

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation of the Family
Child Care License of Mindy Blankers

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

This matter came on for an evidentiary hearing before Administrative Law Judge Eric L. Lipman on October 20, 2014. The hearing record closed October 27, 2014 following the receipt of the parties' post-hearing briefs.

Damain D. Sandy, Assistant Pipestone County Attorney, appeared on behalf of Southwest Health and Human Services and the Minnesota Department of Human Services (Department). Mindy Blankers, the Licensee, appeared on her own behalf and without counsel.

STATEMENT OF THE ISSUES

1. Was there reasonable cause for the Department to believe that Ms. Blankers violated either a statute or a rule that was applicable to her family child care license?
2. Did Ms. Blankers establish that she was in full compliance with the statutes and rules that are applicable to her family child care license?
3. Did the Department establish that Ms. Blankers committed maltreatment by physical abuse of a child, as those terms are used in Minn. Stat. § 626.556, subds. 2, 10e (2014)?
4. Was the Department correct to disqualify Ms. Blankers on the grounds that she had committed serious maltreatment of a child by physical abuse?
5. Did Ms. Blankers establish that notwithstanding her disqualification, she does not pose a risk of harm to the children served by her daycare program?
6. Should Ms. Blankers' family child care license be revoked?

SUMMARY OF CONCLUSIONS

The Administrative Law Judge concludes that: (1) there was reasonable cause for the Department to believe that Ms. Blankers had violated a rule that is applicable to her daycare facility; (2) Ms. Blankers did not establish that she was in full compliance with the requirements of her family child care license in November of 2013; (3) the Department did not establish that the injuries to the infant in Ms. Blankers' care were the result of deliberate misconduct, or a cause other than an unfortunate accident; (4) the Department was not correct to conclude that an accidental injury to a child under care amounts to serious maltreatment of a child by physical abuse; (5) Ms. Blankers established that she does not pose a risk of harm to the children served by her daycare; and (6) imposition of a lesser sanction – a conditional license, a suspension, or a fine – but not revocation, is the appropriate regulatory response in this case.

Accordingly, the Administrative Law Judge recommends that the Commissioner reverse both the maltreatment determination and disqualification and modify the Order of Revocation.

Based upon the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mindy Blankers holds a “C2” family child care license issued by the Department. She undertakes daycare from a home that she obtained for this purpose, in Edgerton, Minnesota.¹

2. Under the terms of her C2 license, Ms. Blankers is entitled to care for 12 children, subject to certain distribution limits. C2 license holders may care for no more than 10 children under school age, no more than 2 infants and toddlers, and a maximum of one infant, at any one time.²

3. On Tuesday, November 12, 2013, a daycare parent who was picking up a child from the Blankers daycare became involved in a verbal altercation with Ms. Blankers. During the exchange, Ms. Blankers referred to the parent as a “jackass.”³

4. Later that day, the same parent made a report to the Pipestone, Minnesota, office of Southwest Health and Human Services (SWHHS). The parent reported that upon his approach to the daycare home that day, he was forced to suddenly stop his car because a daycare child ran into the street in front his vehicle. He

¹ Exhibits 2, 3, 7, 8 and D; Testimony of Mindy Blankers.

² Test. of Judy VandenBosch; see Minn. R. 9502.0365, .0367 (2013).

³ Ex. 8 at 3; Test. of M. Blankers.

maintained that as many as eight children were playing in the street in front of the home, without supervision, on that day.⁴

5. On Friday, November 15, 2013, Judy VandenBosch, a Family Child Care Licensor with SWHHS made an unannounced visit to the Blankers' daycare. Her purpose in making the visit was to observe the supervision practices at the daycare home.⁵

6. Ms. VandenBosch observed a toddler and six preschool age children outside of the home, and beyond sight or hearing of Ms. Blankers, for approximately ten minutes. Ms. Blankers was working in the garage of the daycare home sweeping and arranging toys at this time.⁶

7. When Ms. VandenBosch approached the children, and asked them to help her find Ms. Blankers, it took Ms. Blankers several minutes before she noticed the arrival of another adult and the licensor's presence among the daycare children.⁷

8. During this same visit, Ms. VandenBosch noted that Ms. Blankers had two toddlers and nine preschoolers present, for a total of 11 preschool children under care. Eleven children is one more preschooler than is permitted to be cared for under the terms of Ms. Blankers' C2 license.⁸

9. On November 25, 2013, SWHHS issued a Correction Order to Ms. Blankers. The Correction Order cited three regulatory violations: (1) Ms. Blankers failed to adequately supervise the children under care – because she was not within sight or hearing of all of the daycare children on November 15, 2013; (2) the number of children under care on November 15, 2013, exceeded allowable distribution limits; and (3) using the epithet “jackass” to describe a daycare parent.⁹

10. In her reply to the Correction Order, Ms. Blankers offered that her plan for future compliance with the supervision standards was to “constantly walk around the premise[s] like I always have, or we won't ever be going outside again when I have more than 5 kids.”¹⁰

11. With respect to future compliance with the limits on the number of children under care, Ms. Blankers replied “[on November 15] I had one child show up 10 minutes

⁴ Ex. 8 at 2-3.

⁵ *Id.*; Test. of J. VandenBosch.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

early and one leaving 10 minutes late for school. Guess I'll tell parents to sit in their car and wait to my numbers are right with the law!"¹¹

12. With respect to maintaining appropriate relationships with daycare parents, Ms. Blankers replied that "police have been notified of harassment" and that this particular daycare parent was "no longer allowed on my property!"¹²

13. SWHHS officials were disappointed with Ms. Blankers' reply to the Correction Order. In a letter to licensing officials in the Department, Ms. VandenBosch noted that the Ms. Blankers' plan to keep daycare children indoors when there were more than five children under care would violate regulatory requirements assuring access to outdoor activities to all children under care. Similarly, SWHHS did not regard barring a daycare parent from retrieving his child as an appropriate method of avoiding abusive comments about that parent.¹³

14. The combativeness of Ms. Blankers' replies to the Correction Order, and the substandard approaches that she proposed to addressing the cited problems, led SWHHS officials to conclude that Ms. Blankers failed to appreciate the nature, purposes and gravity of the regulatory requirements. SWHHS urged the Department to impose a Conditional License, for a period of one to two years, so that local licensing officials could "closely monitor Mindy Blankers' care [and] promote compliance with licensing regulations."¹⁴

15. On March 10, 2014, while SWHHS's recommendation was under review, an infant in Ms. Blankers' care was injured at the daycare. A daycare child suffered a fracture to the bone in his arm (a "transverse mid humeral diaphyseal fracture") and the bones of his arm slipped out of proper position at the elbow (a "subluxed radial head").¹⁵

16. On March 18, 2014, the Department issued an Order of Temporary Immediate Suspension. The Order suspended operations in Ms. Blankers' daycare. Ms. Blankers did not contest the entry of the suspension order, preferring instead to wait until the licensing investigation was complete and to address the propriety of any licensing sanction at a later hearing.¹⁶

17. The circumstances surrounding the child's injuries are disputed. Ms. Blankers maintains that she picked up the infant from a bouncy chair, with a fast

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Exs. 1 and 7; Test. of Samantha Kokton.

¹⁶ Ex. 3; Test. of M. Blankers.

motion, placing her arm under the child's armpit, and lifting the child up, until Ms. Blankers heard a popping sound.¹⁷

18. Ms. Blankers acknowledges that she did not lift the infant in a way that was well suited to avoid injury to the child, but disclaims that the resulting injury was intentional or foreseeable.¹⁸

19. The County maintains that Ms. Blankers abused the infant, in part, because the "explained injury does not match the findings of the medical reports received by the agency."¹⁹

20. Regrettably, however, the hearing record does not contain any medical records relating to the examination of the injured infant. Neither party marked for identification or offered these documents into the hearing record.²⁰

21. Similarly, the Department did not offer any evidence from a medical professional regarding the examination of the injured infant in March of 2014, or the conclusions that one could draw from that examination.²¹

22. Likewise, the Department does not assert through testimony, exhibits or pleadings how it believes the injuries occurred.²²

23. The evidence that is in the hearing record is that Samantha Koktan, a Child Protection Social Worker with SWHHS, spoke with a physician who examined the injured infant. Ms. Koktan maintains that according to this physician, the injuries to the infant could not have happened as a result of being lifted up in the way that Ms. Blankers describes.²³

24. On May 8, 2014, following the completion of its child protection investigation, SWHHS determined that Ms. Blankers had committed "simple physical abuse" because the infant under care sustained a broken arm as a result of Ms. Blankers' negligence. The SWHHS determination asserts that the "explained injury does not match the findings of the medical reports received by the agency."²⁴

¹⁷ Ex. 1, 2 and 7; Test. of M. Blankers.

¹⁸ Test. of M. Blankers.

¹⁹ Ex. 4; Test. of S. Kokton.

²⁰ See Exs. 1 – 8 and A - E.

²¹ See DEPARTMENT'S WITNESS LIST (October 13, 2014).

²² See Exs. 4 and 7; Test. of S. Kokton.

²³ Test. of S. Kokton.

²⁴ Ex. 4.

25. On June 16, 2014, the Department issued an Order of Revocation, revoking Ms. Blankers' license to provide family child care. The Department's Order states:

Due to the serious and chronic nature of the above violations; because you physically abused a child in your care; because you are disqualified from any position allowing direct contact with, or access to persons served by DHS licensed programs; because you failed to operate within the age distribution limits of your license; because you failed to provide required supervision to children in care; because you subjected children in care to emotional abuse; and in order to protect the health, safety, and rights of persons receiving services in DHS licensed programs, your license to provide family child care is revoked.²⁵

26. As noted above, among the several bases relied upon in the Order of Revocation, the Department maintains that because Ms. Blankers called a daycare parent a "jackass" while standing near children under care, the children were subjected to emotional abuse. The Department did not, however, call any witness who was present during the conversation – including the Licensee – at the evidentiary hearing.²⁶

27. Ms. Blankers disputes the Department's claim that the off-color exchange with the daycare parent occurred while children were present.²⁷

28. Ms. Blankers timely appealed the Order of Revocation.²⁸

29. Between the imposition of the Order of Temporary Immediate Suspension, in March of 2014, and the evidentiary hearing in October, Ms. Blankers lost the use of the home in which she was providing daycare. Ms. Blankers maintains that regardless of the outcome of this appeal, she will not resume daycare operations.²⁹

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Commissioner and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, .08 (2014).

²⁵ Ex. 7.

²⁶ *Id.* See Test. of J. VandenBosch; Test. of S. Kokton.

²⁷ Test. of M. Blankers.

²⁸ See NOTICE AND ORDER FOR PREHEARING CONFERENCE AND HEARING (June 27, 2014).

²⁹ Ex. D; Test. of M. Blankers.

2. The Department gave proper notice of the hearing. All relevant procedural requirements of law or rule have been fulfilled.

3. Based upon the correction orders that were issued to Ms. Blankers in November of 2013, and the serious injury to an infant child under care in March of 2014, the Department established reasonable cause to believe that Ms. Blankers violated statutes and rules that were applicable to her family child care license.

4. Ms. Blankers did not establish that she was in full compliance with the statutes and rules that were applicable to her family child care license, in November of 2013 and March of 2014. For this reason, application of a regulatory sanction is appropriate.

5. The definition of “physical abuse” in maltreatment statute, excludes injuries that occur by accidental causes. Minn. Stat. § 626.556, subd. 2 (2014) provides:

“Physical abuse” means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child **other than by accidental means**, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 125A.0942 or 245.825.³⁰

6. It was the Department’s burden to establish that the injuries to the infant child which occurred in Ms. Blankers’ daycare in March of 2014 occurred because of some cause other than “accidental means.” See Minn. Stat. § 626.556, subd. 10e(e) (2014).

7. The only evidence offered by the Department in support of its determination that abuse occurred is the out-of-court statement by an unidentified physician, to the effect that the injuries sustained by the infant child could not have happened in the manner described by Ms. Blankers. Such a statement is not the “the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs.”³¹

8. A prudent person, in the conduct of their serious affairs, would, at a minimum, want to know who made the statement; what information was provided about Ms. Blankers’ explanation of events; the training and qualifications of the person making these assessments; the inquiries that the declarant made into the injuries that occurred; and the person’s reasons for excluding Ms. Blankers’ description of events as a cause of the child’s injuries.³² None of these items are in the hearing record.

³⁰ Minn. Stat. § 626.556, subd. 2 (emphasis added).

³¹ See Minn. R. 1400.7300, subp. 1 (2013).

³² *Id.*

9. The Department did not establish by a preponderance of the evidence that the injuries to the infant child which occurred in Ms. Blankers' daycare in March of 2014 occurred because of some cause other than "accidental means."

10. Because it was inappropriate for the Department to conclude, on this record, that the injuries to the child were the result of misconduct by Ms. Blankers, it was likewise inappropriate to disqualify Ms. Blankers on the grounds that she had committed serious maltreatment of child by physical abuse.

11. Notwithstanding the disqualification determination, and the violations of capacity and distribution regulations in November of 2013, Ms. Blankers established that she does not pose a risk of harm to the children served by her daycare program.³³

12. Revocation of the family child care license, and the collateral consequences that attend a revocation, are disproportionate responses to Ms. Blankers' violations of Minn. R. 9502.0315, subp. 29a; .0367 (2013).³⁴

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

1. The determination that Mindy Blankers committed maltreatment by physical abuse be **REVERSED**;
2. The determination that Mindy Blankers be disqualified from providing services to, or having direct contact with, persons receiving services be **REVERSED**;
3. The determination that Respondent's family child care license be revoked be **MODIFIED** to include a lesser sanction, up to a suspension of her daycare license.

Dated: November 26, 2014

s/Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

Reported: Digital Recording

³³ Ex. A; Test. of Timothy Brown; Test. of Amber Decker; Test. of Aaron Gonzales; Test. of Julia Holm; Test. of Timothy Holm; Test. of Kaylee Sholten.

³⁴ See Minn. Stat. § 245A.04, subd. 7(e)(3) (2014); *In re Revocation of the Family Child Care License of Burke*, 666 N.W.2d 724, 728 (Minn. Ct. App. 2003).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) 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 calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Debra Schumacher, Administrative Law Attorney, PO Box 64998, St. Paul, MN 55164, (651) 431-4319 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 (2014). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

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

MEMORANDUM

Due process requires that the subject of a license-revocation proceeding be afforded an opportunity to address the allegations against her. This includes the opportunity to confront adverse witnesses and to present arguments and evidence.³⁵

Under the Administrative Procedure Act, “[n]o factual information or evidence shall be considered in the determination of the case unless it is part of the record.”³⁶

Evidence of Maltreatment

While it is conceivable that medical evidence which links Ms. Blankers to abusive injuries of a child exists, this evidence was not presented at the hearing and is not part of the record.

The only evidence in the hearing record that Ms. Blankers acted abusively is that someone, who did not testify at the hearing, told Ms. Koktan that the injuries to the

³⁵ See Minn. Stat. § 14.60, subp. 3 (2014); Minn. R. 1400.7800 (2013); *Contos v. Herbst*, 278 N.W.2d 732, 742 (Minn. 1979); *Fosselman v. Commissioner of Human Servs.*, 612 N.W.2d 456, 461 (Minn. Ct. App. 2000) (citing *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971) and *Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn.) cert. denied, 528 U.S. 973 (1999)).

³⁶ Minn. Stat. § 14.60, subp. 2 (2014).

infant child could not have happened in the way that Ms. Blankers described. The conversation between Ms. Koktan and this person was not recorded, nor was it testable at the evidentiary hearing.

Likewise significant, when asserting that the medical records were inconsistent with Ms. Blankers' version of events, Ms. Koktan was not rendering a judgment based upon her knowledge, training or experience. Such an assessment is outside of Ms. Koktan's expertise. She merely recounted the out-of-court statement for the truth of the matters asserted.³⁷

While hearsay can be part of the record in contested case proceedings, "reasonable, prudent persons" would not rely upon such a statement alone "in the conduct of their serious affairs."³⁸ Mindful of the profound consequences involved,³⁹ "reasonable, prudent persons" would not rely upon this statement to conclude that Ms. Blankers committed maltreatment.

The Department did not establish that the injuries to the child under Ms. Blankers' care were the result of misconduct by Ms. Blankers.

Violation of the Behavior Guidance Standards

It likewise bears mentioning that the Department's claim that Ms. Blankers violated Minn. R. 9502.0395, subp. 2 (2013), is very problematic. Part 9502.0395 (2013) establishes minimum standards for "caregivers *when guiding behavior in children.*" The rule states in part:

No child shall be subject to corporal punishment or emotional abuse. 'Corporal punishment' means the nonaccidental infliction of physical pain on a child by a caregiver. Corporal punishment includes, but is not limited to, rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, pinching, hitting, and spanking. 'Emotional abuse' means the infliction of verbal or psychological abuse on a child by a caregiver. Emotional abuse includes, but is not limited to, name calling, ostracism, shaming, derogatory remarks about the child or child's family, and threats which threaten, humiliate, or frighten the child.

While no one maintains that Ms. Blankers' word choice with the daycare parent on November 12, 2013 was dignified or appropriate, the Department's regulatory claim breaks new ground. The Department does not maintain that Ms. Blankers was involved in guiding the behavior of a daycare child when she used inappropriate language – only

³⁷ See Minn. R. Evid. 801 (c) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted").

³⁸ See Minn. R. 1400.7300, subp. 1 (2013).

³⁹ See Minn. Stat. §§ 245A.05 (a); .07 (3)(a)(2); .1511; 245C.14; .24, subds. 1, 4; .33, subd. 1 (2014).

that it was “derogatory” about a family member of a child under care. This alone, however, would not establish a violation of Minn. R. 9502.0395, subp. 2.

In addition, because the Department did not call anyone who was present during the conversation to testify at the evidentiary hearing, Ms. Blankers’ claim that no daycare children were present during the exchange is unrebutted. On this record, the Department did not establish a violation of Minn. R. 9502.0395, subp. 2.

For these reasons, the Commissioner should reverse the determination that Mindy Blankers committed maltreatment by physical abuse; reverse the determination that she be disqualified from providing direct contact services; and modify the Order of Revocation to provide for a lesser, proportionate sanction in this matter.

E. L. L.