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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1801**

Keith J. McMoore,  
Relator,

vs.

Commissioner of Human Services,  
Respondent.

**Filed May 18, 2010  
Affirmed  
Harten, Judge\***

Minnesota Department of Human Services  
Agency File No. 21946081

Jonathan Geffen, Arneson & Geffen, PLLC, Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, Cara M. Hawkinson, Assistant Attorney General,  
St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and  
Harten, Judge.

**UNPUBLISHED OPINION**

**HARTEN**, Judge

Relator challenges the decision of respondent Commissioner of Human Services to  
deny relator's request for reconsideration to set aside his disqualification from working at

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

Rayito de Sol, a facility licensed by the Department of Human Services (DHS),<sup>1</sup> arguing that the decision is not supported by substantial evidence and is arbitrary and capricious, and that relator was deprived of due process because no evidentiary hearing was held. Because we conclude that the decision is supported by substantial evidence and is not arbitrary and capricious and that relator was not deprived of due process, we affirm.

### **FACTS**

Relator Keith J. McMoore was convicted for selling drugs under Minn. Stat. § 152.022, subd. 1(1), subd. 3(a) (1994), in 1995 and for illegal possession of a weapon under Minn. Stat. § 624.713 (1996) in 1998.

In March 2009, relator applied to work at Rayito de Sol, a Spanish-immersion facility licensed by DHS. Rayito de Sol provides care to children from 16 months to six years old at multiple sites. DHS did a background check on relator, completed a risk of harm assessment form, and notified Rayito de Sol that relator was disqualified from working in, and must be immediately removed from, any position allowing contact with or access to persons receiving its services. Relator requested reconsideration to have his disqualification set aside.

In May 2009, relator applied to DHS to be a joint license holder of a Rayito de Sol site that was seeking a license. Because of relator's disqualification, DHS planned to deny the request for licensure.

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<sup>1</sup> Respondent Commissioner of Human Services and the Department of Human Services will be collectively referred to as DHS.

On 13 July 2009, DHS informed relator that, by 31 July, it needed additional information to decide on his request for reconsideration. Relator did not submit any additional information by 31 July. On 7 August 2009, DHS denied relator's request for reconsideration because he had failed to prove that he did not present a risk of harm to the persons served by the program. On 12 August, relator submitted the additional information.

On 25 August, relator entered into a Settlement Agreement of his application for licensure with DHS providing that: (1) DHS would not proceed with the denial of Rayito de Sol's request for a license; (2) relator would no longer be a party to the application; (3) relator would not be a controlling individual or have any involvement in the operation of the Rayito de Sol program at that site or other sites; (4) relator would not have any direct contact with or access to those receiving services at any Rayito de Sol site; (5) relator would not be permitted to enter a Rayito de Sol facility except to pick up or drop off his own children; and (6) for at least five years, relator would not apply for a license for any DHS-licensed program. In September 2009, DHS, after reviewing the additional information relator provided and completing a second risk of harm assessment form, denied his request for reconsideration to set aside his disqualification.

Relator challenges that denial, arguing that it is unsupported by substantial evidence and is arbitrary and capricious and that he was deprived of due process because DHS did not provide an evidentiary hearing.

## DECISION

### 1. Denial of Request for Reconsideration

An appellate court may reverse an administrative decision if it is not supported by substantial evidence or is arbitrary and capricious. Substantial evidence is[:] 1. such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2. more than a scintilla of evidence; 3. more than some evidence; 4. more than any evidence; and 5. evidence considered in its entirety. An agency's conclusion is arbitrary and capricious if there is no rational connection between the facts and the agency's decision.

*Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005) (quotation and citations omitted), *review denied* (Minn. 15 Nov. 2005).

In 2009, relator was disqualified because he had been convicted of felonies in violation of Minn. Stat. § 624.713 in 1998 and Minn. Stat. § 152.022, subd. 1(1), subd. 3(a), in 1995. “An individual is disqualified . . . if: (1) less than 15 years have passed since the discharge of the sentence imposed, if any, for the offense; and (2) the individual has committed a felony-level violation of . . . [section] 624.713 (certain persons not to possess firearms); chapter 152 (drugs; controlled substance) . . . .” Minn. Stat. § 245C.15, subd. 2(a) (2008). “The commissioner shall disqualify an individual . . . from any position allowing direct contact with persons receiving services . . . upon receipt of information showing . . . (1) a conviction of . . . one or more crimes listed in section 245C.15 . . . .” Minn. Stat. § 245C.14, subd. 1(a) (2008). Thus, relator's disqualification was mandated by Minn. Stat. § 245C.15, subd. 2(a), and Minn. Stat. § 245C.14, subd. 1(a).

Relator thereafter requested reconsideration to have his disqualification set aside.

The disqualified individual requesting reconsideration must submit information showing that:

(1) the information the commissioner relied upon in determining the underlying conduct that gave rise to the disqualification is incorrect;

. . . or

(3) [the disqualified individual] does not pose a risk of harm to any person served by the . . . [DHS] license holder . . . by addressing the information required under section 245C.22, subdivision 4.

Minn. Stat. § 245C.21, subd. 3(a) (2008).<sup>2</sup> Nine factors are to be considered “[i]n determining whether the individual has met the burden of proof by demonstrating the individual does not pose a risk of harm.” Minn. Stat. § 245C.22, subd. 4(b) (2008). Any one factor may be determinative, and the interests of each individual served by the license holder outweigh the interests of the individual seeking to set aside a disqualification. *Id.*, subd. 3 (2008).

The nine factors provided in Minn. Stat. § 245C.22, subd. 4(b), are the basis of the DHS risk of harm assessment form, which ranks an individual as lower risk, medium risk, or higher risk in 11 categories and provides a space for inserting other relevant information. DHS completed two risk of harm assessment forms on relator, the first in

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<sup>2</sup> Relator initially argued to DHS that the information used as the basis for his disqualification was improperly considered because, in 2002, relator had successfully petitioned the district court for expungement of his felony convictions. But “an expunged record of a conviction may be opened for purposes of a background study under section 245C.08 unless the court order for expungement is directed specifically to the commissioner of human services.” Minn. Stat. § 609A.03, subd. 7(b)(3) (2008). Relator’s expungement was not directed specifically to the commissioner of human services. Relator does not raise the expungement argument on appeal.

response to his initial request to have the disqualification set aside and the second in response to the additional information he submitted.

DHS based its final determination that relator had not met the burden of showing that he does not pose a risk of harm on four factors: (1) the nature and severity of the event causing the disqualification;<sup>3</sup> (2) the fact that relator’s “intended role in [the] childcare center [was] unclear—conflicting/inconsistent information [was] provided by [relator]”;<sup>4</sup> (3) the vulnerability of those served by the program;<sup>5</sup> and (4) the fact that relator had worked less than two years in health or human services.<sup>6</sup> Relator argues that substantial evidence does not support the first two factors. We disagree.

**a. Nature and Severity of Event**

The legislature placed violations of Minn. Stat. § 624.713 and Minn. Stat. § 152.022 in the 15-year disqualification category rather than in the 10-year or 7-year categories, indicating that the legislature considered them severe. DHS found that the events resulting in relator’s convictions placed him in a higher risk category because the events were “intentional, overt, violent.”

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<sup>3</sup> This factor is taken from Minn. Stat. § 245C.22, subd. 4(b)(1): “the nature, severity and consequences of the event or events that led to the disqualification.”

<sup>4</sup> This additional information was provided under Minn. Stat. § 245C.22, subd. 4(b)(9): “any other information relevant to reconsideration.”

<sup>5</sup> This factor is taken from Minn. Stat. § 245C.22, subd. 4(b)(5): “vulnerability of persons served by the program.” Relator does not dispute that children between the ages of 16 months and six years are vulnerable.

<sup>6</sup> This factor is taken from Minn. Stat. § 245C.22, subd. 4(b)(9): “any other information relevant to reconsideration.” Relator does not dispute that he had worked in this field for less than two years when he was disqualified.

Police records from the events support this finding. They show that relator's 1995 conviction involved selling 10.6 grams of cocaine to an undercover agent in exchange for two handguns, having a gram of crack cocaine in his pocket, and having in his bedroom a stolen pistol and \$2,400 in cash; his 1998 conviction involved attempting to flee a police car that tried to pull him over and being stopped by officers who found an illegal handgun, a small amount of marijuana, and a large amount of cash in relator's car. Substantial evidence supports the finding that the events were intentional, overt, and/or violent.<sup>7</sup>

**b. Conflicting Information**

In May 2009, relator applied for a DHS license for a Rayito de Sol facility without disclosing that he had been disqualified from working in a licensed facility because of his felony convictions. On 12 August 2009, relator submitted to DHS a request for reconsideration of his disqualification, saying he performed "Real Estate and Operations" services for Rayito de Sol. On 25 August 2009, he entered into a settlement agreement that provided that he would not have any involvement in the operation of the program at any Rayito de Sol facility, would not have any direct contact with or access to those receiving services at any facility, and would enter the premises of a facility only to pick up or drop off his own children.

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<sup>7</sup> DHS also argues that relator's crimes involved dishonesty, which further supports the decision not to set aside his disqualification. Relator objects because DHS did not previously mention dishonesty. But relator sought to establish his own honesty when he referred to and quoted the district court judge who ordered the expungement of relator's criminal record: "I believe that you are who you say you are. I believe you are on the course you said you're on." Arguably, DHS mentioned the dishonesty inherent in relator's crimes in response to this reference.

Relator could not simultaneously perform operations services for Rayito de Sol, as he claimed on his request for reconsideration, and have no involvement with Rayito de Sol operations, as the settlement agreement required. Thus, the statement that relator provided conflicting and inconsistent information on his role at Rayito de Sol is supported by substantial evidence.<sup>8</sup>

Relator also challenges several of the other evaluations on the risk assessment form. But a determination on any one of the statutory factors may be dispositive. Minn. Stat. § 245C.22, subd. 3. Moreover, for a disqualification to remain valid, no particular number of factors on the form is required to be in the “higher risk” category.

Relator objects to the indication on the assessment form that he “accepts some responsibility” for his crimes because he thinks it should have been “accepts responsibility.” But relator sought to evade responsibility for his crimes when he applied to be a controller of a DHS-licensed facility after he had been disqualified from working at such a facility; the “accepts some responsibility” assessment is not arbitrary and capricious. Relator also objects that two factors, the consequences of his crimes to the victims and the harm suffered by the victims, were evaluated as “medium risk” and

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<sup>8</sup> We note a further inconsistency in the October 2009 brief to this court, filed two months after the settlement agreement, which says relator is “the Director of Real Estate & Operations at Rayito de Sol . . .” and has interaction with children when he “conducts tours of the school with prospective parents.” This is not consistent with his having no involvement in the operation of Rayito de Sol facilities, no contact with children served by the facilities, and no right to enter facilities except to drop off or pick up his own children. The statement also defeats relator’s argument that Minn. Stat. § 245C.14 (2008) (requiring disqualification of certain individuals having contact with or access to those served by a DHS-licensed facility) does not apply to him because he does not have contact with or access to the children.

should have been evaluated as “lower risk” because there were no victims of his sale of a controlled substance to an undercover agent. But, at the time he was selling the drugs, relator presumably did not know they were being sold to an undercover agent and would not be used to anyone’s detriment. The fact that he inadvertently sold to an undercover agent instead of a user does not minimize his risk of harm.

The risk of harm assessment form provides substantial evidence in support of DHS’s decision that relator presents a risk of harm.

## **2. Due Process**

Relator argues that he was denied due process because no evidentiary hearing was held on his request to set aside his disqualification. But “if the individual was disqualified based on a conviction or admission to any crimes listed in section 245C.15, subdivisions 1 to 4 . . . the reconsideration decision under section 245C.22 is the final agency determination . . . and is not subject to a hearing under section 256.045.” Minn. Stat. § 245C.27, subd. 1(c) (2008).

This court has rejected the argument that Minn. Stat. § 245C.27, subd. 1(c), is unconstitutional because it deprives some disqualified individuals of due process. *Sweet*, 702 N.W.2d at 322. After concluding that the relator had a property interest in his public-sector employment, *id.* at 320, and applying the due process balancing test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335-49, 96 S. Ct. 893, 903-09 (1976), *Sweet* determined 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. Consequently, the

statutory language contained in Minn. Stat. § 245C.27, subd. 1(c), that an applicant is not entitled to an evidentiary hearing is not unconstitutional on its face or as applied to relator.

*Id.* at 322.<sup>9</sup>

None of relator's four due process arguments is supported by law or the record. He argues first that DHS failed to explain its decision not to set his disqualification aside because it did not provide an adequate response to the supplementary material relator supplied. But DHS completed a second risk assessment form on relator after reviewing the supplementary material.

He then argues that the DHS risk of harm form is inadequate for determining whether an individual poses a risk of harm. But the form tracks the factors set out in Minn. Stat. § 245C.22, subd. 4(b), for determining risk of harm. Relator claims that "this Court is given no guidance from DHS as to the basis for its decision [not to set aside relator's disqualification]," but the form clearly indicates that DHS considered and made a determination on each factor.

Third, relator argues that government interests would support providing a hearing. But the legislature explicitly stated that no hearing is necessary for those who were convicted of or admitted to a crime listed in Minn. Stat. § 245C.15. Minn. Stat. § 245C.27, subd. 1(c).<sup>10</sup> Relator relies on the analysis of the *Mathews* factors provided in

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<sup>9</sup> Relator does not attempt to distinguish *Sweet*; he argues "that [it] was wrongly decided."

<sup>10</sup> The legislature specifically differentiated between individuals not entitled to a hearing, who were disqualified "based on a conviction or admission to any crimes listed in section 245C.15, subdivisions 1 to 4," and individuals entitled to request a hearing, who were disqualified because they "committed an act or acts that meet the definition of any of the

*Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 464-65 (Minn. App. 2000), but *Sweet* distinguished *Fosselman*. 702 N.W.2d at 321. The same distinction applies here: the applicants in *Fosselman* had been disqualified because they failed to report maltreatment of a child and were not afforded any due process rights; relator, like the relator in *Sweet*, “has already been afforded the full panoply of rights in the criminal proceedings leading up to his convictions.” *Id.*

Finally, relator argues that he has had no opportunity to cross-examine the DHS person who reviewed his documents. But the legislature has provided that those who, like relator, are disqualified because of convictions of the crimes set out in Minn. Stat. § 245C.15 have adequate due process without a hearing. Any change in the statute must come from the legislature, not from this court. *Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963).

The denial of relator’s request for reconsideration to set aside his disqualification is supported by substantial evidence and is not arbitrary or capricious, and relator’s argument that he was denied due process lacks merit.

**Affirmed.**

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crimes listed in section 245C.15.” *See* Minn. Stat. § 245C.27, subd. 1(c), (a) (2008); *see also* *Thompson v. Comm'r of Health*, 778 N.W.2d 401, 408 (Minn. App. 2010) (relator who was disqualified because he committed a disqualifying act, not because he was convicted of or admitted to a crime, was deprived of due process when denied a hearing under Minn. Stat. § 245C.27, subd. 1(a) (2008)).