

No. A09-1061

STATE OF MINNESOTA

IN COURT OF APPEALS

Irwin I. Thompson,

Relator,

v.

Commissioner Department of Health,

Respondent.

RELATOR'S REPLY BRIEF

JONATHAN GEFFEN, ESQ.
Attorney 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

ATTORNEY FOR RESPONDENT

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ARGUMENT

I. MDH's References To *State v. Sweet* Are Not Persuasive As *Sweet* Involves A Relator With Convictions And Who Did Not Contest The Underlying Disqualification.

MDH's reliance of *State v. Sweet* is misguided because the facts of that case are fundamentally different from Mr. Thompsons, which consequently alters the due process analysis under the test articulated in *Mathews v Eldridge*, 424 U.S. 319 (1976).

A. Unlike *Sweet*, Relator seeks review of the correctness of the disqualification not just a set-aside.

In *State v. Sweet*, DHS disqualified an individual who was *convicted* of first and third-degree criminal sexual conduct. *State v. Sweet*, 702 N.W.2d 314, 314 (Minn. Ct. App. 2005). After his disqualification, Sweet sought a set-aside of the disqualification, which DHS denied. *Id.* As such, unlike this case, Sweet did not oppose the correctness of the disqualification; rather he merely sought to have the disqualification set-aside.

This distinction is important when reviewing the *Mathews* test. Specifically, the second factor of the *Mathews* test requires one to review the procedures provided by the governmental agency to determine the risk of error. *See Mathews*, 424 U.S. at 335. In *Sweet*, the court concluded that the Relator had “unfettered right to present all evidence” at his criminal trial and that “because the agency presented no controverting testimony, a hearing was not necessary to permit cross examination of agency witnesses.” *Sweet* at 321. But, in Mr. Thompson's case, he has not had an unfettered right to present evidence and the agency is presenting controverting testimony about the underlying facts of the case. Contrary to *Sweet*, whether the Relator committed the underlying disqualifying act

is in controversy. As such, the amount of due process afforded to Sweet is fundamentally different than the due process this Court should afford to Mr. Thompson.

Finally, MDH's glib responses to Relator's written requests illustrate exactly why a hearing is necessary. 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. Relator's Brief App. 23-31. On April 30, 2009, MDH agreed to set-aside Mr. Thompson's disqualification, but failed to address the correctness of the disqualification. Relator's Brief 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. Relator's Brief 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 reasonable to believe that the appeals coordinator did consider correctness when making her decision to grant [Mr. Thompson] a set aside." Relator's Brief App. 44. As such, the current level of due process provided by MDH does not include an explanation from MDH why it upheld its conclusion or even why the information submitted by Relator was deficient. In fact, MDH's notices are completely silent regarding MDH's review of the Relator's request. Mr. Thompson's livelihood is at stake and Due Process requires more from MDH.

B. Relator's case does not involve a conviction.

Unlike the Relator in *Sweet*, Mr. Thompson was never convicted of a crime. As noted, Mr. Thompson was never convicted, never admitted guilt, and his case was

dismissed. This is patently different from *Sweet* where the Relator was convicted of two counts of criminal sexual conduct.

This Court has previously identified the importance of the existence of a conviction when disputing the accuracy of a disqualification. Specifically, this Court recently noted that when an individual is convicted this “minimized the risk of erroneous decision” during a subsequent administrative review and as such there was less risk and less need to hold a hearing duplicative to the criminal matter. *Obara v. Minnesota Department of Health*, 758 N.W.2d 873, 879 (Minn. Ct. App. 2008). Again, this is not the case before the Court. In this case, Mr. Thompson was never convicted and has not received the rights and process necessary to minimize the risk of an erroneous deprivation.

II. Police Reports Are Inherently Unreliable And Are Not Substantial Evidence In This Case.

The police reports contain unsworn statements from police officers and are therefore inherently untrustworthy. The Minnesota Supreme Court has stated on several occasions that *ex parte* statements made during police questioning are inherently untrustworthy. See *State v. Greenleaf*, 591 N.W.2d 488, 503 (Minn. 1999); *In the Matter of the Welfare of R.J.E.*, 642 N.W.2d 708 (Minn. 2002).

Under federal law, police records are not admissible evidence in a criminal trial.¹ While this is not a criminal trial, police reports are potentially unreliable since they are

¹ Rule 803(8)(B) provides a hearsay exception for
Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth ... (B)
matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding,
however, in criminal cases matters observed by police officers and other law enforcement personnel.

made in an adversary setting, and are often subjective evaluations of whether a crime was committed. See *Quezada*, 754 F.2d at 1193-94 (5th Cir. 1985); *United States v. King*, 613 F.2d 670, 673 (7th Cir.1980); *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir.), *cert. denied*, (1979). Federal law seeks to avoid admitting an officer's report of his observations in lieu of his personal testimony of what he observed. "In adopting this exception, Congress was concerned about prosecutors attempting to prove their cases in chief simply by putting into evidence police officers' reports of their contemporaneous observations of crime." *Orozco*, 590 F.2d at 794 (quoting *United States v. Grady*, 544 F.2d 598, 604 (2d Cir.1976)). Similarly, Rule 803(8)(B) contains an exclusion for police reports because they are not "reliable evidence of whether the allegations of criminal conduct they contain are true." *United States v. Bell*, 785 F.2d 640, 644 (8th Cir.1986). In this case, MDH relied solely on these police reports, and as such, Mr. Thompson was not afforded an opportunity to cross examine the individuals who made the statements or otherwise provide testimony regarding the facts of this case. MDH's decision is based solely on police reports which is not reliable hearsay and is not substantial evidence.

III. MDH's Allegation Of A Pending Substantial Increase In Hearings Is Unsupported By The Facts.

MDH erroneously alleges that permitting hearings in cases such as this would "dramatically" increase the number of appeals and costs. MDH Brief at 23. First, MDH failed to provide any information to support this panicked response. Second, Relator's request for additional procedure is very limited and specific. Specifically, the request only applies to those who are disqualified based on the preponderance of evidence they

committed a crime, request reconsideration and receive a set-aside but not a reversal of the underlying disqualification. There is no evidence that this is a common scenario. In fact, there are no Minnesota appellate cases that address this exact issue.

IV. This Court Should Not Defer To MDH On Issues Of Criminal Justice Since MDH Is Not A Criminal Justice Agency.

Contrary to Respondent's claim, there is no need for this Court to defer to MDH on issues of criminal justice. Although one may normally presume that an agency has "expertise to decide technical matters within the scope of the agency's authority", this deference is misguided in this case. *See In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota*, 624 N.W.2d 264, 278 (Minn. 2001). In this case, MDH is opining on matters of criminal justice, yet it is not a criminal justice agency and it has provided no proof that it has any expertise in deciding when the preponderance of the evidence illustrates a crime occurred.

V. Burden Of Proof Rests Solely On Department Of Health To Prove That Relator Committed A Disqualifying Act.

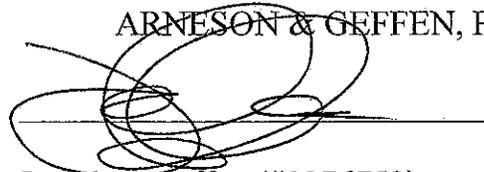
Contrary to MDH's statements, the burden is on MDH to show that Relator committed a disqualifying offense. MDH cites Minn. Stat. § 245C.22, subd. 4 and alleges Relator carries the burden of proof to show he is not disqualified. MDH misreads the law. Minn. Stat. § 245C.22, subd. 4 only addresses the issue whether individuals deserve to have their disqualification set-aside; not whether the disqualification is correct. As noted, MDH set-aside Relator's disqualification because he is not a threat to those he wished to serve. Whether MDH should have originally disqualified Relator is a different issue and that burden rests solely on MDH to prove.

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.

Dated: September 10, 2009

ARNESON & GEFFEN, PLLC



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

Certification of Brief Length:

Counsel certifies that this brief complies with the word court limit of Rule 132.01, subd.

3. This brief was prepared on MS WORD and contains 1,839 words.