

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Application for  
Licensure of J.B.

**RECOMMENDATION GRANTING  
MOTION FOR SUMMARY DISPOSITION**

This matter is before Administrative Law Judge LauraSue Schlatter on a motion for summary disposition filed by the Minnesota Department of Health (Department) on April 29, 2015. Applicant J.B. (Applicant) filed his Memorandum Contesting Motion for Summary Disposition on May 4, 2015 and the record closed on that date.

Cody M. Zustiak, Assistant Attorney General, appeared on behalf of the Department. Applicant appeared on his own behalf.

Based on the submissions of the parties and for the reasons set forth in the attached Memorandum, the Administrative Law Judge makes the following:

**RECOMMENDATIONS AND ORDER**

IT IS HEREBY RECOMMENDED that the Commissioner of Health **GRANT** the Department's Motion for Summary Disposition. There are no additional issues in dispute.

IT IS HEREBY RECOMMENDED that the Commissioner of Health **AFFIRM** the Denial of J.B.'s application for licensure as a body art technician.

IT IS HEREBY ORDERED that the hearing scheduled for **Tuesday, June 30, 2015**, is **CANCELLED**.

Dated: May 20, 2015

s/LauraSue Schlatter  
LAURASUE SCHLATTER  
Administrative Law Judge

## NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2014), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Edward Ehlinger, Commissioner, Department of Health, 625 Robert St. N, PO Box 64975, St. Paul, MN 55164-0975, (651) 201-5810 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1 (2014), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

This matter arises out of the Department's denial of the Applicant's application for a body art technician license pursuant to Minn. Stat. § 146B.03, subd. 5 (2014). The Department seeks summary disposition on the sole legal issue in the case, which is whether the Department properly denied Applicant's application for licensure based on Applicant's criminal background, including convictions for felony-level criminal sexual conduct and convictions that included conduct likely to deceive, defraud, or harm the public.

### I. Regulatory Framework

Minnesota Statutes section 146B.03 (2014) authorizes the Commissioner of the Department of Health (Commissioner) to license Minnesota body art technicians. A body art technician is any individual licensed under Minnesota law as a tattoo technician, a body piercing technician, or both.<sup>1</sup> With certain limited exceptions which do not apply in this case, an individual is prohibited from performing either tattooing or body piercing unless the individual holds a license to do so issued by the Commissioner.<sup>2</sup>

Minnesota Statutes section 146B.03, subdivision 4 establishes the requirements for licensure as a body art technician. The applicant must be over the age of 18, pay

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<sup>1</sup> Minn. Stat. § 146B.01, subd. 31 (2014).

<sup>2</sup> Minn. Stat. § 146B.03.

certain fees, provide proof of a minimum of 200 hours of supervised experience in each area for which the applicant seeks licensure, and provide proof of completion of certain required coursework.<sup>3</sup> The Commissioner may refuse to grant a license if the Commissioner finds, among other reasons, that an applicant has “engaged in conduct likely to deceive, defraud, or harm the public” or “been convicted of a felony-level criminal sexual conduct offense” whether by plea, jury verdict, or court finding.<sup>4</sup> If an applicant’s license application is denied, the Department must notify the applicant in writing of the determination, the grounds for the determination, and the applicant’s right to request a contested case hearing.<sup>5</sup>

The Department evaluates, on a case-by-case basis, each application from an applicant with a felony-level criminal sexual conduct offense conviction or conviction that includes conduct likely to deceive, defraud, or harm the public.<sup>6</sup> In each such case, the Department determines the potential risk to the consumers whom the applicant plans to serve.<sup>7</sup>

## **II. Factual Background**

The material facts in this case are not in dispute. Applicant submitted a body art technician application to the Department on October 28, 2014. On his application, he checked a box indicating that he had been convicted of a felony-level criminal sexual conduct (CSC) offense. An accompanying handwritten note on the application stated that he was charged with fourth degree CSC when he was 18 years old. He stated that the charge was based on a consensual relationship he had with a 15-year-old female who had lied about her age. Applicant further stated “[t]his was in no way related to my profession as a tattoo artist nor is it applicable in any way as minors can’t get tattoos anyway.”<sup>8</sup>

On October 29, 2014, the Department informed Applicant his application was not complete. The Department requested, among other things, that Applicant provide a signed Minnesota Bureau of Criminal Apprehension (BCA) consent form, which he did.<sup>9</sup> With Applicant’s consent, the Department obtained a BCA report which indicated that Applicant had two felony-level criminal sexual conduct convictions and multiple other convictions, including, among others, failure to register as a predatory offender (2010),

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<sup>3</sup> Minn. Stat. § 146B.03, subd. 4.

<sup>4</sup> Minn. Stat. § 146B.08, subs. 3, 4.

<sup>5</sup> Minn. Stat. § 146B.03, subd. 5.

<sup>6</sup> Affidavit of Anne Kukowski at ¶¶ 2 and 3 (April 24, 2015) (Aff. of A. Kukowski 1).

<sup>7</sup> *Id.*

<sup>8</sup> Aff. of Erin Smilanich, ¶ 2, Ex. A at 3.

<sup>9</sup> E. Smilanich Aff., ¶ 3, Exs. B and C.

domestic assault (2010 and 2012) and felony drug possession (2013).<sup>10</sup> The BCA report included information that Applicant knowingly failed to register as a predatory offender and intentionally provided false information.<sup>11</sup>

Applicant was previously licensed by Anoka County as a body art technician.<sup>12</sup> Applicant has performed many tattoos over the years. There have been no allegations related to conduct by Applicant in connection with his body art clients that involved fraud, deceit, or other harm.<sup>13</sup> The Commissioner issued Applicant a temporary license prior to his pending application and there have been no problems related to the temporary license.<sup>14</sup>

On December 23, 2014, the Department sent Applicant a letter via certified mail informing him that it was denying his application for licensure as a body art technician.<sup>15</sup> The Department denied Applicant's application based on his felony-level CSC convictions; and on other criminal convictions that the Department determined included conduct that was likely to deceive, defraud, or harm the public.<sup>16</sup>

In an e-mail dated January 29, 2015, Applicant appealed the Department's decision denying his application for licensure as a body art technician.<sup>17</sup>

### **III. Summary Disposition Standard**

Summary disposition is the administrative equivalent of summary judgment and the same legal standards apply.<sup>18</sup> Summary disposition is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.<sup>19</sup> A genuine issue is one that is not a sham or frivolous, and a material fact is one which will affect the outcome of the case.<sup>20</sup> The Office of Administrative Hearings has generally

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<sup>10</sup> *Id.* at ¶ 4, Ex. C. In its initial Memorandum in Support of the Motion for Summary Disposition, the Department characterized Applicant's criminal sexual conduct (CSC) convictions as having occurred in 1999 and 2003. Department's Memorandum in Support of Motion for Summary Disposition at 4 (Department's Memorandum). In his responsive memorandum Applicant asserted, and the Department later acknowledged, that the two CSC convictions (criminal sexual conduct in the third and fourth degrees) arose from a single incident involving a single victim. Applicant's Memorandum Contesting Motion for Summary Disposition at 1 (May 4, 2015) (Applicant's Memorandum); Affidavit of Anne Kukowski, ¶ 2 (May 7, 2015) (Aff. of A. Kukowski 2). Sentences for both convictions were imposed on June 22, 1999. See E. Smilanich Aff., Ex. C at 9.

<sup>11</sup> *Id.*

<sup>12</sup> Applicant's Memorandum at 1.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1-2.

<sup>15</sup> E. Smilanich Aff., ¶ 5, Ex. D.

<sup>16</sup> *Id.*

<sup>17</sup> E. Smilanich Aff., ¶ 7, Ex. E.

<sup>18</sup> Minn. R. 1400.5500(K) (2013).

<sup>19</sup> Minn. R. Civ. P. 56.03; Minn. R. 1400.5500(K).

<sup>20</sup> *Highland Chateau v. Minnesota Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), rev. denied (Minn. Feb. 6, 1985).

followed the summary judgment standards developed in judicial courts in considering motions for summary disposition in contested case matters.<sup>21</sup>

The moving party must demonstrate that no genuine issues of material fact exist and that it is entitled to summary disposition as a matter of law.<sup>22</sup> If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.<sup>23</sup> It is not sufficient for the nonmoving party to rest on mere averments or denials; presentation of specific facts demonstrating a genuine issue for hearing is required.<sup>24</sup> When considering a motion for summary disposition, the Administrative Law Judge must view the facts in the light most favorable to the nonmoving party.<sup>25</sup> All doubts and factual inferences must be resolved against the moving party.<sup>26</sup> If reasonable minds could differ as to the import of the evidence, disposition as a matter of law should not be granted.<sup>27</sup>

#### **IV. The Parties' Arguments**

Applicant acknowledges in his Memorandum that the Department of Health “has the right” to deny his application for a body art technician license. His Memorandum asks for “special consideration” concerning this matter. Applicant also points out that the two CSC convictions arose out of a single incident and a single victim, and that the charge dates back to 1999, before he was licensed to perform body art. He argues that his sentence has expired, treatment and rehabilitative programming have been completed, and that he was assigned the lowest risk level possible for a sex offender, a Risk Level 1, by the End of Confinement Review Committee.<sup>28</sup> Applicant asserts that he is an accomplished artist and that he practiced as a body art technician for many years without incident before the Department took over the licensing function. He states that he has paid for the mistakes he made earlier in his life and that he wishes to be able to earn a living as a body art technician rather than rely on some form of public assistance.<sup>29</sup>

The Department affirms that, in evaluating whether to grant Applicant’s license, it was aware that the CSC convictions arose out of one incident and one victim. The Department also acknowledges that Applicant has worked as a body artist in the past and that this license denial may pose a hardship to him. Nonetheless, the Department states that it must put its duty to protect the public foremost, and that it is concerned

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<sup>21</sup> Minn. R. 1400.6600 (2013).

<sup>22</sup> *Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

<sup>23</sup> *Highland Chateau*, 356 N.W.2d at 808.

<sup>24</sup> Minn. R. Civ. P. 56.05.

<sup>25</sup> *Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).

<sup>26</sup> *Thiele*, 425 N.W.2d at 583.

<sup>27</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

<sup>28</sup> See Minn. Stat. § 244.052, subd. 3 (2014).

<sup>29</sup> Applicant’s Memorandum at 1-2.

about prevention of future misconduct by Applicant, even though the Department is not aware of any incidents involving Applicant and his performance of body art in the past.<sup>30</sup>

In addition, the Department contends that it denied Applicant's license application based on Applicant's more recent criminal conduct. He was convicted in 2010 of failing to register as a predatory offender; in 2010 and 2012 of domestic assault; and in 2013 of felony-level drug possession. The Department determined that these offenses involved conduct likely to deceive, defraud, or harm the public. The Department argues that, while Applicant addressed the CSC convictions, pointing out that they occurred many years ago, he did not address the more recent convictions.<sup>31</sup>

The Department indicates that, perhaps with the passage of time and more substantive evidence of his rehabilitation, Applicant may be granted a license in the future, but maintains that it properly denied his application.<sup>32</sup>

## **V. Discussion**

The law grants the Commissioner broad discretion to deny an application for a body art technician's license. Minnesota Statutes section 146B.08, subdivision 4 states that the Commissioner "may" refuse to grant a license if the Commissioner finds that a technician is subject to any of the grounds for disciplinary action listed in section 146B.08, subdivision 3. In this case, the Commissioner found that Applicant engaged in conduct likely to deceive, defraud, or harm the public (subdivision 3, item (9)), and that he has been convicted of felony-level CSC (subdivision 3, item (13)). There is no time limit connected to any of the grounds for disciplinary action in subdivision 3. Thus, the Commissioner may consider conduct and convictions that happened any number of years in the past.

In his Memorandum contesting the Departments Summary Disposition Motion, Applicant asks the Administrative Law Judge for special consideration in this matter. The scope of the Administrative Law Judge's authority in this matter is solely to determine whether the Department acted properly when it decided to deny Applicant's body art technician license application. The Administrative Law Judge may not substitute her own judgment for that of the Department. The Commissioner, in reviewing the record and this recommendation, could decide that the Department should have given Applicant special consideration, and come to a conclusion that is different than the Department originally reached, but that is a matter for the Commissioner, not the Administrative Law Judge.

In its Reply Memorandum in Support of Motion for Summary Disposition, the Department points out that it did not rely solely on Applicant's CSC convictions when it made the decision to deny the license application. The Department emphasized that, in

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<sup>30</sup> Department's Reply Memorandum in Support of Motion for Summary Disposition at 2 (Department's Reply Memorandum); Aff. of A. Kukowski 2, ¶¶ 2, 3.

<sup>31</sup> Department's Reply Memorandum at 2.

<sup>32</sup> *Id.* at 2-3.

the past four or five years, Applicant has been convicted of failing to register as a predatory offender, as well as of domestic assault and felony-level drug possession. Thus, the Department concluded that Applicant engaged in conduct demonstrating he is likely to deceive, defraud, or harm the public. The Administrative Law Judge agrees that it was reasonable for the Department to conclude that knowingly failing to register as a predatory offender is conduct that deceives the public. Similarly, both domestic assault and felony-level drug possession can reasonably be found to be conduct that harms the public. Applicant did not address any of this conduct in this proceeding.

The Administrative Law Judge concludes that the Department's denial of Applicant's application for a body art technician license was proper under the criteria set forth at Minn. Stat. § 146B.08. Therefore, the Administrative Law Judge respectfully recommends that the Commissioner affirm the Department's denial of the license application.

**L. S.**