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No. A-06-1799

STATE OF MINNESOTA

IN COURT OF APPEALS

Margie Kleven,

Relator,

vs.

Commissioner of Human Services,

Respondent.

RESPONDENT'S BRIEF

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LEGAL ISSUES

I. Whether the Commissioner of Human Services ("Commissioner") correctly found abuse under the Minnesota Vulnerable Adults Act where Relator engaged in repeated disparaging, derogatory and humiliating language and conduct toward a vulnerable adult.

The Commissioner found that Relator engaged in repeated acts of abuse, which constitutes recurring maltreatment, and disqualified Relator from positions involving direct contact with persons served by programs licensed by the Department of Human Services.

Apposite Cases:

Grossman v. Martin Luther Manor, 2005 WL 2850491 (Minn. Ct. App., Nov. 1, 2005) (unpublished)

Apposite Statutes:

Minn. Stat. §§ 626.557, 626.5572 (2005)

STATEMENT OF THE CASE

Relator appeals from an Order of the Commissioner of Human Services dated August 17, 2006 ("Commissioner's Order"), affirming the Department of Human Services' ("DHS'") decision to disqualify Relator from positions involving direct contact with persons served by DHS-licensed programs because Relator engaged in recurring maltreatment against a vulnerable adult. *See* Minn. Stat. §§ 245C.14, subd. 1(a)(3); 245C.15 subd. 4(b) (2005). The Commissioner also affirmed DHS' decision to not set aside the Relator's disqualification under Minn. Stat. § 245C.22, subd. 4 (2005).

A contested case was heard by an Administrative Law Judge ("ALJ") on March 20, 2006. The ALJ issued Findings of Fact, Conclusions and a Recommendation ("Recommendation") dated May 22, 2006. The ALJ recommended that the Commissioner affirm the determination of recurring maltreatment, the disqualification of Relator, and the decision to not set aside the disqualification. The Commissioner's Order, which affirmed and adopted the ALJ's Recommendation in its entirety, is appealable to this Court pursuant to Minn. Stat. § 14.63 (2005).

The only issue raised by Relator on appeal is whether her conduct, which is undisputed for purposes of this appeal, constitutes abuse within the meaning of the Minnesota Vulnerable Adults Act.[1] Relator has not challenged the Commissioner's decision to not set aside Relator's disqualification on risk-of-harm grounds. DHS,

[1] More than one act of "abuse" under the Minnesota Vulnerable Adults Act constitutes "recurring maltreatment," which was the basis for Relator's disqualification. *See* Minn. Stat. §§ 245C.02 subd. 16; 626.5572 subd. 15 (2005).

therefore, limits briefing to the issues raised by Relator. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived)(citations omitted). DHS acknowledges, however, that if this Court reverses the determination that Relator committed abuse, there may no longer be a basis for Relator's disqualification in the absence of a determination of recurring maltreatment.

STATEMENT OF FACTS

The facts of this case are not in dispute, and are fully set forth in the Commissioner's Order and attachments thereto, all of which are included in Relator's Appendix.[2] In the interest of efficiency, Respondent Commissioner of Human Services ("Commissioner" or "State") will briefly summarize the key facts, which provide context for the legal issue on appeal.

While working at a state-operated group home between 2000 and May 2004, Margie Kleven ("Relator") was responsible for direct care and supervision of four developmentally disabled adult men ("vulnerable adults"). Relator's Appendix, A-11 at ¶ 6 ("A-11 at ¶ 6"). Each of these vulnerable adults functions, mentally, at the approximate level of an 18-month old child. A-10 at ¶ 5. They cannot speak, and with a few exceptions related to their daily routines, do not understand words spoken to them. *Id.* One of the vulnerable adults cannot dress himself, while the other three can dress

[2] In a footnote, Relator indicates that while she denies committing some of the acts attributed to her, she is not challenging the Commissioner's findings that she did commit those acts. Appellant's Brief at 8, n.1.

themselves if prompted by staff. *Id.* Each vulnerable adult requires assistance with most of his daily living activities, such as bathing, shaving, and meals. *Id.*

Relator referred to one of the vulnerable adults as an "asshole" on a somewhat regular basis. A-12 at ¶¶ 13-15. On some occasions, Relator told this vulnerable adult that he was an "asshole" while using a sweet tone of voice. *Id.* On others, she called him an "asshole" using an aggressive, angry tone. *Id.* In several instances, Relator referred to this vulnerable adult as an "asshole" when speaking with other staff members. These conversations occurred in the presence of one or more of the vulnerable adults. *Id.*

On February 24, 2004, another staff member observed Relator teaching one of the vulnerable adults to say "fuck you." A-13 at ¶ 17. Due to the vulnerable adult's inability to speak, the sound he was making resembled "ruh roo." *Id.* Relator invited the other staff member to observe this encounter, and thought the activity was funny. *Id.*

There was no evidence that any of the vulnerable adults actually understood the abusive comments Relator directed toward them or that they experienced emotional harm as a result of the Relator's conduct. A-20.

The Commissioner determined that Relator engaged in repeated abuse under the Minnesota Vulnerable Adults Act ("MVAA"), Minn. Stat. § 626.5572, subd. 2(b)(2), by encouraging a vulnerable adult to say "fuck you" and by repeatedly calling a vulnerable adult an "asshole." A-2, A-18 at ¶¶ 4-5. The Commissioner concluded that the "conduct involve[ed] language toward a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, and humiliating." *Id.*

SCOPE OF REVIEW

The Court's review of an agency decision following a contested case hearing is governed by Minnesota's Administrative Procedures Act ("APA"), codified at Minnesota Statute Chapter 14 (2005). Under the APA, the Court may reverse or modify an agency's decision if the decision: (a) violates the constitution; (b) exceeds the agency's statutory authority or jurisdiction; (c) was made upon unlawful procedure; (d) is affected by error of law; (e) is not supported by substantial evidence; or (f) is arbitrary or capricious. Minn. Stat. § 14.69 (2005). The party challenging an agency action has the burden of proving one or more of the foregoing grounds. *In re Space Ctr. Transp.,* 444 N.W.2d 575, 579 (Minn. Ct. App. 1989). In this case, Relator's challenge is based on subsection (d), that the Commissioner's Order incorrectly interprets the statutory language and thus contains an error of law.

This Court retains the authority to review de novo errors of law that arise when an agency decision is based on the interpretation of a statute. *In re Denial of Eller Media Co.'s Applications for Outdoor Adver. Device Permits in City of Mounds View,* 664 N.W.2d 1, 7 (Minn. 2003); *St. Otto's Home v. Minn. Dept. of Human Servs.,* 437 N.W.2d 35, 39-40 (Minn. 1989). An agency's interpretation of the statutes it administers, while not binding upon this Court, is entitled to deference and should be upheld unless the Court finds that it conflicts with the express purpose of the statute and the legislature's intent. *Matter of Univ. of Minn.,* 566 N.W.2d 98, 103 (Minn. Ct. App. 1997), *citing Geo. A. Hormel & Co. v. Asper,* 428 N.W.2d 47, 50 (Minn. 1988). As this Court has held, "when an agency reasonably interprets a statute, it is the role of the legislature or the

supreme court, and not the role of this court, to overrule that interpretation." *Matter of Univ. of Minn.,* 566 N.W.2d at 103, *citing In re Hyman Freightways, Inc.,* 488 N.W.2d 503, 505 (Minn. Ct. App. 1992).

ARGUMENT

Relator asks this Court to adopt a preposterous interpretation of the Minnesota Vulnerable Adults Act. Relator's position, simply put, is that because vulnerable adults with certain afflictions cannot comprehend what is happening to them, their caregivers may treat them in a manner that would cause physical harm or emotional distress to a person who is not vulnerable.

In contrast, the Commissioner asks the Court to uphold his interpretation of the law, which requires a finding of abuse when a caregiver commits certain statutorily proscribed conduct - such as hitting a vulnerable adult or using language toward a vulnerable adult that a reasonable person would consider to be disparaging, humiliating, or threatening - even when a vulnerable adult does not comprehend the nature of the conduct directed at him or her, or is unable to express pain or anguish resulting from such conduct.

I. THE COMMISSIONER APPLIED THE CORRECT STANDARD WHEN DETERMINING THAT RELATOR'S CONDUCT CONSTITUTES ABUSE UNDER THE MINNESOTA VULNERABLE ADULTS ACT.

Relator argues that the Commissioner applied the wrong standard when determining that she committed "abuse" by repeatedly referring to vulnerable adults in her care as "asshole[s]" and by attempting to teach one of them to say "fuck you." A-18

¶¶ 4-5. Relator's argument, however, would require this Court to adopt a subjective standard under which "abuse" occurs only if a vulnerable adult perceives a caregiver's conduct as abusive. *See* Minn. Stat. § 626.5572, subd. 2(b) (2005). Relator's interpretation must be rejected because it would contravene both the letter and the spirit of the law.

The MVAA defines "abuse" as follows:

> Conduct which is not an accident or therapeutic conduct as defined in this section, which produces or *could reasonably be expected to* produce physical pain or injury or emotional distress including, but not limited to, the following:
>
> (1) Hitting, slapping, kicking, pinching, biting, or corporal punishment of a vulnerable adult;
>
> (2) Use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which *would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening*;
>
> (3) Use of any aversive or deprivation procedures, unreasonable confinement, or involuntary seclusion, including the forced separation of the vulnerable adult from other persons against the will of the vulnerable adult or the legal representative of the vulnerable adult; and
>
> (4) Use of any aversive or deprivation procedures for persons with developmental disabilities or related conditions not authorized under section 245.825.

Minn. Stat. § 626.5572, subd. 2(b) (emphasis added). The Commissioner found that Relator's "repeated instances of directly calling a vulnerable adult an 'asshole'" meet the definition of abuse in subpart (2) because they constitute "repeated oral language toward a vulnerable adult which would be considered by a reasonable person to be disparaging,

derogatory, and humiliating." A-18 at ¶ 5. For the same reasons, the Commissioner found that teaching a vulnerable adult to say "fuck you" also constitutes abuse, and is "precisely the sort of conduct that the vulnerable adult act prohibits as offensive to a [vulnerable adult's] dignity." A-21.

Relator does not dispute the Commissioner's determination that her conduct toward the vulnerable adults in her care would be considered by a reasonable person to be disparaging, derogatory, and humiliating, and thus that it fits squarely within subpart (2), above. She argues, however, that the Commissioner must conduct a separate inquiry under the flush language of subdivision 2(b), to determine whether her conduct actually produced or was reasonably expected to produce physical pain, injury or emotional distress in the specific person(s) at whom it was directed. Accordingly, Relator claims that since there was no evidence that the vulnerable adults understood the language she used toward them or actually became distressed by her conduct, she did not commit abuse.

The Commissioner correctly found that the Legislature has already determined that conduct described in subparts (1) through (4) meets the criteria set forth in the preamble, and that such conduct, therefore, constitutes abuse, per se. This Court has taken a similar approach. In *Grossman v. Martin Luther Manor*, 2005 WL 2850491 (Minn. Ct. App. Nov. 1, 2005),[3] the Court affirmed the decision of a senior

[3] A copy of this unpublished decision is attached as Exhibit 1 to the Affidavit of Amber Hawkins. Minn. Stat. § 480A.03 (2005).

unemployment law judge, finding that a nursing home employee had committed abuse against a vulnerable adult in violation of subparts (2) and (3) of the very statute at issue here.[4] In the first incident, the employee physically held and yelled an obscenity at a resident. *Id.* at *1. There was no evidence that the vulnerable adult expressed emotional distress or suffered physical pain or injury. *Id.* at *1-3. This Court stated that, "[b]ecause a reasonable person would consider relator's treatment of [the vulnerable adult] to be disparaging and humiliating, it was abuse within the meaning of Minn. Stat. § 626.557[2], subd. 2(b)(2). . . ." *Id.* at *2.[5]

In the second incident, the employee removed a vulnerable adult's walker from her room to prevent her from leaving. The vulnerable adult was later seen crawling and scooting on the floor. *Id.* at *2. The employee testified that she had removed the walker because she believed it was more safe for the resident to crawl than to use the walker and risk falling. *Id.* Again, there was no evidence that vulnerable adult felt physical pain or emotional distress. Nonetheless, the Court determined that conduct which falls under one of subparts (1) though (4) of subsection 2(b) qualifies as abuse per se. "Relator's removal

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[4] The issue in *Grossman* was whether the employee was entitled to unemployment benefits as a displaced worker. Under Minnesota law, a worker who is discharged for misconduct is not eligible for unemployment benefits; for purposes of unemployment compensation, misconduct includes "abuse" as the term is defined in the MVAA. Thus, as in the present matter, the Court was required to determine whether the employee's conduct constituted "abuse" under the MVAA. *Grossman*, 2005 WL 2850491 at *1.

[5] In *Grossman*, the Court erroneously cites to Minn. Stat. § 626.557*5* rather than 626.557*2* in several instances. However, § 626.5575 did not exist in 2004 and does not exist today, and the Court directly quotes the language of § 626.5572 while citing to 626.5575.

of [the vulnerable adult's] walker so that she was reduced to scooting around the floor was a deprivation procedure and, therefore, abuse within the meaning of Minn. Stat. § 626.557[2], subd. 2(b)(3). . .." *Id.*

The Commissioner's reasoning follows this Court's prior interpretation of the MVAA's abuse provision in *Grossman*. That interpretation also honors the Legislature's purpose in enacting the statute, follows the rules of statutory construction, and avoids absurd results.

A. Relator's Interpretation Would Lead to Absurd (and Tragic) Results.

Relator's interpretation of the MVAA is untenable for several reasons. First, it would lead to absurd and potentially tragic results that the Legislature could not possibly have intended. As the Commissioner noted by way of example, Relator's interpretation would allow the sexual assault of comatose patients and the physical abuse of those who could not experience pain. A-6. It would allow egregious verbal abuse directed at anyone who could not hear, understand, or express their distress. Courts should construe a statute to avoid absurd results and unjust consequences. *Minnesota Ins. Guar. Ass'n v. Integra Telecom, Inc.*, 697 N.W.2d 223, 227 (Minn. Ct. App. 2005); *American Fam. Ins. Group v. Schroedl*, 616 N.W.2d 273, 278 (Minn. 2000).

B. The Commissioner's Interpretation Upholds the State's Public Policy of Protecting Vulnerable Adults.

Relator's interpretation would provide vulnerable adults with *less* protection than their non-vulnerable counterparts. Specifically, it would allow a caregiver to treat a vulnerable adult in a way that would cause a non-vulnerable adult to feel emotional

distress or pain simply because the vulnerable adult is unable - due to the very nature of his or her vulnerabilities - to comprehend or express physical or emotional injury. This result would clearly violate the law's express purpose:

> **Policy:** The legislature declares that the public policy of this state is to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to maltreatment; to assist in providing safe environments for vulnerable adults; and to provide safe institutional or residential services, community-based services, or living environments for vulnerable adults who have been maltreated.

Minn. Stat. § 626.557, subd. 1 (2005). When interpreting a statute, the court's primary task is to effectuate the Legislature's intent. Minn. Stat. § 645.16 (2005); *see also Janssen v. Janssen*, 331 N.W.2d 752, 755 (Minn. 1983). The Legislature did not intend to provide less protection for vulnerable adults. Nor did it intend the ludicrous and inequitable results described above.

Relator argues that, because she believed the vulnerable adult in her care could not understand what was happening, she committed no wrongdoing by treating him in a way that a reasonable person would consider disparaging, derogatory, and humiliating. The MVAA exists to *enhance* protection for Minnesota's most vulnerable citizens; not to allow their caregivers to abuse them. Relator's behavior is exactly the sort of conduct the law forbids.

C. The Commissioner's Interpretation Adheres to the Canons of Statutory Construction.

Relator's interpretation violates applicable standards of statutory construction. Indeed, statutory provisions relating to the same subject matter are to be interpreted *in*

pari materia, consistently and in harmony with one another, based on the premise that they are "governed by one spirit and policy. . . ." *Foley v. Whelan*, 17 N.W.2d 367, 369 (Minn. 1945); *See also Septran, Inc. v. Indep. School Dist. No. 271, Bloomington, Minn.*, 555 N.W.2d 915, 919 (Minn. Ct. App. 1996) (courts are required to harmonize apparently conflicting statutory provisions wherever possible). The best way to harmonize the preamble of subsection 2(b) with the "reasonable person" standard articulated in subpart (2) is to find that subparts (1) - (4) describe conduct that the Legislature has already determined meets the criteria set forth in the flush language. In other words, while other conduct "which is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress" would constitute abuse, conduct described in subparts (1) - (4) is abuse per se.

Relator argues that the way to harmonize the preamble language with the "reasonable person" standard in subpart (2) is to find that the Legislature added the "reasonable person" standard to protect caregivers from unusually sensitive vulnerable adults who may suffer emotional distress from language a reasonable person would find innocuous. Again, as the Commissioner notes, Relator's interpretation flouts the purpose behind the MVAA, which is "to protect *those receiving services* from inappropriate care." A-6.

CONCLUSION

Based on the foregoing, the Commissioner of Human Services respectfully requests the Court affirm the Order of the Commissioner of Human Services in its

entirety, upholding the determination that Relator committed acts of abuse constituting recurring maltreatment against vulnerable adults and that she should thus be disqualified from positions in which she would have direct contact with individuals who receive services from programs licensed by the Department of Human Services, and that the disqualification should not be set aside.

Dated: 11/27/06

Respectfully submitted,

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Attorney General
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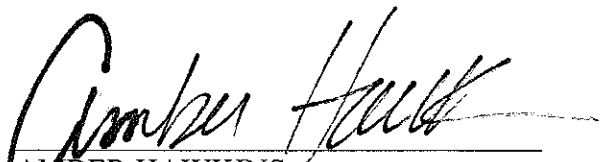

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A06-1799

STATE OF MINNESOTA

IN COURT OF APPEALS

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Respondent.

AFFIDAVIT OF AMBER HAWKINS

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

Amber Hawkins, being first duly sworn upon oath, deposes and states:

1. I am an Assistant Attorney General with the Consumer Enforcement Division of the Minnesota Attorney General's office. I am one of the attorneys handling the above-captioned case for the State.

2. Pursuant to Minnesota Statutes section 480A.08(3), attached to this affidavit as Exhibit 1 is a true and correct copy of *Grossman v. Martin Luther Manor*, 2005 WL 2850491 (Minn. Ct. App., November 1, 2005), an unpublished case cited in Respondent's Brief.

FURTHER THE AFFIANT SAYETH NOT.

AMBER HAWKINS

SUBSCRIBED AND SWORN to before me
this 27th day of November 2006.

Notary Public
My Commission expires: 1-31-2010.

LINDA J. KROLICK
NOTARY PUBLIC - MINNESOTA
MY COMMISSION
EXPIRES JAN. 31, 2010

AG: #1707446-v1

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).