

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-754**

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Michael Scott Anderson,

Relator,

vs.

Commissioner of Health,

Respondent.

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**RELATOR'S REPLY BRIEF**

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## INTRODUCTION

Relator Michael Anderson submits this reply to respondent's brief. In sum, respondent's determination to disqualify relator from direct contact with the patients he has cared for compassionately and without nary a complaint for the past sixteen years is in fact arbitrary and capricious because without a risk of harm analysis "there is no rational connection between the facts and the agency decision." *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314, 318 (Minn. App. 2005). The fact Mr. Anderson misbehaved, albeit crudely, on a crowded dance floor while intoxicated does not mean he is a bad nurse or presents any danger whatsoever to his patients. His record over time, and the abundant support he has within and among the healthcare community, despite this one incident, demonstrates he is not a threat to patient safety. Any conclusion otherwise, without an objective and thorough risk of harm analysis using the factors set forth in Minn. Stat. §245C.22, subd. 4, violates his right to procedural due process.

## ARGUMENT

### **I. Minn. Stat. §245C.29 Could Be Interpreted to Allow For a Risk of Harm Analysis**

Unless otherwise specified in statute, a determination that:

\* \* \* \*

A preponderance of evidence shows that an individual committed an act or acts that meet the definition of any of the crimes listed in section 245C.15

Minn. Stat. §245C.29, subd. 2(a)(2). "If a determination that the information relied upon to disqualify an individual was correct and conclusive under this section, and the individual is subsequently disqualified under 245C.15, the individual has a right to request reconsideration on the risk of harm under section 245C.21." *Id.* subd. 2(c).

Mr. Anderson's disqualification came about because a preponderance of evidence showed he committed an act that met the definition of a crime listed in §245C.15. (5<sup>th</sup> degree criminal sexual conduct). As such, he is entitled to a risk of harm analysis despite what appears to be a prohibition to a set aside a disqualification set forth in Minn. Stat. §245C.24, subd. 2. At minimum these statutes are in conflict. Sound public policy supports a risk of harm analysis when the criminal act or conviction has no rational relation to the care giver's position. This is especially true where an individual has always exceeded expectations in his role as a pediatric nurse.

**II. Even if Minn. Stat. §245C.29 Does Not Afford Relator a Risk of Harm Analysis, Procedural Due Process Does**

Despite Respondent's assertion to the contrary, Mr. Anderson was never given a meaningful opportunity to challenge his disqualification. Respondent never looked beyond the conviction itself in making the disqualification determination. To the extent discernable, the Commissioner did not take an objective look at the facts and circumstances underlying the conviction. More importantly, the Commissioner did not undertake a thoughtful analysis of any factors which may or may not show that Mr. Anderson poses an actual or credible threat of harm to the patients he serves.

The reason the Background Study Act was upheld against a procedural due process challenge in *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314 (Minn. App. 2005) is precisely because the Commissioner provided relator with at least some consideration to whether he posed a risk of harm to the clientele he served. *See Sweet*, 702 N.W.2d at 318-19. Unlike this case, the Commissioner in *Sweet* considered all eight statutory risk of harm factors before the final disqualification decision was made. *Id.* at 318. In *Obara v. Minnesota Department of Health*, 758 N.W.2d 873 (Minn. App. 2008) a substantive due process challenge was rejected

because, as the court noted, Minn. Stat. §245C.22, subd. 4, “allows a disqualified individual to show that he has been rehabilitated and can be trusted to have direct contact with patients...” *Id.* at 880. It is precisely because of this right to request relief from disqualification, that the statute passed constitutional muster. *Id.* A review of the correctness of the conviction is simply insufficient to satisfy due process. To suggest Mr. Anderson was given a “meaningful opportunity to present his case” as it relates to a job he has performed exceptionally well for sixteen years is disingenuous. *See Mathews v. Eldridge*, 424 U.S. 319, 349 (1976).

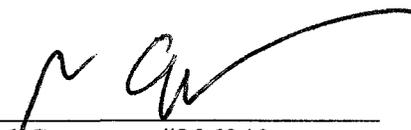
We understand the “public purpose of Chapter 245C is to protect the health and safety of individuals who are vulnerable due to their age or their physical, mental, cognitive or other disabilities.” *Obara*, 758 N.W.2d at 879. But there ought to be some credible evidence to show that the safety of these patients is actually placed at risk by an individual who the statute purports to protect them from. Due process requires there at least be some analysis to determine whether a person with a protected property interest poses this risk.

### CONCLUSION

For the reasons set forth above and those previously stated in relator’s main brief, Michael Anderson respectfully requests this Court to reverse the Commissioner’s decision to disqualify him with direct contact with his patients and to remand for a risk of harm analysis.

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