

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

In the Matter of the Application for
License by Superior Home Care.

**ORDER DENYING
DEPARTMENT'S MOTION FOR
SUMMARY DISPOSITION**

The above-captioned matter is pending before the undersigned administrative law judge pursuant to a Notice of and Order for Hearing and Prehearing Conference issued by the Director of the Facility and Provider Compliance Division of the Minnesota Department of Health on April 1, 1997. The Department of Health has moved for summary disposition of this matter.

Susan A. Casey, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, filed the motion on behalf of the Department of Health (department). AnnaMarie Brooks, 4886 West Pike Lake Road, Duluth, Minnesota 55811, filed a Memorandum in Opposition to the department's motion on behalf of the Applicant, Superior Home Care. For purposes of this motion, the record closed on December 9, 1996, when the last memorandum was received.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum attached hereto, the administrative law judge makes the following:

ORDER

The Department's Motion for Summary Disposition is DENIED.

Dated this _____ day of January, 1998.

JON L. LUNDE
Administrative Law Judge

MEMORANDUM

The department has filed a motion for summary disposition in this matter. Summary disposition is the administrative equivalent to summary judgment. Minn. R. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings generally has followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. See Minn. R. 1400.6600.

It is well established that, in order to successfully resist a motion for summary judgment, the nonmoving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. *Id.* To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. *Id.*

Questions as to how equivocal evidence is to be considered have been addressed by long-standing rules governing summary judgment motions. As the Minnesota Supreme Court has stated:

1. Under Rule 56.03, Minn.R.Civ.P., a summary judgment may be granted to either party if "there is no genuine issue as to any material fact." In construing this rule, we have held that "the moving party has the burden of proof and * * * the nonmoving party has the benefit of that view of the evidence which is most favorable to him." Sauter v. Sauter, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955); see 2 J. Hetland & O. Adamson, *Minnesota Practice* 571 (1970). All doubts and factual inferences must be resolved against the moving party. Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957); 2 J. Hetland & O. Adamson, *supra* at 572. However, as the Anderson court stated, "it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried." 250 Minn. at 186, 84 N.W.2d at 605. The care with which an inquiry required by Rule 56.03 should be conducted was emphasized by this court in Donnay v. Boulware, 275 Minn. 37, 144 N.W.2d 711 (1966). There, we stated that "(s)ummary judgment is

a 'blunt instrument' and * * * should be employed only where it is perfectly clear that no issue of fact is involved." *Id.* at 45, 144 N.W.2d at 716.

Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981).

The department previously denied a license application filed by Covenant Home Care on April 17, 1995, due to the participation of Gerald S. Buchanan in the "management" of Covenant Home Care, and his responsibility for statutory and rule violations committed by Health Personnel, another home health provider Buchanan owned. Absolon Affidavit, Exhibit A, Attachment 3. After Covenant Home Care appealed the denial of its license application, summary disposition was recommended and subsequently granted to the department in that appeal. Absolon Affidavit, Exhibit B. Covenant Home Care then agreed to indefinitely continue the matter, pending an amendment to its application. *Id.*, Exhibit A, Attachment 4. No amended application has been filed.

On October 25, 1996, the applicant, Superior Home Care, applied for a home health care license from the department. Absolon Affidavit, Exhibit A, Attachment 5. The application identified Anna M. Brooks as the person legally responsible to operate the applicant's business. *Id.* Based on the department's knowledge of Brooks' intimate relationship to Gerald Buchanan, the department inquired of Superior Home Care as to whether Gerald Buchanan would have any financial interest, share any revenues, or have any involvement "in positions of management, supervision, or consulting . . ." *Id.* Exhibit A, Attachment 6. Brooks responded that Buchanan had no financial interest in Superior Home Care but had been hired as a consultant to provide services on a daily basis. *Id.* Exhibit A, Attachment 7.

The department reviewed the information submitted by Brooks in response to the inquiry and concluded that more information regarding Buchanan's involvement was required before Superior Home Care's application could be acted upon. *Id.* Exhibit A, Attachment 8. Specifically, the department asked for "copy(ies) of all formal agreement(s) by which Gerald Buchanan will provide consultation services." *Id.* Brooks replied that the agreement was "a formal unmemorialized verbal agreement under which he provides advice, counsel [*sic*], and administrative service, to Superior Home Care, in return for payment based on a percentage of Superior Home Care gross and net incomes. *Id.* Exhibit A, Attachment 9.

Based on the information received from Superior Home Care, the department denied the application for licensure. The reason given for the denial was the involvement of Gerald Buchanan in the operations of Superior Home Care. The department cited Minn. R. 4668.0012, subp. 11 E as supporting the denial. That rule states:

Subp. 11. Denial of license. A license shall be denied if:

* * *

E. the commissioner determines that an owner or managerial official, as an owner or managerial official of another licensee, was substantially

responsible for the other licensee's failure to substantially comply with Minnesota Statutes, sections 144A.43 to 144A.49, and this chapter.

Minn. R. 4668.0012, subp. 11 E.

The department has brought this summary disposition motion, asserting that there are no genuine issues of material fact and the department is entitled to a resolution of this appeal in its favor as a matter of law.

Superior Home Care has submitted a response to discovery regarding the role of Gerald Buchanan in its operations. That response states:

Mr. Buchanan will provide consultant (expert or professional advice) services in the area of Home Health Care. Mr. Buchanan is available to respond verbally or in writing to questions that I [Brooks] might have. Mr. Buchanan is available to provide this consultant service 24 hours per day seven days a week. Mr. Buchanan will have no line responsibility or authority regarding Superior Home Care. Mr. Buchanan does not have the authority to speak for Superior Home Care. Mr. Buchanan does not have the authority to bind Superior Home Care. Mr. Buchanan does not have the authority to open mail for Superior Home Care. Mr. Buchanan has not been authorized any powers regarding Superior Home Care. My agreement with Gerald Buchanan has not yet identified percentages that he will be paid for his consultant service. Gerald Buchanan does not have any authority or responsibility to act in my behalf should I become incapacitated; that authority would fall to my mother Virginia Brooks, 8677 South Strand Lake Road, Cotton Minnesota 55724. Gerald Buchanan has not been delegated the authority to establish or control business policy. When I asked Mr. Buchanan about the matter of his having authority to establish or control business policy he responded: "I could not accept any such authority, because that could jeopardize your license."

Memorandum in Opposition, Attachment 1, at 4-5 (Answers to Interrogatory No. 11).

Superior Home Care maintains that summary disposition in this matter is inappropriate, since the status of Buchanan is in dispute and the issue of his status is material to whether a license should be issued in this matter. The department maintains that Superior Home Care's response are "admittedly self-serving statements" that do not raise genuine issues of fact. Department Reply, at 1. The department notes that Superior Home Care has the ultimate burden of proof in this matter, and asserts that burden has not been met since "the totality of the evidence supports a **finding** that Gerald Buchanan created and controls Superior Home Care" Department Memorandum, at 14 (emphasis added).

The "totality of the evidence" referred to by the department is based upon: 1) the personal relationship between Gerald Buchanan and AnnaMarie Brooks; 2) the close proximity in time between the suspension of Covenant's appeal and Superior Home

Care's application; 3) the similarities between the Covenant application and the Superior Home Care application; 4) similarities between language in correspondence originating from Covenant and Superior Home Care; 5) the documentation in client files of another provider run by Buchanan's brother; and 6) a **finding** that Buchanan was the responsible person for a licensed home care provider whose license was revoked (Health Personnel). Department Memorandum, at 4-7 and 11-14 (emphasis added).

Contested case hearings provide the opportunity for a person affected by an agency decision to have that decision reexamined by an impartial decisionmaker. The department has taken a number of circumstances surrounding the application of Superior Home Care and inferred from those facts that Gerald Buchanan is the owner or manager of Superior Home Care. See Department Reply, at 1. Superior Home Care has denied that Gerald Buchanan has any role other than that of paid advisor to the business. A list of the powers that Gerald Buchanan lacks is provided by Superior Home Care.

Because the consultant services described are related to personal care services, the department asserts that those services are not truly consulting. In support of this argument, the department states:

As a rule, consultants are retained to provide specific services or expertise. See *Castner v. Christgau*, 222 Minn. 61, ___, 24 N.W.2d 228, 231-32 (1946). Consultants provide professional services (i.e., legal or accounting) which generally are not at the heart of the business to which the consultant services are provided.

Department Memorandum, at 9.

The business of Superior Home Care is to provide personal care services. Brooks has indicated that Buchanan has no responsibilities in that area. In order to do business, Superior Home Care must do other things than simply provide care, including comply with the rules of the department. Brooks cited an example of Buchanan's consulting when she asked if he could have any authority over Superior Home Care and he responded that for him to have any role would jeopardize the application for a license. Buchanan's action is the provision of advice in an important noncare area. Taken in a light most favorable to the nonmoving party, this is a fact supporting Superior Home Care's assertion that Buchanan is a consultant to the business.

The situation presented by this appeal is unlike the situation in Covenant Home Care. In Covenant Home Care's application, Buchanan was identified as the applicant's responsible person. Thus, Buchanan could be found to be an owner or managerial official as a matter of law. Superior Home Care has established, for purposes of this motion, a *prima facie* case that Buchanan does not own or manage its business. The department has cited no facts demonstrating, as a matter of law, that Buchanan holds any position of authority over Superior Home Care. Whether Buchanan has any authority as "a managerial official, if not the *de facto* applicant" [Department's Memorandum, at 9] is a genuine issue of fact.

Granting the department's motion requires a conclusion that Minn. R. 4668.0012, subp. 11 E precludes issuing a license to Superior Home Care. The department asks the administrative law judge to infer that the circumstances of Superior Home Care support the department's conclusion that Buchanan is a managerial official of the applicant. As the moving party, the department is not entitled to color the facts to support its position. The evidence must be taken in the light most favorable to the nonmoving party. In the Matter of the Application for License by Covenant Home Care, OAH Docket No. 3-0900-10712-2, Recommendation on Motion for Summary Disposition, at 6 (issued June 19, 1997)(Commissioner's Order issued August 25, 1997)(fully discussing the standards for inferences on summary disposition motions). In this matter, Superior Home Care is entitled to the most favorable view of the evidence.

Discovery responses may be relied upon in summary judgment motions. See Kay v. Fairview Riverside Hospital, 531 N.W.2d 517, 519 (Minn.App. 1995)(*rev. denied* July 20, 1995). Taking Brook's responses to Interrogatories as true, Buchanan has no formal role with Superior Home Care. He provides advice, which she is free to ignore. Buchanan does not own or manage Superior Home Care. Reasonable minds could differ as to whether Buchanan has a greater role in the operations of Superior Home Care than that of a consultant. Under such circumstances, judgment as a matter of law cannot be granted on a motion for summary disposition. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1976).

None of the standards in Minn. R. 4668.0012, subp. 11 E, have been demonstrated by the department as a matter of law. Genuine issues of material fact, questions of credibility, and the inferences that reasonably should be drawn from the evidence remain for hearing. Buchanan's role in Superior Home Care's operation should be decided after a full hearing. Summary disposition is not appropriate in this matter. A conference call will be scheduled to set the hearing date and to resolve any remaining prehearing issues.

J.L.L.

