was never convicted of this crime, but DHS stated it relied on police and court reports in making its finding. *Id.*

On January 26, 2009, Mr. Thompson requested reconsideration of DHS's decision alleging that he did not commit the crime in question and did not pose a risk to those he wished to serve. App. 23-31. In a notice dated April 30, 2009, MDH agreed to "set aside" Mr. Thompson's disqualification pursuant to Minn. Stat. § 245C.22, but did not address the correctness of the disqualification. App. 41. On May 27, 2009, Mr. Thompson, through his attorney, sent MDH a letter asking it to address whether it reconsidered the underlying disqualification and whether it would give him a fair hearing on the correctness of the underlying disqualification. App. 42-43. On June 4, 2009, MDH sent notice to Mr. Thompson agreeing that its April 30, 2009 notice did not specifically address the issue of the correctness of the disqualification, but alleged "it is

¹ Pursuant to Minnesota law, the Minnesota Department of Human Services conducts the initial background study on behalf of MDH.

reasonable to believe that the appeals coordinator did consider correctness when making her decision to grant [Mr. Thompson] a set aside.” App. 44. MDH further stated that Mr. Thompson was not entitled to a fair hearing based on Minn. Stat. § 245C.27, subd 1. *Id.*

STATEMENT OF THE FACTS

Irwin Thompson has a Masters Degree in Social Work and works with vulnerable adults and children who need assistance and care. App. 28. Mr. Thompson is a member of the National Association of Social Workers and has been for four years. *Id.* Mr. Thompson has worked without incidence as a case-manager with the “It’s All About Kids” Project through Lutheran Social Services, Institute For Minority Development, and as an Outreach Coordinator. App. 28-29. There is no evidence in the record that Mr. Thompson has had any problem with employment or law enforcement since 1995. Nonetheless, MDH disqualified him for 15-years from providing care to those in facilities licensed by MDH. App. 1-2. According to MDH, Mr. Thompson has no right to a fair hearing to cross-examine witnesses, subpoena witnesses and records, determine the process MDH used to determine he committed this crime, and personally present his side of the story. App. 44.

Minneapolis Police Department records allege that on June 11, 1995, Minneapolis Police were working with an informant who alleged he purchased cocaine from Mr. Thompson. App. 7-19. Despite this allegation, there is no statement in the record from the alleged informant regarding the purchase and record is also devoid of the informant’s name. *Id.* In fact, the only records that exist are the officer’s written statements allegedly restating what the informant told him.

Police records allege that in 1995, several Minneapolis Police Officers entered a residence where Mr. Thompson was located and from which Mr. Thompson fled. *Id.* After a brief chase, the police apprehended Mr. Thompson alleging he had dropped a bag with cocaine in it. *Id.* Police records assert that the bag was later determined to contain 4.3 grams of crack cocaine. *Id.* None of the police reports include signatures of the officers and as such none of the statements were taken under oath. There is no information in the file that MDH spoke with any of the officers about the events that took place in 1995.

On November 21, 1996, Mr. Thompson was charged Hennepin County with a felony controlled substance crime third degree—sale and controlled substance crime third degree—possession. App. 4-6. Prior to a trial, and without entering into a plea of guilt, the court routed Mr. Thompson through a diversion program. *Id.* On February 21, 1998, after successfully completing all the terms of the diversion program, the court dismissed the case without any adjudication of guilt. *Id.*

Since his arrest in 1995, Mr. Thompson has not been convicted, charged or even arrested and has done amazing things with his life. App. 28-31. Mr. Thompson graduated from Augsburg College in with a 3.6 GPA and graduated with a Masters in Social Work from the University of Minnesota with a 3.8 GPA. App. 27. Mr. Thompson's academic advisor wrote a letter of support to MDH. App. 25. In the letter, Ms. Glenda Dewberry Rooney, MSW, Ph.D., LICSW, stated that "it would be unfortunate and a tremendous loss to the social work community should [Mr. Thompson] be unable to secure employment in the profession." *Id.*

MDH set aside Mr. Thompson's disqualification, but it took MDH more than three months to make that decision and Mr. Thompson is only permitted to work in one facility. App. 23 and 41.

STANDARD OF REVIEW

The constitutionality of a statute is a question of law, which this court reviews *de novo*. *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 591 (Minn. App. 2005), review dismissed (Minn. June 9, 2005). This court presumes statutes are constitutional, and will declare a statute unconstitutional "with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). "A party challenging a statute carries the heavy burden of demonstrating beyond a reasonable doubt that a statute is unconstitutional." *Unity Church*, 694 N.W.2d at 591.

A quasi-judicial agency decision not subject to the Administrative Procedure Act is reviewed on writ of certiorari by inspecting the record to determine whether the decision was " 'arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.' " *Rodne v. Commissioner of Human Servs.*, 547 N.W.2d 440, 444-45 (Minn. App. 1996) (quoting *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (other quotations omitted)).

ARGUMENT

I. Denying Mr. Thompson a Fair Hearing on The Issue Whether There is a Preponderance of the Evidence That He Committed A Felony, Absent A Conviction, is a Violation of His Right to Procedural Due Process.

Denying Mr. Thompson the right to a fair hearing prevents him from being heard at a meaningful time and in a meaningful manner. Minnesota's Due-Process Clause

protects an individual's property interest in pursuing work with a department-licensed facility. Minn. Const. Art. I, sec. 7. Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

To determine whether an individual's right to procedural due process has been violated, one must first determine whether a protected liberty or property interest is implicated and then determine what process is due by applying a balancing test. *Mathews v. Eldridge*, 424 U.S. 319, 332, 335 (1976); *Humenansky v. Minn. Bd. of Med. Exam'rs*, 525 N.W.2d 559, 566 (Minn. App. 1994).

This court has previously addressed an individual's property rights to pursue employment in the public sector. Specifically, this court concluded that an individual "has a property interest to pursue employment as a counselor in the public sector." *Sweet v. Comm'r Human Services*, 702 N.W.2d 314, 320 (Minn. App. 2005). In *Sweet*, the relator argued that the due process clause required the Department of Human Services to provide him with a fair hearing whether his request for a set-aside to his disqualification was properly denied. Again, this court affirmatively found that an individual has a property interest in employment in the public sector and thus applied the balancing test articulated in *Mathews*. *Id.*

Not only are Mr. Thompson's property interests involved, but the courts have also recognized that if a person's good name, reputation, honor, or integrity is at stake because of governmental action, the person is entitled to procedural due process. *Wisconsin v.*

Constantineau, 400 U.S. 433, 437 (1971); see also *Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn.1999) (recognizing liberty interest is implicated when loss of reputation is coupled with loss of another tangible interest), *cert. denied*, 528 U.S. 973, (1999). “Because relators have been disqualified for alleged failure to carry out the provisions of a law embodying an important policy—that of protecting children’s health and welfare—it is clear to us that disqualification has tainted their good names and reputations.” *Fosselman v. Comm’r of Human Services*, 612 N.W.2d 456, 461 (Minn. App. 2000). In this case, Mr. Thompson’s interest in securing employment and protecting his good name are interests that require due process protection.

As such, one must use the balancing test articulated in *Mathews* to determine the type and amount of due process. *Sweet v. Comm’r Human Services*, 702 N.W.2d 314, 319 (Minn. App. 2005). In *Mathews*, the Court stated that the “fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews*, 424 U.S. at 333. When determining whether the administrative process passes the constitutional balancing test, the court must analyze the governmental and private interests affected. *Id.* This analysis requires the court to balance three factors:

A. Mr. Thompson’s property interest in pursuing employment as a social worker and protecting his good name weighs heavily in favor of providing him a fair hearing.

Mr. Thompson has a valuable property right to seek employment in the public sector in the area of social work and has an interest in protecting his good name. As noted above, Mr. Thompson has a property interest in seeking employment as a social

worker. *Falgren v. State Bd. of Teaching*, 545 N.W.2d 901, 909 (Minn. 1996) (noting revocation of teaching license affects ability to work in chosen profession and quoting United States Supreme Court, “ ‘the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood.’ ” (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985); *Humenansky*, 525 N.W.2d at 566 (“A license to practice medicine is a property right deserving constitutional protection.”)).

In this case, MDH did set-aside Mr. Thompson’s disqualification, but a set-aside is a flawed remedy and the underlying disqualification remains an enormous impediment to employment. For example, a set-aside is only facility specific, so any time during the fifteen year disqualification period when Mr. Thompson wants to change employment, his potential employer will be informed of the disqualification. Minn. Stat. § 245C.17, subd. 3. In order to be eligible for employment, Mr. Thompson will have to request reconsideration from MDH and then he must again wait for the Commissioner to set-aside his disqualification. *See* Minn. Stat. § 245C.22, subd. 5.

Previously, MDH has taken an extraordinary amount of time to determine whether to grant Mr. Thompson a set-aside. Specifically, MDH’s initial determination to set-aside Mr. Thompson’s disqualification took it more than 3 months.² Moreover, if Mr. Thompson applies for other jobs, his potential employer will receive a notice from MDH informing it that Mr. Thompson is disqualified from working in that position. Minn. Stat.

² Minnesota law affirmatively states that reconsideration decisions must be made within 45 days. Minn. Stat. § 245C.22, subd.1 (c). MDH took over 90 days and as such failed to comply with the law.

§ 245C.17. If Mr. Thompson requests a set-aside and MDH awards such a set-aside, then MDH will provide the employer with the facts of the underlying disqualification. Specifically, MDH will inform his employer that he is a felony drug user and dealer. *See* Minn. Stat. § 245C.23, subd.1. If disqualification is set-aside, the data, which was previously designated as nonpublic, is reclassified as public data. Minn. Stat. § 245C.22, subd. 7. Additionally, potential employers are under no obligation to hire an individual who receives a set-aside and can terminate an offer of employment at any time. Accordingly, Mr. Thompson's disqualification precludes him from working in his chosen field, renders his opportunity to re-enter that field at the discretion of the commissioner, and publically labels him a drug dealing felon to prospective and current employers.

B. The risk of erroneous harm to Mr. Thompson and the probable value of additional procedural safeguards weighs in favor of Mr. Thompson.

The risk of potential erroneous deprivation supports adding additional procedural safeguards in the form a fair hearing. Due process requires the opportunity to be heard and that the hearing must be at a meaningful time and in a meaningful manner. *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Goldberg*, the U.S. Supreme Court held that New York's procedure for terminating welfare benefits, before giving recipients the opportunity for an evidentiary hearing, denied recipients due process. *Id.* at 268. The Court held that the failure to grant recipients the opportunity to present evidence orally or to confront and cross-examine adverse witnesses was "fatal to the constitutional adequacy" of the New York procedures. *Id.* at 267-68. In regard to the issue of oral versus written presentations, the Court noted that "written submissions do not afford the

flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many [welfare] termination proceedings, written submissions are a wholly unsatisfactory basis for decision.” *Id.* Second, the Court said, “In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine witnesses.” *Id.*

Mr. Thompson’s case is particularly susceptible to erroneous harm because MDH’s decision is based on the preponderance of the evidence that Mr. Thompson committed a crime for which he was never convicted. Moreover, the foundation for the decision is 15-year-old unsigned police reports. As such, Mr. Thompson has never had the opportunity to defend these allegations in person. As noted, he was not convicted of this crime and the charges were subsequently dismissed without a finding of guilt. Moreover, he has never had the opportunity to defend these charges in any administrative setting because MDH has denied his requests for a fair hearing. This denial of a hearing right is different from cases such as *Sweet* where the relator had an opportunity in the past to defend themselves in court. *Sweet v. Comm’r Human Services*, 702 N.W.2d 314, 319 (Minn. App. 2005) (case where an individual who was convicted sought a fair hearing on the issue of whether he was entitled to a set-aside.) Mr. Thompson’s case is also different from cases such as *Dobie*, where the individual received a fair hearing as to whether the preponderance of the evidence illustrated they committed a crime. *Dobie v. Ludeman*, No. A08-1546 (Minn. App. June 16, 2009).

Mr. Thompson's disqualification is based solely on MDH's review of unsigned, 15-year-old police reports. MDH failed to conduct any of its own investigation, failed to contact the police involved in the case and simply relied on ancient unsigned reports containing hearsay statements. Moreover, it is unclear who at MDH made the decision to disqualify Mr. Thompson, what, if any, training qualifies that MDH employee to make a finding that a person committed a crime, and what criteria and factors were applied in reaching the conclusion to disqualify. As such, MDH's determination is acutely susceptible to erroneous conclusions.

C. Government interests support additional procedures.

The government's interest in ensuring vulnerable individuals receive safe and effective care supports the additional procedural safeguard of a fair hearing. The governmental interest in protecting the public, especially vulnerable individuals receiving services from social workers is of paramount importance. *See* Minn. Stat. § 245C.22, subd. 3. *Sweet* at 321. MDH may assert that it has an additional interest in avoiding the cost and administrative burden of providing individuals with a fair hearing. If this is the case, "The burden on the department is lessened, however, because [MDH] already has procedures in place for hearings in other human services cases." *See* Minn. Stat. § 256.045 (describing procedures for review of human services matters). *Fosselman* at 464.

As noted, MDH does not even allege Mr. Thompson is a threat to the public, as it has already concluded that Mr. Thompson is not a risk of harm to those he wishes to serve. As such, there is no legitimate governmental interest in this case regarding the

safety or well being of patients and those who receive care from facilities licensed by MDH. In fact, all the evidence illustrates that Mr. Thompson's ability to work in the field of social work will help provide vulnerable individuals with safe and effective care. Since 1995, Mr. Thompson has devoted his life to helping others. Accordingly, allowing Mr. Thompson to work in the field of social work supports the government's interest in protecting the public.

If the governmental interest is solely monetary, this interest is, as identified in *Fosselman*, reduced by the fact that MDH already has elaborate procedures in place to conduct such hearings. Moreover, as noted in *Fosselman*, "Although this *Mathews* factor weighs against granting relators an agency hearing, its weight is not significant, and it is clearly outweighed by the other two *Mathews* factors." *Id.*

II. MDH's Decision to Disqualify Mr. Thompson is Not Supported by Substantial Evidence and is Arbitrary and Capricious.

MDH's decision to disqualify Mr. Thompson based on 15-year-old police reports is not substantial evidence. A quasi-judicial agency decision not subject to the Administrative Procedure Act is reviewed on writ of certiorari by inspecting the record to determine whether the decision was "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Rodne v. Commissioner of Human Servs.*, 547 N.W.2d 440, 444-45 (Minn. App.1996) (quoting *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn.1992) (other quotations omitted)). *see also White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997) (substantial evidence is "1. [s]uch relevant evidence as a reasonable mind might accept as

adequate to support a conclusion; 2. [m]ore than a scintilla of evidence; 3. [m]ore than some evidence; 4. [m]ore than any evidence; and 5. [e]vidence considered in its entirety"), *review denied* (Minn. Oct. 31, 1997).

Since MDH has not offered Mr. Thompson a fair hearing, one must rely solely on its written notices to surmise MDH's decision making processes. Specifically, in its notice to disqualify Mr. Thompson, MDH notified him that based on records from the "Federal Bureau of Investigation (FBI), the Hennepin County District Court, and the Minneapolis Police Department showing that there is a preponderance of evidence" that he committed a felony drug crime. App. 1-2. Mr. Thompson requested reconsideration alleging this was inaccurate and also requested that MDH set-aside the disqualification. In its response, three months later, MDH set-aside the disqualification, but failed to address the issue of the correctness of the disqualification. Mr. Thompson, through his attorney, sought clarification and mailed MDH a letter asking for such. App. 42-43. On June 4, 2009, MDH asserted that "Although the Department of Health's letter did not specifically address the correctness of Mr. Thompson's underlying disqualification, it is reasonable to believe that the appeals coordinator did consider the correctness when making her decision to grant the set-aside." App. 44. This glib response illustrates that MDH failed to conduct any meaningful review and calls into question whether it conducted any review at all. Despite MDH's statements, it is more reasonable to think that MDH did not conduct any review because it patently failed to address the issue at all in its notice and subsequent communications.

The use of unsigned 15-year-old police reports is not substantial evidence. In reaching its conclusion that there is a preponderance of evidence that supports a finding that Mr. Thompson committed felony drug crime, MDH relied exclusively on old police reports. These reports include various forms of hearsay, including allegations from an unnamed informant. The police reports are also unsigned. We ask this court to conclude that these unsigned, uncertified police reports, without additional evidence, do not constitute "substantial evidence."

III. MDH Failed to Provide Any Documentation That it Reviewed Mitigating Factors of the Alleged Offense.

There is no information in MDH's file suggesting it evaluated whether there were mitigating circumstances surrounding the 14-year old arrest which would lessen the severity of the alleged offense. This court recently opined in an unpublished opinion that a DHS's decision to disqualify an individual based on the preponderance of the evidence:

[R]equires a determination of the severity level of second-degree assault that, by a preponderance of evidence, Dobie can be deemed to have committed. The commissioner found only that "[a] preponderance of the evidence shows that Dobie committed the offense of second degree assault" and, despite having found mitigating circumstances, failed to make any findings regarding the level of Dobie's offense as felony, gross-misdemeanor, or misdemeanor. Without any determination of the level of severity of Dobie's presumed offense, the commissioner arbitrarily assigned a permanent disqualification.

Dobie v. Ludeman, No. A08-1546 (Minn. App. June 16, 2009).

In *Dobie*, the Relator appealed a determination that she was disqualified based on the preponderance of the evidence that she committed second degree assault. *Id.* Dobie appealed and was granted a fair hearing where the ALJ determined there were some

“mitigating factors” in her situation. *Id.* This court remanded the case to DHS for it to determine what level of offense may have occurred, but affirmatively opined that “based on the record as a whole, including the findings of mitigating factors and the lack of prosecution in 1991, we conclude that there is not sufficient evidence in the record to support a determination that Dobie committed a felony-level second-degree assault, therefore, on remand, the commissioner may only consider whether her offense level was gross misdemeanor or misdemeanor.” *Id.*

In the case now before the court, Mr. Thompson similarly was never convicted of the crime and as such MDH is bound to review the severity of the alleged offense level. Minnesota law does not include separate levels of drug crimes that include the possession or sale of cocaine. Specifically, there are no provisions for gross misdemeanor or misdemeanor use or sale of cocaine, but the law permits the court to impose other less severe options. Particularly, the law permits the use of a diversion programs. In this case, we know that Mr. Thompson was charged with a felony drug crime, and such charges were dismissed after he completed a drug diversion program. What is far less clear is whether MDH reviewed the factors the trial court reviewed in 1996 to route Mr. Thompson through diversion and not pursue a felony conviction. This case is very similar to *Dobie* in that there are mitigating circumstances which persuaded the trial court to permit Mr. Thompson to complete diversion without entering a plea of guilty and without pursuing any conviction. To the extent MDH considered and weighed these factors is a mystery.

Without the benefits of a fair hearing, Mr. Thompson is unable to determine what factors MDH reviewed, and which it did not when determining he is disqualified. The need for a fair hearing is amplified by MDH's glib responses to Mr. Thompson's requests for reconsideration. Specifically, in its response to Mr. Thompson's request for reconsideration on the disqualification, MDH failed to even acknowledge his request. MDH's response is silent regarding Mr. Thompson's request for reconsideration. Mr. Thompson's attorney subsequently mailed MDH a request to address this issue and, MDH explicitly agreed that its previous notice did not specifically address the issue of the correctness of the disqualification, but alleged "it is reasonable to believe that the appeals coordinator did consider correctness when making her decision to grant [Relator] a set aside." App. 44. Accordingly, we request that this matter be remanded to address the mitigating factors and severity of the alleged offense.

IV. Potential Violations of Mr. Thompson's Equal Protection Rights.

If MDH does not review all non-convictions under the preponderance of the evidence standard that involve allegations of drug use, then it violated Mr. Thompson's right to equal protection under the law. Under the equal-protection clause, "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. "The Equal 10 Protection Clause . . . requires that people in similar circumstances be similarly treated under the law." *Hawes v. 1997 Jeep Wrangler*, 602 N.W.2d 874, 880 (Minn. App. 1999).

Thus, one must first determine whether Mr. Thompson and his group of persons claiming disparate treatment are actually “similarly situated to those to whom they compare themselves.” *Greene v. Comm’r of Minn. Dep’t of Human Servs.*, 733 N.W.2d 490, 494 (Minn. App. 2007), *aff’d*, 755 N.W.2d 713 (Minn. 2008) (quotation omitted). Whether two groups are similarly situated depends on their respective structure and makeup in light of the statute’s purpose. *Erickson v. Fullerton*, 619 N.W.2d 204, 209 (Minn. App. 2000). To be similarly situated, the groups “must be alike in all relevant respects.” *St. Cloud Police Relief Ass’n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Jan. 7, 1997).

Because a fundamental right or a suspect class is not involved, whether the statute will survive this constitutional challenge depends on whether there is some rational relationship to a legitimate state purpose. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993). The rational-basis test requires “(1) a legitimate purpose for the challenged legislation, and (2) that it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose.” *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991). The legitimate purpose here is to protect children and vulnerable adults. In this case, MDH already affirmatively stated that Mr. Thompson does not pose a risk of harm to those he wishes to serve. Moreover, since there was no fair hearing to ask MDH how it enforces the preponderance of evidence law, there is no proof that MDH applies the law equally to all similarly situated individuals.

For example, in Minnesota it is a felony to possess cocaine. Accordingly, everyone who has ever used cocaine has “possessed” it and has committed the acts

amounting to a drug felony, and according to MDH, is disqualified for 15 years. However, it is unclear how MDH enforces this standard. Is MDH disqualifying all rehabilitated drug users, or even all those who have used cocaine even a single time? Moreover, is DHS only using arrest records when making this determination? If so, what is the impact of the use of arrest only records on persons of color, like Mr. Thompson? Statistics have shown that in Minnesota, African American men are over policed and over arrested. For example, in some Minnesota jurisdictions, black drivers were pulled over in excess of 310% more than their white counterparts.³ As such, a policy whereby MDH relies solely on police records, failing to pursue other avenues of information, will disproportionately affect African Americans like Mr. Thompson. Mr. Thompson requires a hearing to pursue this matter and ask these important questions.

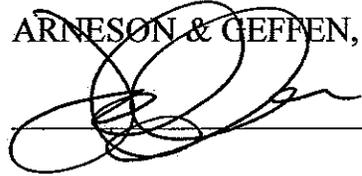
CONCLUSION

For the reasons set-forth above, Mr. Thompson requests that this court rescind his disqualification and permit him to work in his field of chose. In the alternative, Mr. Thompson requests a fair hearing to address the allegations against him and an opportunity to be heard in a meaningful way at a meaningful time.

³www.crimeandjustice.org/researchReports/Racial%20Profiling%20Report-%20All%20participating%20Jurisdictions.pdf (last visited July 31, 2009).

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ARNESON & GEFFEN, PLLC



Jonathan Geffen (#0276753)
333 Washington Ave. No., Ste. 202
Minneapolis, MN 55401
(612) 465-8580
Attorneys for Relator

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