

No. A08-85

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STATE OF MINNESOTA

IN COURT OF APPEALS

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George Marita Obara,

Relator,

vs.

Minnesota Department of Health,

Respondent.

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**RESPONDENT'S BRIEF**

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GLENN P. BRUDER  
Atty. Reg. No. 148878  
Mitchell, Bruder & Johnson  
4005 West 65th Street, Suite 110  
Edina, MN 55435

ATTORNEY FOR RELATOR

LORI SWANSON  
Attorney General  
State of Minnesota

JOCELYN F. OLSON  
Assistant Attorney General  
Atty. Reg. No. 0082016

445 Minnesota Street, Suite 1200  
St. Paul, Minnesota 55101-2130  
(651) 297-5933 (Voice)  
(651) 296-1410 (TTY)

ATTORNEYS FOR  
RESPONDENT

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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).

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## LEGAL ISSUES

- I. Did Relator demonstrate beyond a reasonable doubt that the application of Minn. Stat. § 245C.27, subd. 1(c) deprived him of procedural due process because it does not allow for an evidentiary hearing on a request to rescind or set aside a disqualification issued under Minn. Stat. §§ 245C.14-.15 where the disqualification is based upon conviction of felony-level crimes?

**The Minnesota Department of Health (“MDH”) refused to rescind or set aside Relator’s disqualification. MDH did not hold an evidentiary hearing but notified Relator of his right to seek review in this Court.**

*Most apposite authorities:*

*Sweet v. Comm’r of Human Servs.*, 702 N.W.2d 314 (Minn. Ct. App. 2005), *rev. denied* (Minn. Nov. 15, 2005).  
U.S. Const. amend. V.  
Minn. Const. Art. 1, § 7.  
Minn. Stat. § 245C.27, subd. 1(c) (Supp. 2007).

- II. Did Relator demonstrate beyond a reasonable doubt that the application of Minn. Stat. §§ 245C.14-.15 to Relator deprived him of substantive due process of law by disqualifying him from working in certain health care positions on the basis of his felony-level convictions for third degree assault and making terroristic threats?

**MDH refused to rescind or set aside Relator’s disqualification.**

*Most apposite authorities:*

*Boutin v. LaFleur*, 591 N.W.2d 711 (Minn. 1999), *cert. denied*, 528 U.S. 973 (1999).  
U.S. Const. amends. V, XIV.  
Minn. Const. Art. 1 § 7.  
Minn. Stat. § 245C.14, subd. 1(a)(1) (Supp. 2007).  
Minn. Stat. § 245C.15, subd. 2 (Supp. 2007).

- III. Are Minn. Stat. §§ 245C.14-.15 subject to constitutional challenge under the “overbreadth” doctrine where Relator has not alleged that the statutes deprive him of any rights guaranteed by the First Amendment to the United States Constitution?

**MDH refused to rescind or set aside Relator’s disqualification.**

*Most apposite authorities:*

*State v. Machholz*, 574 N.W.2d 415 (Minn. 1998).

*United States v. Salerno*, 481 U.S. 739 (1987).

U.S. Const. amend. I.

Minn. Stat. § 245C.14, subd. 1(a)(1) (Supp. 2007).

Minn. Stat. § 245C.15, subd. 2 (Supp. 2007).

## STATEMENT OF THE CASE

On September 11, 2007, pursuant to Minn. Stat. §§ 245C.14-.15 (2006 and Supp. 2007), the Minnesota Department of Human Services (“DHS”) notified Relator that he had been disqualified from working in any position allowing direct contact with or access to persons receiving services from certain health care providers. *See* Administrative Record (“R.”), Tab 2; Relator’s Appendix (“A.”), A.4 to A.9. The grounds for Relator’s disqualification are statutory: Minn. Stat. § 245C.15, subd. 2(a)(2) (2006) requires that Relator be disqualified for fifteen years because in June 2007, he was convicted in Hennepin County District Court of two felony-level crimes: third degree assault and making terroristic threats. Relator requested that the Commissioner of Health rescind or “set aside” his disqualification to allow him to work at Caremaxx Health Care Systems, a home care provider licensed by MDH pursuant to Minn. Stat. § 144A.46 (2006). *See* R., Tab 3. On November 14, 2007, the Commissioner denied Relator’s request. *See* R., Tab 1; A.10 to A.15. This appeal followed. *See* A.16 to A.19.

## STATEMENT OF FACTS

### **A. The Incident Leading To Relator’s Disqualifying Convictions.**

On October 9, 2006, Champlin police were dispatched to investigate a report of “rolling domestic” involving Relator and his wife. *See* R., Tab 5 at 6-11. The report was made by an eyewitness who was driving eastbound on West River Road and observed a vehicle pulled off to the side of the road. *See id.* at 8. According to the police report, the witness observed a male, Relator, in the front seat punching a female passenger (his wife). *See id.* The witness then observed Relator’s vehicle take off and travel at speeds

of approximately 80 miles per hour. *See id.* The witness followed Relator's vehicle in her car; she saw the vehicle's passenger door open and observed the Relator punch his wife several more times and then push his wife out of the car. *See id.* The witness estimated that Relator's vehicle was traveling at a speed of approximately 50 miles per hour when he pushed his wife out of the car. *See id.* The witness then pulled her vehicle over next to Relator's wife, and Relator's wife got into the witness' vehicle. *See id.* Both vehicles then proceeded to a gas station, and the police arrived shortly thereafter. *See id.* at 6, 7.

According to the police report, Relator's wife told the police that during the incident, she and Relator were arguing, Relator became very upset, and Relator told her: "You know I can f---ing kill you right now." *See id.* at 6. Relator's wife stated that Relator hit her multiple times and pushed her out of the vehicle as he was driving down the road. *See id.* Relator's wife stated that she was hanging on to the vehicle when Relator struck her again; she then lost her grip and fell. *See id.* at 9. Relator's wife sustained severe abrasions on both elbows and a large abrasion on her belly. *See id.* at 10. The new tennis shoes that Relator's wife was wearing during the incident were worn down completely through the material. *See id.* at 6, 10.

According to the police report, Relator denied punching his wife and stated to the police that she jumped out of the moving vehicle. *See id.* at 7, 10-11. An officer who responded to the scene noted the smell of alcohol on Relator and gave him a preliminary breath test, the results of which indicated a .075 blood alcohol concentration. *See id.* at 7-8.

According to the police report, on October 9, 2006, Relator was transported by police to the Hennepin County Detention Center and was booked in on third degree assault. *See id.* at 7; *see also* Report from the Bureau of Criminal Apprehension (“BCA Report”), R., Tab 4 at 1.

**B. Relator’s First Disqualification Notice, Based On A “Preponderance Of Evidence.”**

Minn. Stat. ch. 245C, the Background Studies Act, and Minn. Stat. § 144.057 (2006) require DHS to conduct background studies on Relator because he was either working in or wished to work in three MDH-licensed programs involving direct contact with individuals served by those programs: Caremaxx Health Care Systems (“Caremaxx”), Texas Terrace Care Center (“Texas Terrace”), and Walker Methodist Health Center (“Walker”). *See* R., tab 9 at 1. In the fall of 2006, DHS conducted a background study on Relator. *See id.* As part of its background study, DHS conducted a “Preponderance of Evidence Review” concerning Relator’s October 9, 2006 arrest. *See* R., Tab 8. DHS concluded that “a preponderance of evidence exists that [Relator] committed an act or acts meeting the definition of assault in the third degree, a felony, pursuant to Minnesota Statutes, section 609.223, subdivision 1.” *See id.* at 2.

In a letter dated November 30, 2006, DHS notified Relator that he was disqualified,<sup>1</sup> pursuant to Minn. Stat. § 245C.14, subd. 1(a)(2).<sup>2</sup> *See* R., Tab 9 at 1-2.

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<sup>1</sup> At page 2 of his Brief, Relator erroneously states that MDH disqualified Relator. As discussed herein, the record is clear that DHS conducted background studies on Relator and made the determinations that Relator was disqualified. MDH ruled on Relator’s requests for reconsideration.

(Footnote Continued on Next Page)

DHS also notified Caremaxx, Texas Terrace, and Walker that Relator was disqualified but did not require Relator's immediate removal from service. *See id.* at 3-5. Rather, each facility was allowed to choose whether to continue to employ Relator under certain conditions, including the condition that Relator must be under continuous, direct supervision when providing direct contact services to clients or patients. *See id.*

In the November 30, 2006, notification, DHS explained that Relator could request reconsideration of the disqualification based on DHS' preponderance-of-evidence finding.<sup>3</sup> *See R.*, Tab 9 at 1-2; *see* Minn. Stat. § 245C.21. On December 15, 2006, Relator submitted a request for consideration to MDH. *See R.*, Tabs 10-12. On April 24, 2007, MDH refused to rescind or set aside Relator's disqualification and notified him that he could appeal the decision by requesting a fair hearing.<sup>4</sup> *See R.*, Tab 13; *see* Minn. Stat. § 245C.27, subd. 1(a) (individual may request a fair hearing if commissioner does not set aside a disqualification based on a preponderance of evidence that the individual

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(Footnote Continued From Previous Page)

<sup>2</sup> Minn. Stat. § 245C.14, subd. 1(a)(2) provides, in relevant part: "The [DHS] commissioner shall disqualify an individual . . . upon receipt of information showing, or when a background study completed under this chapter shows any of the following: . . . (2) a preponderance of the evidence indicates that the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15, regardless of whether the preponderance of the evidence is for a felony, gross misdemeanor, or misdemeanor level crime."

<sup>3</sup> The "reconsideration" process is discussed in more detail *infra* at 9-10.

<sup>4</sup> A "fair hearing" is an administrative evidentiary hearing conducted by a Human Services Judge in accordance with the procedures set forth in Minn. Stat. §§ 256.045-.0451 (2006).

committed a disqualifying crime). Relator requested a fair hearing. *See R.*, Tab 15 at 1. The matter was referred to DHS' Appeals and Regulation Division for hearing, and a Human Services Judge was assigned to the matter. *See id.* at 2-3. While the administrative appeal was pending, Relator was permitted to work, subject to continuous supervision. *See R.*, Tab 13 at 7-8; Tab 7.

In June 2007, as further discussed below, Relator was convicted of two disqualifying crimes arising out of the October 9, 2006 incident. On June 19, 2007, the Human Services Judge, who was apparently aware of Relator's intention to appeal his criminal convictions, notified the parties to Relator's fair hearing (i.e., Relator and counsel for MDH) that she was suspending the fair hearing "until the question of the criminal appeal has ripened."<sup>5</sup> *See* Tab 15 at 4.

### **C. Relator's Criminal Convictions.**

In June 2007, Relator was convicted<sup>6</sup> in Hennepin County District Court of two felony-level crimes as a result of the October 9, 2006 incident: third degree assault and making terroristic threats, in violation of Minn. Stat. §§ 609.223 and 609.713,

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<sup>5</sup> On December 12, 2007, counsel for MDH requested that the Human Services Judge dismiss Relator's fair hearing in light of the fact that Relator's most recent disqualification is based on convictions, from which appeal must be taken to this Court. *See R.*, Tab 15 at 5. To date, the Human Services Judge has not ruled on the request for dismissal.

<sup>6</sup> Relator indicates at page 2 of his Brief that he was convicted following a jury trial that took place June 6-7, 2007.

respectively. *See* R., Tab 4. On August 18, 2007, Relator filed an appeal with this Court to challenge his criminal convictions. *See* R., Tab 16 at 3-4.

**D. The September 11, 2007, Disqualification Notice.**

Following Relator's convictions, he was incarcerated for a period of time. *See* R., Tab 7; Tab 4 at 3. After his release, Caremaxx submitted another background study form to DHS in connection with Relator's desire to return to work. *See* R., Tabs 7 and 2. DHS' background study revealed Relator's two felony convictions discussed above.

Pursuant to Minn. Stat. § 245C.14, subd. 1(a)(1) (Supp. 2007), the DHS commissioner must disqualify an individual if a background study shows "a conviction or admission to one or more crimes listed in section 245C.15, regardless of whether the conviction or admission is a felony, gross misdemeanor, or misdemeanor crime." Minn. Stat. § 245C.15, subds. 1-4 (Supp. 2007) specify differing disqualification periods for different disqualifying crimes or conduct: permanent, 15-year, 10-year, and 7 years.

Pursuant to Minn. Stat. § 245C.15, subd. 2(a), the crime of third degree assault is a disqualifying characteristic with a disqualification term of 15 years. In a letter dated September 11, 2007, DHS notified Relator that, as a result of his two felony convictions, he was disqualified from any position allowing direct contact with or access to persons receiving services from facilities licensed by DHS or MDH, from facilities serving children or youth licensed by the Department of Corrections, and from unlicensed

Personal Care Provider Organizations.<sup>7</sup> *See* R., Tab 2 at 1-3. DHS also notified Caremaxx that Relator was disqualified and ordered his immediate removal from direct contact with or access to persons receiving services from its programs. *See id.* at 4.

In the September 11, 2007 notification, DHS explained that Relator could request reconsideration of his disqualification. *See* R. Tab, 2 at 2-3. A disqualified individual seeks a set aside from the state agency that licenses the facility where he wants to work. *See* Minn. Stat. §§ 144.057; 245C.22, subd. 5 (2006 and Supp. 2007). Because the facility where Relator wished to work, Caremaxx, is licensed by MDH, the disqualification notice indicated that if Relator wished to request reconsideration, the request should be mailed to MDH. *See* R., Tab 2 at 2.

**E. MDH's Decision On Reconsideration That Is The Subject Of This Appeal.**

Under Minn. Stat. § 245C.21, a disqualified individual can submit a request for reconsideration seeking: (1) a rescission of the disqualification and/or (2) a “set aside” of the disqualification. To seek a rescission, the individual must submit information to show that DHS relied upon incorrect information in disqualifying the individual. *See* Minn. Stat. § 245C.21, subd. 3(a)(1) (Supp. 2007). If the individual shows that DHS relied upon incorrect information in disqualifying the individual (in this case, evidence

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<sup>7</sup> *See* Minn. Stat. §§ 245C.14 (2006 and Supp. 2007); 144.057 (2006); and 241.021, subd. 6 (2006) (statutes related to disqualification). Relator's disqualification does not prevent him from working in positions that are outside the scope of the disqualification statutes. For example, doctor's offices and insurance companies are not licensed by MDH or DHS.

that the individual was not convicted of the disqualifying crimes), then Minn. Stat. § 245C.22, subd. 2 (2006) applies. That statute provides:

The commissioner shall rescind the disqualification if the commissioner finds that the information relied upon to disqualify the individual is incorrect.

To seek a “set aside” of a disqualification, the disqualified individual must submit information to show that, even if DHS relied on correct information in disqualifying the individual, the individual does not pose a risk of harm to any person receiving services at the facility where the person wants to work. *See* Minn. Stat. § 245C.21, subd. 3(a)(3). In a “risk of harm” reconsideration request, the individual seeks a “set aside” of the disqualification that would allow that individual to work for a specific licensee or licensees. A set aside request is evaluated based on where the individual wants to work and the actual position or positions that the individual wants to fill. *See* Minn. Stat. § 245C.22, subd. 5 (Supp. 2007). Subdivisions 3 and 4 of section 245C.22 provide the criteria under which a request must be evaluated. In particular, Minn. Stat. § 245C.22, subd. 3 provides:

**Preeminent weight given to safety of persons being served.** In reviewing a request for reconsideration of a disqualification, *the commissioner shall give preeminent weight to the safety of each person served by the license holder, applicant, or other entities as provided in this chapter over the interests of the disqualified individual, license holder, applicant, or other entity as provided in this chapter, and any single factor under subdivision 4, paragraph (b), may be determinative of the commissioner's decision whether to set aside the individual's disqualification.*

(Emphasis added.)<sup>8</sup>

On October 4, 2007, Relator submitted a request for reconsideration to MDH. *See R.*, Tab 3. On the form, near the top of page 2, Relator claimed, by checking “No,” that the information about his disqualification is incorrect.<sup>9</sup> However, he did not submit any information to rebut the essential fact that he had been convicted of two disqualifying crimes. In his Brief, at page 6, he makes it clear that he does not deny the existence of his felony convictions for third degree assault and making terroristic threats.

Relator also requested a set aside of his disqualification to allow him to work at Caremaxx. *R.*, Tab 3 at 1. MDH reviewed the information in the request and, on November 14, 2007, notified Relator that his request was denied. *See R.*, Tab 1. As stated in the November 14, 2007 letter, and as shown on the “Request for Reconsideration Assessment Form” included with the letter (*R.*, Tab 1 at 3-6), MDH considered each of the “risk of harm” factors in Minn. Stat. § 245C.22, subds. 3 and 4. The nine statutory factors are as follows:

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<sup>8</sup> At page 9 of his Brief, Relator erroneously characterizes the procedures in chapter 245C as a “disciplinary process.” As this Court recognized in *Wynn v. Comm’r of Human Servs.*, No. C8-00-445, 2000 WL 1239775, at \*3 (Minn. Ct. App. Sept. 5, 2000) (unpublished), the purpose of the background study/disqualification statutory scheme is “grounded on a humanitarian public policy -- namely, to protect people who lack the physical and or mental capacity to protect themselves.” Respondent’s Addendum at Add-2.

<sup>9</sup> Relator’s reconsideration request relates his version of the events of October 9, 2006. *See R.*, Tab 3 at 5. Relator acknowledged that he and his wife were arguing but denied pushing his wife out of the car. *See id.* He stated: “After driving for about 5-10 minutes in silence suddenly as we approached a stop sign she fell out of the car.” *Id.*

1) the nature, severity, and consequences of the event or events that led to the disqualification; (2) whether there is more than one disqualifying event; (3) the age and vulnerability of the victim at the time of the event; (4) the harm suffered by the victim; (5) vulnerability of persons served by the program; (6) the similarity between the victim and persons served by the program; (7) the time elapsed without a repeat of the same or similar event; (8) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and (9) any other information relevant to reconsideration.

Minn. Stat. § 245C.22, subd. 4(b).

MDH's Request for Reconsideration Assessment Form indicates, for the factor "nature, severity and consequences of the event," that the disqualifying conviction involved violence with serious harm likely; Relator punched his wife and pushed her out of a vehicle moving at high speed, resulting in injuries. *See id.* at 3. The form noted that Relator had two convictions and that the victim suffered short-term damage. *See id.* at 3-4. The form indicated that there is "some similarity," in terms of relative vulnerability, between the victim, his wife, and the clients of the home health care agency where Relator wants to work. *See id.* The form noted that the June 2007 disqualifying convictions are "recent" and that, although Relator accepts some responsibility for his actions and has apparently begun the road to rehabilitation through taking classes and reading books, not enough time has passed to provide sufficient evidence that he has been rehabilitated. *See id.* at 5.

In accordance with Minn. Stat. § 245C.27, subd. 1(c) (Supp. 2007),<sup>10</sup> MDH's November 14, 2007 letter notified Relator that MDH's decision was a "final agency decision" subject to review if Relator filed a timely petition for certiorari with this Court. *See R.*, Tab 1 at 2. Accordingly, by writ of certiorari dated January 14, 2008, Relator appealed MDH's decision. *See A.16 to A.19.*

### SCOPE OF REVIEW

The constitutionality of a statute is a question of law, which this Court reviews *de novo*. *Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 319 (Minn. Ct. App. 2005), *rev. denied* (Minn. Nov. 15, 2005). Minnesota statutes are presumed constitutional, and the power to declare statutes unconstitutional should be exercised with extreme caution and only when absolutely necessary. *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 298-99 (Minn. 2000); *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A party challenging the constitutionality of a statute "carries the heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *Sweet*, 702 N.W.2d at 319 (quoting *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 591 (Minn. Ct. App. 2005), *rev. dismissed* (Minn. June 29, 2005)); *see also Haggerty*, 448 N.W.2d at 364.

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<sup>10</sup> Minn. Stat. § 245C.27, subd. 1(c) provides that if an individual is disqualified based on a conviction or admission to any crime listed in sections 245C.15, subs. 1-4, "the reconsideration decision under section 245C.22 is the final agency determination for purposes of appeal by the disqualified individual and is not subject to a hearing under section 256.045."

Relator's certiorari appeal is before this Court pursuant to Minn. Stat. § 480A.06, subd. 3 (2006) and Minn. Stat. ch. 606. See *Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444 (Minn. Ct. App. 1996). A decision concerning a request for reconsideration is a quasi-judicial decision. See *id.* at 444. On certiorari appeal from a quasi-judicial decision of a state agency not subject to the Administrative Procedure Act, the Court inspects the record to review:

. . . questions affecting the jurisdiction of the [agency], the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.

*Rodne*, 547 N.W.2d at 444-45 (quoting *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (other quotations omitted).

Further, when an agency is acting in a quasi-judicial manner, its decision "will be reviewed on the substantial evidence standard." *Matter of Quantification of Envtl. Costs*, 578 N.W.2d 794, 899 (Minn. Ct. App. 1998), *rev. denied* (Minn. Aug. 18, 1998). To prove a lack of substantial evidence, Relator must show that MDH's decision is not supported by evidence that a reasonable mind, considering the record in its entirety, might accept as adequate to support the Commissioner's conclusion.<sup>11</sup> *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977). "Substantial evidence" is defined as:

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<sup>11</sup> Relator's Brief does not raise any challenge to the adequacy of the evidence in the administrative record underlying MDH's decision to refuse to rescind or set aside Relator's disqualification.

1. [s]uch relevant evidence as a reasonable mind would 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.

*Sweet*, 702 N.W.2d at 318 (quoting *White v. Minnesota Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997), *rev. denied* (Minn. Oct. 31, 1997)).

In addition, in considering the appeal of the agency decision, deference should be given to the agency's expertise in administering and enforcing the disqualification statutes. As the Minnesota Supreme Court stated in *In re Excess Surplus Status of Blue Cross and Blue Shield of Minnesota* (hereinafter "*Blue Cross*"), 624 N.W.2d 264, 278 (Minn. 2001):

When reviewing agency decisions we "adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agency's expertise and their special knowledge in the field of their technical training, education, and experience." [Citation omitted.] The agency decision maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, [citation omitted] and judicial deference, rooted in the separation of powers doctrine, [footnote omitted] is extended to an agency decision maker in the interpretation of the statutes that the agency is charged with administering and enforcing. [Citation omitted.]

Moreover, an agency's conclusions are arbitrary and capricious only if "there is no rational connection between the facts and the agency decision." *Sweet*, 702 N.W.2d at 318 (citing *Blue Cross*, 624 N.W.2d at 277).

## ARGUMENT

### I. THE APPLICATION OF MINN. STAT. § 245C.27, SUBD. 1(C) TO RELATOR DID NOT DEPRIVE HIM OF PROCEDURAL DUE PROCESS.

Relator contends that he has been deprived of procedural due process guaranteed by both the United States Constitution and the Minnesota Constitution because, in Relator's circumstances, Minn. Stat. § 245C.27, subd. 1(c), does not provide for the holding of an evidentiary hearing prior to ruling on Relator's request for reconsideration. Minn. Stat. § 245C.27, subd. 1(c) provides that if an individual is disqualified based on a conviction or admission to any crime listed in section 245C.15, subs. 1-4, "the reconsideration decision under section 245C.22 is the final agency determination for purposes of appeal by the disqualified individual and is not subject to a hearing under section 256.045." Thus, Relator challenges the constitutionality of Minn. Stat. § 245C.27, subd. 1(c). Relator's challenge has no merit.

Relator's procedural due process challenge to section 245C.27, subd. 1(c) is not a case of first impression in this Court. Under facts similar to those in the instant case, the statute was upheld against a procedural due process challenge in *Sweet*, 702 N.W.2d at 319-21. As the discussion below demonstrates, the principles announced in *Sweet* are applicable to the facts in this case and, as a result, Relator's procedural due process challenge should be rejected by this Court.

In *Sweet*, a DHS background study revealed that Mr. Sweet had been convicted of crimes listed in Minn. Stat. § 245C.15 (i.e., disqualifying crimes). See 702 N.W.2d at 316. As a result, the DHS notified Mr. Sweet that he was disqualified from his

counseling job at a drug and alcohol counseling service. *See id.* Mr. Sweet submitted a written request for reconsideration and, in accordance with section 245C.27, subd. 1(c), was given no opportunity to request an evidentiary hearing on the Commissioner of Human Service's decision refusing to set aside his disqualification. *See id.* at 316-17. On appeal to this Court, Mr. Sweet challenged the constitutionality of section 245C.27, subd. 1(c).

In rejecting Mr. Sweet's constitutional challenge, the court's first step was to determine whether Mr. Sweet had a property interest in his ability to pursue employment as a counselor in state-licensed programs. *See Sweet*, 702 N.W.2d at 320. The court's next step was to employ the three-factor balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 322, 335 (1976), quoted in *Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 462 (Minn. Ct. App. 2000). The factors may be summarized as follows: (1) the property interest at stake; (2) the risk of an erroneous deprivation of such interest through the procedures used; and (3) the burden on the government that additional procedural requirements would entail. *See id.*

The court found that, as to the first *Mathews* factor, Mr. Sweet had a property interest in his ability to pursue employment as a counselor in state-licensed programs and that this interest weighed heavily in his favor. *See Sweet*, 702 N.W.2d at 320. However, the court determined that the second factor weighed in favor of DHS. The court found the following items to be significant in this analysis: (1) that Mr. Sweet had the burden of proof under Minn. Stat. § 245C.22, subd. 4 to show that he is not disqualified by the statutory criteria and that he does not pose a risk of harm; (2) that Mr. Sweet "had the

unfettered right to present all evidence, including letters of support, that he thought the commissioner should consider in his written submission”; and (3) that the agency presented no controverting testimony, and thus a hearing was not necessary to permit cross-examination of witnesses. *See* 702 N.W.2d at 321. The court stated:

Based on this record, we discern no likely value to an evidentiary hearing. Whether the case is presented orally or in writing to the commissioner, relator would submit the same evidence. Therefore, we conclude that allowing the appellant to file written submissions provided appellant with an adequate opportunity to present his case. Secondly, we also conclude that the potential risk of an erroneous decision is the same under either procedure. The commissioner is required to review and analyze relator’s evidence regardless of the format in which it is presented.

*Id.*

Finally, the court considered the third *Mathews* factor, the government’s interests, and determined that the third factor weighed in favor of the commissioner. The court stated:

[T]he governmental interest in protecting the public, especially vulnerable individuals attending counseling for drug and alcohol addiction, is of paramount importance. Minn. Stat. § 245C.22, subd. 3. The government also has an interest in saving time and money by considering disqualification quickly and efficiently, without the additional time, expenses, and personnel required to provide evidentiary hearings to disqualified individuals. If an individual disqualified for criminal convictions were due an oral evidentiary hearing, the commissioner would need to hold one on the same issue every time the same individual was hired or re-hired by a state-licensed program.

*Sweet*, 702 N.W.2d at 321-22. After considering all three factors, the court concluded that “an evidentiary hearing was not required to afford relator with procedural due process; providing relator with the right to submit evidence in writing was adequate to meet the requirements of due process.” *Id.* at 322. The court held that the statutory

language in Minn. Stat. § 245C.27, subd. 1(c) “is not unconstitutional on its face or as applied to relator.” *Id.*

The facts and the law in *Sweet* are on all fours with the facts and the law in this case. In both cases, the disqualifying characteristics were criminal convictions. In both cases, the lack of an evidentiary hearing was due to the operation of Minn. Stat. § 245C.27, subd. 1(c). In both cases, the disqualified individuals had both the burden of proof and the unfettered opportunity to present to the state agency any information that they believed supported their request for reconsideration. In both cases, the state agency did not present evidence to contradict the submitted information; rather, the state agency reviewed the submitted information to see if it “showed” that the DHS relied upon incorrect information and/or that the individual does not pose a risk of harm. *See* Minn. Stat. § 245C.21, subd. 3 (Supp. 2007). Because the facts and the laws in the instant case cannot be distinguished from the facts and the law in *Sweet*, Relator’s constitutional challenge should be rejected.

For his procedural due process argument, Relator relies heavily on the 2000 decision of this Court in *Fosselman*. Relator’s reliance is misplaced. *Fosselman* was decided prior to *Sweet*, and the court in *Sweet* distinguished *Fosselman*. *See* 702 N.W.2d at 321. In *Fosselman*, two nurses and a mental retardation professional were disqualified for failure to report suspected maltreatment of a child by another person, C.B.<sup>12</sup> C.B. did

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<sup>12</sup> At page 5 of his Brief, Relator misstates the facts in *Fosselman*, indicating that the disqualified individuals were accused of maltreatment themselves and had no right to a hearing. This is not the case. Individuals accused of maltreatment have a right to a fair (Footnote Continued on Next Page)

not ask for a hearing on the maltreatment finding against her, and the maltreatment finding became “conclusive” by operation of law. The *Fosselman* court held that the disqualified nurses and mental retardation professional were entitled to a hearing because they had been deprived of a meaningful opportunity to challenge evidence concerning the events (i.e., those that they had not reported) that allegedly constituted maltreatment. See 612 N.W.2d at 459-65. Thus, as stated in *Sweet*, in *Fosselman* “the evidence supporting the disqualification was disputed.” By contrast, in *Sweet*, the initial disqualification based on convictions “has not been challenged. Relator has already been afforded a panoply of rights in the criminal proceedings leading up to his convictions.” 702 N.W.2d at 321.

*Fosselman* is distinguishable from the instant case for the same reasons stated above. Relator has been tried by a jury of his peers and has been convicted of felony third degree assault and making terroristic threats. Like Mr. Sweet, he has been afforded a panoply of rights in the criminal proceeding. Although his conviction is currently on appeal, he does not dispute that his current status is properly described as “convicted.”<sup>13</sup>

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hearing under Minn. Stat. § 256.045, subd. 3 (2006). At the time of the *Fosselman* decision, individuals disqualified for failure to *report* maltreatment had no right to an evidentiary hearing. See *Fosselman*, 612 N.W.2d at 461. Currently, a right to a fair hearing is afforded by statute to persons disqualified on the basis of failure to report maltreatment. See Minn. Stat. § 245C.27, subd. 1(a) (Supp. 2007).

<sup>13</sup> Relator states in footnote 5 at page 6 of his Brief that, because of the existence of the appeal of his criminal convictions, “the disqualification was premature.” However, Relator provides no authority or argument for this assertion. The disqualification was based on two convictions that continue to exist unless and until they are overturned.

See Relator's Brief at 6. There is no conceivable benefit to holding an evidentiary hearing on the undisputed fact that he has been convicted of two disqualifying crimes.

The procedural due process that was afforded Relator in this case under Minn. Stat. ch. 245C insured that Relator was given a "meaningful opportunity to present [his] case." *Mathews*, 424 U.S. at 349. Relator has not met his heavy burden of showing that Minn. Stat. § 245C.27, subd. 1(c) is unconstitutional "beyond a reasonable doubt." See *Sweet*, 702 N.W.2d at 319 (challenger must show statute is unconstitutional beyond a reasonable doubt). Accordingly, the Court should affirm MDH's decisions to refuse to rescind or set aside Relator's disqualification.

## **II. THE APPLICATION OF MINN. STAT. §§ 245C.14-.15 TO RELATOR DID NOT DEPRIVE HIM OF SUBSTANTIVE DUE PROCESS OF LAW.**

Relator contends that Minn. Stat. §§ 245C.14-.15 violate his substantive due process rights because they compel Relator's disqualification upon conviction for felony third degree assault and making terroristic threats. See Relator's Brief at 6. Relator alleges that some of the disqualifying offenses listed in section 245C.15 "bear little or no connection to patient safety," especially when, as in the instant case, there is no evidence that Relator has mistreated patients under his care. See *id.* at 8. Relator identifies the following offenses as examples of offenses allegedly bearing no relation to patient safety: wrongfully obtaining public assistance, issuing dishonored checks, receiving stolen property, and maintaining spring guns.<sup>14</sup> See *id.* Significantly, he does not argue that

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<sup>14</sup> Under the principles of standing, Relator may only challenge Minn. Stat. §§ 245C.14-.15 as applied to him, and not as applied to other people in situations not before this (Footnote Continued on Next Page)

the felony crimes of third degree assault and making terroristic threats bear no relation to patient safety.

Unless state legislation employs suspect classifications or impinges on fundamental rights, minimal judicial scrutiny of the legislation is appropriate. *State v. Mitchell*, 577 N.W.2d 481, 491 (Minn. 1998); *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983). Substantive due process for such statutes requires only that the statute be “rationally related to achievement of a legitimate government purpose.” *Id.* at 239. Such statutes are subject to a “rational basis” standard of review when challenged on substantive due process grounds. *See Boutin v. LaFleur*, 591 N.W.2d 711, 717-18 (Minn. 1999), *cert. denied*, 528 U.S. 973 (1999). “A defendant carries a great burden in proving that a statute violates substantive due process.” *Mitchell*, 577 N.W.2d at 491.

The rational basis standard requires: “(1) that ‘the act serve [sic] to promote a public purpose,’ (2) that the act ‘not be an unreasonable, arbitrary or capricious interference’ with a private interest, and (3) that ‘the means chosen bear a rational relation to the public purpose sought to be served.” *Boutin*, 591 N.W.2d at 718, quoting *Contos v. Herbst*, 278 N.W.2d 732, 741 (Minn. 1979); *see also Doll v. Barnell*, 693

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court, i.e., people who have been disqualified for convictions of, e.g., wrongfully obtaining public assistance, issuing dishonored checks, receiving stolen property, and maintaining spring guns. *See State v. Gray*, 413 N.W.2d 107, 112 (Minn. 1987) (“Gray has no standing the champion the causes of others in situations not before this court,” citing *Broadrick v. Oklahoma*, 413 U.S. 601 (1973)). As stated in Part III of this Brief, Relator’s attempt to mount a facial challenge to Minn. Stat. §§ 245C.14-.15 on the grounds of “overbreadth” lacks merit and must be rejected.

N.W.2d 455, 463 (Minn. Ct. App. 2005), *rev. denied* (Minn. Jun. 14, 2005). As stated by the United States Supreme Court in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 565 (1981), quoted in *Boutin*, 591 N.W.2d at 718:

States are not required to convince the courts of the correctness of their legislative judgments. Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Relator argues that Minn. Stat. §§ 245C.14-.15 do not meet the rational basis test.<sup>15</sup> See Relator's Brief at 8-9. For the reasons discussed below, Relator has failed to meet the heavy burden to show that statutes violate substantive due process.

Minn. Stat. §§ 245C.14-.15 meet the first prong of the rational basis test because they promote a public purpose. As this Court recognized in *Sweet*, the statutory scheme embodied in Minn. Stat. ch. 245C serves a governmental interest in protecting the public, especially vulnerable individuals. *Sweet*, 702 N.W.2d at 321-22. Relator acknowledges that the state has a legitimate interest in "assuring patient safety." Relator's Brief at 7.

The second and third prongs of the rational basis test are interrelated. The second prong examines whether the statutes are unreasonable, arbitrary or capricious. As stated by the court in *Contos*, legislative enactments are not arbitrary or capricious if they are "a

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<sup>15</sup> Relator does not claim that a suspect classification or a fundamental right is at issue in this proceeding. See Relator's Brief at 6-9. Suspect classifications are those based on race or national origin. See 2 Ronald D. Rotunda and John E. Novak, *Treatise on Constitutional Law* § 18.3 (4th ed. 2007). Examples of "fundamental" constitutional rights are: the right to vote and participate in the electoral process; the right to interstate travel; the right to freedom of association; and the right to privacy. See *id.*, § 15.7.

reasonable means to a permissive objective.” *Contos*, 278 N.W.2d at 741. The third prong examines whether “the means chosen bear a rational relation to the public purpose sought to be served.” *Id.* In conducting this examination, the challenged legislation may be supported by “any set of facts either known or which could reasonably be assumed.” *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), cited with approval in *Boutin*, 591 N.W.2d at 717.

Minn. Stat. §§ 245C.14-.15 as applied to Relator meet the second and third prongs of the rational basis test because they are rationally related to protecting the health and safety of individuals who are vulnerable due to of their age or their physical, mental, cognitive or other disabilities. It was reasonable for the Legislature to believe that a person convicted of a violent crime, felony third degree assault, has shown a propensity for both violence and lack of self-control that could manifest itself when working in a job involving direct contact with and access to vulnerable individuals. Similarly, it is reasonable for the Legislature to believe that a person convicted of threatening extreme violence, i.e., felony terroristic threats, could pose a threat to the safety of vulnerable adults in that person’s care. There is a rational relationship between ensuring the safety of these vulnerable individuals and removing the convicted individual from their environment for a period of time.

It was also reasonable for the Legislature to exercise its judgment in determining that, in order to protect vulnerable individuals, different crimes, according to their nature and level of severity, merit different disqualification periods: permanent (for, e.g., first degree murder, first degree criminal sexual conduct); 15-year (for various felony-level

offenses); 10-year (for various gross-misdemeanor offenses); and 7-year (for various misdemeanor offenses and for serious and/or recurring maltreatment). Such judgments are appropriate, as it is “up to the Legislature . . . and not the courts to decide on the wisdom and utility of legislation.” *Essling*, 335 N.W.2d at 240, quoting *Clover Leaf Creamery*, 449 U.S. at 469.

Further, the statutory scheme embodied in Minn. Stat. ch. 245C and as applied to Relator is rationally related to the Legislature’s intent to protect vulnerable individuals because it provides a mechanism for an individual disqualified for 15 years to return to working in a MDH-licensed facility during the disqualification period, provided the disqualified individual demonstrates that he or she does not pose a risk of harm to the individuals served by the MDH program where he or she wants to work. As discussed *supra* at 10, Minn. Stat. §§ 245C.21-.22 allow a disqualified individual to request a set aside of the disqualification.<sup>16</sup> If MDH sets aside a disqualification, the disqualified individual remains disqualified but may have direct contact with or access to persons receiving services. *See* Minn. Stat. § 245C.22, subd. 5 (Supp. 2007). The Legislature has directed that in considering reconsideration requests, MDH must give “preeminent weight” to the safety of each person to be served by the program where the disqualified individual works and must consider specific criteria relating to the “risk of harm” posed

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<sup>16</sup> Minn. Stat. § 245C.24 (2006 and Supp. 2007) establishes exceptions, not applicable in this case, that prevent the granting of set-asides with respect to the most serious category of crimes (i.e., permanently disqualifying crimes) and with respect to certain specific workplaces (e.g., family child care, foster care for children in the provider’s home, or foster day care for adults in the provider’s home).

by the disqualified individual to vulnerable individuals. *See* Minn. Stat. § 245C.22, subds. 3-4 (2006 and Supp. 2007). The fact that Relator's request for a set aside to work at Caremaxx was denied, because he failed to demonstrate that he did not pose a risk of harm, does not render the statutory scheme unconstitutional. "[T]hat a statute of general applicability may work an injustice or hardship in a particular case has never been recognized as a valid objection to its application." *Tepel v. Sima*, 7 N.W.2d 532, 537 (Minn. 1942), cited with approval in *Mammenga v. State Dep't of Human Servs.*, 422 N.W.2d 786, 789 (Minn. 1989).

Relator argues that Minn. Stat. §§ 245C.14-.15 affect him in an arbitrary and capricious manner<sup>17</sup> because he was not accused of maltreatment of his patients; rather, the victim of his crimes was his wife. This argument has no merit. The Minnesota Supreme Court has recognized that commission of a serious crime, even though not committed on the job or directly job-related, can have a direct connection to employment issues. In *Pechacek v. Minnesota State Lottery*, 497 N.W.2d 243 (Minn. 1993), a Minnesota State Lottery employee was discharged following his conviction of a felony, i.e., criminal sexual conduct in the second degree, involving sexual abuse of his daughter. *See id.* at 244-45. The commissioner of Department of Jobs and Training ruled that

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<sup>17</sup> At pages 8-9 of his Brief, Relator states that if he had "successfully entered into a plea negotiation with stayed imposition of sentence he might have escaped the draconian effects of this statute." However, Relator misreads Minn. Stat. § 245C.14, subd. 1 (Supp. 2007), which requires disqualification upon "a conviction of, admission to, or Alford plea to one or more crimes listed in section 245C.15." Thus, a stay of imposition of Relator's sentence would not have had any effect upon Relator's disqualification.

Pechacek was disqualified from receiving unemployment compensation benefits because his conduct met the definition of “gross misconduct” in Minn. Stat. § 268.09, subd. 1(d) (1990), which included any act, “the commission of which amounts to a felony.” *See id.* at 245. Pechacek argued that the commissioner’s decision was wrong because his crime was not connected to his employment and did not adversely affect his employment because none of the retailers with whom he dealt would know about his conviction. *See id.* The court rejected Pechacek’s argument that his conviction had no connection to his job, stating: “[T]he fact of the conviction, whether job-related or not, of a Lottery employee affects the credibility of and reduces the public confidence in the integrity of the Lottery.” *See id.* at 246. Similarly, in this case, as discussed *supra*, Relator’s commission of a crime of violence and a crime involving the threat of extreme violence raises legitimate concerns about his propensity for violence and lack of self-control that are relevant to the state’s legitimate interest in the safety of vulnerable individuals.

Relator cites a forfeiture case, *United States v. Bajakajian*, 524 U.S. 321 (1998), in support of his argument that Minn. Stat. §§ 245C.14-15 violate his rights to substantive due process of law. However, *Bajakajian* is inapposite because it was decided under the Excessive Fines Clause of the United States Constitution, U. S. Const. amend. VIII. In *Bajakajian*, the appellant challenged the government’s attempt to seize over \$357,000 for violation of the prohibition against leaving the United States without reporting that he was transporting more than \$10,000 in currency. *See id.* at 321. The Court held that the forfeiture of the entire amount “would violate the Excessive Fines Clause.” *Id.* at 344.

*Bajakajian* involved no substantive due process claim and is thus not relevant to this case.

In sum, because Relator has not shown that Minn. Stat. §§ 245C.14-.15 do not meet the rational basis test, he failed to show that the statutes are unconstitutional beyond a reasonable doubt. MDH's decision should be affirmed.

**III. NO VALID CONSTITUTIONAL QUESTION IS RAISED BY RELATOR'S "OVERBREADTH" CHALLENGE TO MINN. STAT. §§ 245C.14-.15.**

Relator contends that Minn. Stat. §§ 245C.14-.15 are unconstitutional because they violate the "overbreadth" doctrine. *See* Relator's Brief at 9-10. Relator argues that because the statutes require disqualification for many different offenses, it "exposes many individuals to disqualification for behavior which has, on the surface, little if any relationship to patient safety." *Id.* at 10. However, Relator has failed to raise any valid constitutional question in his purported "overbreadth" challenge.

The overbreadth doctrine "departs from the traditional rules of standing to permit, *in the First Amendment area*, a challenge to a statute both on its face and as applied to the challenger." *State v. Machholz*, 574 N.W.2d 415, 419 (Minn. 1998) (emphasis added). The underlying reason for allowing facial challenges to statutes is "the potential chilling effect that overbroad statutes have on the exercise of protected speech." *Id.* (citing *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987)). The doctrine is applied "'only as a last resort' and only if the degree of overbreadth is substantial, and the statute is not subject to a limiting construction." *See id.*, quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

The overbreadth doctrine is limited to the context of First Amendment challenges. See *United States v. Salerno*, 481 U.S. 739, 745 (1987) (the Court “has not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment”). As the court stated in *Machholz*:

Before we can address a facial overbreadth challenge, we must determine whether the statute in question implicates the First Amendment. If the First Amendment is not implicated, then we need go no further because no constitutional question is raised.

574 N.W.2d at 419.

Under the above-stated principles stated in *Machholz*, this Court need not consider Relator’s purported overbreadth challenge because Relator does not allege that the statutes he challenges in this proceeding violate his own First Amendment rights of or the First Amendment rights of any other person. Because no First Amendment rights are implicated in Relator’s challenges to the statutes, no overbreadth challenge has been properly raised in this proceeding.

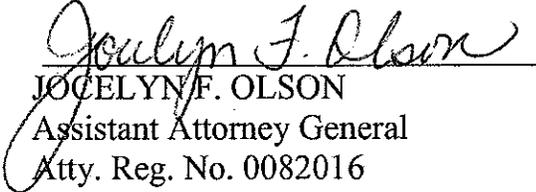
**CONCLUSION**

Based on the foregoing, the Minnesota Department of Health respectfully requests this Court to affirm its decision to deny Relator's request to rescind or set aside his disqualification.

Dated: March 20, 2008

Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota

  
JOCELYN F. OLSON  
Assistant Attorney General  
Atty. Reg. No. 0082016

445 Minnesota Street, Suite 1200  
St. Paul, Minnesota 55101-2130  
(651) 297-5933 (Voice)  
(651) 296-1410 (TTY)

ATTORNEYS FOR RESPONDENT