

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

Michael Scott Anderson,

Relator,

vs.

Commissioner of Health,

Respondent.

RELATOR'S BRIEF

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LEGAL ISSUES

- I. Does due process require the Commissioner of Health to conduct a risk of harm analysis before permanently disqualifying an RN from direct contact with his patients when the disqualifying event is unrelated to the RN's position as a caregiver?

Result below: The Commissioner of Health refused to conduct a risk of harm analysis on relator's request for reconsideration.

U.S. Const. amendment V

Minn. Const. art. I, §7

Mathews v. Eldridge, 424 U.S. 314, 96 S.Ct. 833 (1976)

- II. Does Minn. Stat. §245C.29 obligate the Commissioner of Health to provide a risk of harm analysis upon reconsideration of a disqualification to an RN disqualified from direct contact with his patients for a conviction unrelated to his position as a caregiver?

Result below: The Commissioner of Health limited its review to one of "correctness" and refused to conduct a risk of harm analysis.

Minn.Stat. §245C.29, subd. 2(c)

Minn.Stat. §245C.22, subd. 4

STATEMENT OF THE CASE

This is a certiorari appeal from the Commissioner of Health's determination to disqualify Relator Michael Anderson from allowing contact with, or access to, his patients at Minneapolis Children's Hospital where he has worked as a pediatric surgical nurse for the past sixteen years. The commissioner's determination was made following Mr. Anderson's plea to a gross misdemeanor criminal sexual conduct offense.

Mr. Anderson requested reconsideration of the commissioner's determination, specifically on the risk of harm he posed to his patients. Proclaiming the conviction to be a permanent bar to direct contact with children served in programs licensed by the Department of Health, the commissioner limited its review to one of correctness of the disqualifying event, characterized all risk of harm factors as irrelevant, and refused to reconsider its initial determination. From this decision, Mr. Anderson takes this appeal.

STATEMENT OF FACTS

On December 12, 2009, Mr. Anderson, while intoxicated, touched a woman inappropriately as they danced together on a crowded dance floor at a bar near his home in Rockford, Minnesota.¹ (Tab No. 10, p.1; Tab No. 15, p.2). He was escorted from the bar and was unaware of his conduct until a deputy sheriff visited him at his home several days later (*Id.*).

Highly concerned by his alleged behavior, Mr. Anderson voluntarily submitted to a chemical health evaluation in February 2010. (Tab No. 1). He also completed a psychological assessment in June 2010 (Tab No. 5). Both the alcohol counselor and psychologist recommended he abstain from alcohol (*Id.*). He has followed their recommendations and continues to abstain.

On September 28, 2010, Mr. Anderson entered a *Norgaard* plea² to one count of criminal sexual conduct in the fifth degree (Tab No. 4). He told the trial court he could not remember many of the details of the evening but acknowledged the accuracy of the prosecutor's case, including the testimony of the victim and her witnesses (Tab 15, p.2).

On December 3, 2010, the trial court stayed imposition of sentence and placed Mr. Anderson on probation for two years on the conditions he perform 15 days of out of custody sentence-to-service, remain sober and have no new offenses. (Tab No. 4). He submitted a written apology to the victim that day and has complied with all other conditions of probation. (Tab No. 10, p.4; Tab No. 15, p.2).

¹ The record on appeal consists of the itemized list of documents filed by Respondent on May 20, 2011. We will refer to the relevant documents by their Tab No. within the Index of Administrative Record. We have also included the relevant disqualification and request for reconsideration letters as exhibits in the addendum.

² A *Norgaard* plea is where the defendant asserts an absence of memory on the essential elements of the offense but pleads guilty when the record establishes, and the defendant reasonably believes, that the state has sufficient evidence to convict. *See, State ex. rel. Norgaard v. Tahash*, 110 N.W.2d 867,871 (Minn. 1961).

For almost a year while the matter was pending in court, Mr. Anderson remained employed at Minneapolis Children's Hospital where he worked as a licensed surgical nurse. (Tab No. 10, p.2; Tab 15, p.3-4). He had been at the hospital for sixteen years, accumulating accolades and at least one award (*Id.*; Tab No. 2). Performance evaluations consistently demonstrated he exceeded expectations for competence and care. (Tab No. 16). There were never any complaints voiced about Mr. Anderson or his job performance during his long employment at Children's. (Tab No. 15, p.4). Supervisors and co-workers considered him to be a valued and trusted nurse, with leadership qualities. (*Id.*; Tab No. 3).

A few days after he was sentenced, Respondent notified Mr. Anderson that based on his conviction he was being disqualified from any direct contact with his patients at Children's Hospital (Tab No. 9). Respondent characterized the disqualification as a permanent bar, prohibiting a set aside "regardless of how much time has passed." (*Id.*).

Mr. Anderson sent a letter to Respondent requesting reconsideration (Tab No. 10). He explained in detail the circumstances of the offense, accepted responsibility for his actions and described his job responsibilities and spoke of the love he has for his work at the hospital (*Id.*). In a letter dated February 25, 2011, Respondent reiterated the permanent nature of the bar to employment, stating:

[a]dditionally, under Minnesota Statutes, Section 245C.24, subd. 2, the Commissioner may not set aside this disqualification, regardless of how much time has passed, and regardless of whether it is determined that you pose a risk of harm. Therefore, the risk of harm factors listed in Minnesota Statute, Section 245C.22 are not applicable.

(Tab No. 12). Respondent characterized its decision as a "final agency decision" and stated Mr. Anderson's only recourse was to petition the Court of Appeals. (*Id.*).

Mr. Anderson responded, this time through counsel. He pointed out that while Minn.Stat. §245C.24, subd. 2, does preclude a set aside “regardless of how much time has passed”, the statute says nothing about risk of harm. (Tab No. 15). He noted that in fact, risk of harm is a legitimate factor to consider when determining the appropriateness of a permanent disqualification, citing Minn.Stat. §245C.29, subd. 2(c) (providing an individual disqualified for a predicate offense under §245C.15 the opportunity to request reconsideration on the risk of harm). (*Id.*). He specifically requested reconsideration on the risk of harm he posed to his patients (*Id.*). In doing so, he addressed each risk of harm factor set forth in Minn.Stat. §245C.22, subd. 4. (*Id.*).

In a letter dated March 30, 2011, Respondent once again stated Mr. Anderson’s only appeal to Respondent under the circumstances was a “correctness review.” (Tab No. 17). Because Mr. Anderson did not dispute his conviction, Respondent would not conduct a risk of harm analysis. (*Id.*).

ARGUMENT

I. DUE PROCESS REQUIRES THAT RESPONDENT CONDUCT A RISK OF HARM ANALYSIS FOR A NURSE DISQUALIFIED FOR A CONVICTION COMPLETELY UNRELATED TO THE JOB THE NURSE PERFORMS AND TO THE PATIENTS HE SERVES

Standard of Review

The Court of Appeals reviews de novo the procedural due process afforded a party. *Thompson v. Commissioner of Health*, 778 N.W.2d 401, 403 (Minn. App. 2010). The due process protections granted under the United States and Minnesota Constitutions are identical. *Fosselman v. Commissioner of Human Services*, 612 N.W.2d 456, 461 (Minn. App. 2000). To determine whether an individual’s right to procedural due process has been violated a reviewing court first determines whether a protected liberty or property interest is implicated and then

determines what minimum procedures must be afforded by applying a balancing test. *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 901 (1976).

Due Process Requires a Risk of Harm Analysis

In defining those areas in which governmental action is restricted by procedural due process, the United States Supreme Court has stated:

Procedural due process imposes constraints on government decisions which deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth and Fourteenth Amendments.

Mathews, 424 U.S. at 332, 96 S.Ct. at 901 (1976). *See also, Fosselman*, 612 N.W.2d at 461 (relators, two of whom were RNs, “clearly have a property interest in working in direct-contact positions.”). 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. Constantinean*, 400 U.S. 433, 437, 91 S.Ct. 507, 510 (1971).

Disqualification proceedings under Minn.Stat §245C are subject to the requirements of procedural due process. *Fosselman*, 612 N.W.2d at 465.

The *Mathews* balancing test requires this Court to consider: (1) the private interest that will be affected by the governmental action; (2) the risk of erroneous deprivation of this interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the government’s interests “including the function involved and the fiscal and administrative burdens that the additional or substantive procedural requirements would entail.” *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903.

There should be no question Mr. Anderson has a protected interest in his employment at Children’s Hospital. This Court has consistently recognized that an individual has a property and liberty interest in pursuing private employment. *See, Sweet v. Commissioner of Human Services*,

702 N.W.2d 314, 320 (Minn. App. 2005) (relator has a property interest to pursue employment as a counselor for recently released individuals in state-licensed programs); *Obara v. Minnesota Department of Health*, 758 N.W.2d 873, 878 (Minn. App. 2008) (relator has a protected property interest in pursuing his nursing career).

The first of the *Mathews* factors, Mr. Anderson's private interest, weighs heavily in his favor. His disqualification prevents him from working at the hospital where he has performed admirably for the past sixteen years. It also effectively prevents him from working in his chosen field, anywhere, permanently. Because his chosen profession is so paramount to his livelihood, so necessary to provide for his family, so vital to his self worth, it is surely deserving of constitutional protection. *See, Humenansky v. Minnesota Board of Medical Examiners*, 525 N.W.2d 559, 566 (Minn. App. 1994) (license to practice medicine is a property right deserving of constitutional protection).

The second *Mathews* factor – risk of erroneous deprivation of Mr. Anderson's ability to work in his chosen profession and the probable value of additional procedural safeguards – also weighs heavily in Mr. Anderson's favor. "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, 96 S.Ct. at 902. And though Mr. Anderson does not challenge the existence of his gross misdemeanor conviction, due process requires he be given an opportunity to show he does not pose a risk of harm to the patients he cares for. He is ashamed of the behavior which led to the conviction. He has, however, made amends for his behavior and has taken steps to ensure it does not happen again. It was a one time incident, fueled by alcohol on a crowded dance floor. It had nothing to do with his role as a nurse. He has stopped drinking. Mr. Anderson has never before or has since been in trouble or been accused of misconduct, at work or in his personal life.

Fifteen months passed between the time of the incident and his disqualification. During this period Mr. Anderson continued to work at Children's without incident, providing competent, trusted and compassionate care to his young patients. The incident from December 2009 does not equal or portend a risk of harm to his patients. It does not define him as a person or detract from his unquestioned abilities as a competent nurse. He is only asking for an opportunity to show he presents no risk.

This Court has issued two published decisions dealing with criminal convictions, instructive on this issue. In *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314 (Minn. App. 2005) relator was convicted of separate crimes for controlled substances and first and third degree criminal sexual conduct. After his release from prison he became a minister and worked with prisoners re-entering society. Because one of the programs was a state-licensed program, the Department of Human Services was required to conduct a background study. The study revealed the convictions and relator was disqualified from direct contact with persons served by the state-licensed program.

Relator requested reconsideration and the commissioner conducted a risk of harm analysis.³ Following an analysis of the eight factors, the commissioner affirmed the disqualification.

On appeal this Court stated:

The crux of the issue is whether relator was rehabilitated and poses no risk of harm to Aftercare's clients. But relator

³ The factors the commissioner was required to consider were: (1) the nature, severity and consequences of the event or events that led to 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) the similarity between the victim and persons served by the program; (6) the time elapsed without a repeat of the same or similar event; (7) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and (8) any other information relevant to reconsideration. Minn.Stat. §245C.22, subs. 3, 4.

presented no medical or psychological evidence to support his contention that he is fully rehabilitated. In his application to the commissioner, relator blamed the victim of the crime and argued that the evidence was insufficient to support his conviction. Here the commissioner found, and the record supports, the determination that relator refuses to take responsibility for his actions and blames the victim for his criminal-sexual-conduct convictions.

Sweet, 702 N.W.2d at 318-19. With respect to relator's due process argument, this Court wrote that because relator was allowed to submit documentation on the risk of harm he posed and the commissioner was required to, and did, consider relator's written submissions, "we see no prejudice to relator's due-process right to be heard." *Id.* at 321. Allowing relator to file written submissions provided him with an adequate opportunity to be heard. *Id.* Of course here, Mr. Anderson had no such opportunity, or more accurately the commissioner ignored both his request for reconsideration and his written submissions, which had the same effect as not having an opportunity to be heard at all.

In *Obara v. Minnesota Department of Health*, 758 N.W.2d 873 (Minn. 2008) this Court affirmed the disqualification of a nurse convicted of two felonies. Noting that the criminal proceeding afforded relator of due process which "minimized the risk of an erroneous decision" this Court held that due process did not require the Department of Health to provide relator an evidentiary hearing on his disqualification. *Id.* at 879. Interestingly, relator failed to take advantage of that "portion of the statute that allows a disqualified individual to show that he has been rehabilitated and can be trusted to have direct contact with patients, who are generally vulnerable individuals. Minn.Stat. §245C.22, subd. 4 (2006)." *Id.* at 880. Because the statute provided a right to request relief from disqualification, this Court found that the statute passed constitutional muster. *Id.*

Unlike *Obara*, we are not asking for an evidentiary hearing. We are simply asking that the commissioner conduct a risk of harm analysis consistent with the statutory factors listed in Minn.Stat. §245C.22, subd. 4. These factors take into consideration the totality of circumstances underlying the disqualifying event as well as any written submissions the aggrieved individual submits to demonstrate their job performance and rehabilitative efforts. These factors ensure that an individual's character, behavior and job performance are fairly evaluated to determine whether he or she poses an *actual* risk to patient safety, not simply some hypothetical, presumed risk. A review for "correctness" of the underlying conviction is insufficient. Due process and meaningful review demand there be some correlation between the conviction and Mr. Anderson's role as a pediatric nurse. On this record no correlation, no relatedness between his behavior one winter night and his stellar sixteen year career at Children's Hospital, can be fairly discerned.

We recognize that an evidentiary hearing is neither required, nor even the most effective, method of deciding cases in all circumstances. As the Supreme Court has said, "[a]ll that is necessary is that the procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard, to ensure that they are given a meaningful opportunity to present their case." *Mathews*, 424 U.S. 349, 96 S.Ct. at 909. Mr. Anderson has not been given a meaningful opportunity to be heard. Requiring a risk of harm analysis would at least provide him an opportunity to show he is not (and never has been) a danger to his patients.

The third *Mathews* factor requires consideration of the government's interest in protecting individuals being treated in direct-contact facilities. *See, Fosselman*, 612 N.W.2d at 464. The government also has an interest "in saving time and money by reconsidering disqualification quickly and effectively, without the additional time, expenses, and personnel

required to provide evidentiary hearings to disqualified individuals.” *Sweet*, 702 N.W.2d at 321.

This factor also weighs in Mr. Anderson’s favor.

We support the government’s interest in protecting potentially vulnerable patients in state-licensed facilities. Mr. Anderson has never conducted himself in a manner inconsistent with this purpose throughout his sixteen year career. Moreover, the government’s burden is lessened by conducting a risk of harm analysis without the need for a contested evidentiary hearing. Presumably the commissioner has procedures in place which allow effective, efficient and fair consideration of the risk of harm factors. These factors are set forth by statute clearly and concisely, conducive for an objective evaluation.

The overall balance of the *Mathews* factors clearly favors Mr. Anderson. As a result, he has a due process right to have the commissioner conduct a meaningful reconsideration of the initial disqualification, taking into account the nature of the disqualifying event, Mr. Anderson’s employment history, his support in the health care community, his rehabilitative efforts, his character, the vulnerability of the patients he serves and any other information relevant to whether he poses a risk of harm to the children with whom he has direct contact. *See, Thompson v. Commissioner of Health*, 778 N.W.2d 401, 408 (Minn. App. 2010) (overall balancing of *Mathews* factors affords due process right to a hearing to challenge underlying disqualification from direct contact with persons receiving services from state-licensed facilities).

II. MR. ANDERSON HAS A STATUTORY RIGHT TO A RISK OF HARM ANALYSIS UNDER MINN. STAT. §245C.29

Standard of Review

Because a contested-case hearing was not held, and Mr. Anderson petitioned for certiorari review directly to this Court, this Court will examine the record to determine whether the Commissioner’s decision “was arbitrary, oppressive, unreasonable, fraudulent, under an

erroneous theory of law, or without any evidence to support it.” *Rodne v. Commissioner of Human Services*, 547 N.W.2d 440, 444-45 (Minn. App. 1996). The Commissioner’s decision in this case not to conduct a risk of harm analysis upon request is unreasonable and contrary to law and must be reversed.

Statutory Analysis

Risk of harm is a valid factor to consider when determining the appropriateness of a permanent disqualification based on a criminal conviction.

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 section 245C.15, the individual has a right to request reconsideration on the risk of harm under section 245C.21.*

Minn.Stat. §245C.29, subd. 2(c) (emphasis added). Minn.Stat. §245C.21, subd. 3(a)(3) places the burden on the individual to show he or she does not pose a risk of harm by specifically addressing the factors listed in §245C.22, subd. 4.

Minn.Stat. §245C.22, subd. 4, authorizes the commissioner to set aside the disqualification if the commissioner finds that “the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm to any person served by the applicant, license holder, or other entities . . .” In making this determination the Commissioner *shall* consider:

- (1) the nature, severity and consequences of the event 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).

In this case, Mr. Anderson specifically requested reconsideration on the risk of harm he presented to the patients he serves. In support of his request, he addressed each statutory factor listed above and submitted documentation pertinent to factors eight and nine. He submitted chemical health and mental health evaluations (Tab Nos. 1 and 5). He submitted a recent award acknowledgement and three past performance evaluations (Tab Nos. 2 and 16). He submitted several letters of support from his colleagues, doctors and nurses alike, at Children's Hospital (Tab No. 3).

The Commissioner appeared to have ignored Mr. Anderson's written submissions entirely. In a letter dated March 30, 2011, commissioner's representative stated their review was limited to a "correctness review." She did not acknowledge his request for reconsideration on whether he posed a risk of harm, and did not even address the risk of harm factors, let alone apply them to the circumstances of Mr. Anderson's case. Because Minn.Stat. §245C.29, subd. 2(c) affords Mr. Anderson an opportunity to demonstrate that he posed no harm to his patients, the commissioner's refusal to conduct a risk of harm analysis is unreasonable and contrary to law.

CONCLUSION

The commissioner's refusal to conduct a risk of harm analysis for an individual disqualified for a criminal conviction completely unrelated to the job the individual performs and

to the patients he serves violates the individual's right to procedural due process and is contrary to the Human Services Background statute. For these reasons, relator Michael Anderson respectfully requests this Court to reverse the commissioner's decision disqualifying him from direct contact with his patients and to remand for a risk of harm analysis.

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Dated: 6/21/11

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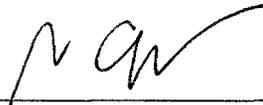
I hereby certify that this brief conforms to the requirements of Minn.R.Civ.App.P.
132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is
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