OAH 5-1800-35573

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Shaun Erichsrud of a Maltreatment Determination and Shaun and Samantha Erichsrud of the Order to Pay a Fine	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

License No. 1076590 (Child Foster Care)

This matter came before Administrative Law Judge Jim Mortenson for an evidentiary hearing on December 21, 2018, at the Faribault County Court House in Blue Earth, Minnesota. The record closed on January 18, 2019, the deadline for receipt of closing briefs.

Kathryn Karjala-Curtis, Faribault County Attorney, represents the Minnesota Department of Human Services (Department) and Human Services of Faribault and Martin Counties (County). Samuel J. Merritt, The Hoffner Firm, Ltd., represents Shaun and Samantha Erichsrud.

The Erichsruds offered six exhibits, which the parties stipulated to and the Judge entered into the record. Four witnesses testified for the Department: Debra Mosloski; Bethany Noomen; Vickie Savick; and Ashley Fenton. Two witnesses testified for the Erichsruds: Samantha Erichsrud and Jennifer Karge.

STATEMENT OF THE ISSUES

1) Did the Department correctly determine that Shaun Erichsrud was responsible for maltreatment of a child by abuse, pursuant to Minn. Stat. § 626.556, subds. 2(k), 10e(e), and 10e(f) (2018)?[1]

2) If so, did the Department properly issue an Order to pay a $1,000 fine, pursuant to Minn. Stat. § 245A.07, subd. 3(c)(4) (2018)?

SUMMARY OF RECOMMENDATION

The Department did not demonstrate that Shaun Erichsrud was responsible for maltreatment of a child. As a result, there is no basis for a fine.

[1] The Department clarified at hearing that the issue was solely about Shaun Erichsrud and alleged abuse of one child (Child A).

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

FINDINGS OF FACT

I. Key People

A. The Erichsruds

1. Samantha and Shaun Erichsrud lived in Blue Earth, Minnesota, Faribault County, and were licensed as foster care providers in 2012.[2]

2. The Erichsruds were licensed for two foster children.[3] The Erichsruds preferred younger foster children.[4]

3. The Erichsruds have three biological children.[5]

4. Samantha was also a licensed daycare provider.[6]

5. Shaun moved to Missouri for work in October 2017.[7] Samantha and the Erichsruds' biological children moved to Missouri in June 2018, after the school year ended.[8]

6. The Erichsruds did not use corporal punishment on any children in their care.[9]

7. The Erichsruds had no negative actions against their foster care license prior to the present matter.[10]

B. Child A – the Alleged Victim

8. Child A was approximately three years old in March 2017.[11] Child A and Child A's younger sibling were the Erichsruds' foster children at that time.[12] Child A had other siblings who were in another foster home at the time.[13]

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[2] Exhibit (Ex.) 3; Testimony (Test.). of Debra Mosloski; Test. of Samantha Erichsrud.
[3] Test. of Bethany Noomen.
[4] *Id.*
[5] *Id.*; Ex. 1 at 11.
[6] Test. of S. Erichsrud.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Test. of Ashley Fenton.
[12] *Id.*
[13] Test. of Vickie Savick.

9. Child A and Child A's sibling had visits with their biological parents while in foster care with the Erichsruds.[14] Child A's parents were methamphetamine users.[15]

10. Child A is the alleged victim of maltreatment by Shaun.[16]

C. Children B and C – Prior Alleged Victims

11. Child B was a four-year-old foster child in the Erichsruds' care in 2016, along with an eight-year-old sibling.[17] The children saw the Erichsruds for respite care in 2017.[18]

12. In May 2016, a claim was made that Samantha struck Child B with a wooden spoon.[19] The County reviewed the report and declined to investigate.[20] As a result, the allegation regarding Samantha striking Child B was never substantiated.[21]

13. Child C was a child in Samantha's daycare in 2016.[22]

14. On July 28, 2016, Child C's parent made a claim that Shaun spanked Child C while in Shaun's care at the daycare.[23] The County reviewed the claim but no maltreatment determination was ever made or substantiated.[24]

D. County Staff

15. Ashley Fenton was the County's child protection investigator examining the claims concerning Child A. Fenton left the employ of the County in September 2017.[25] Fenton was not trained on forensic interviews at the time she conducted the investigation.[26] Fenton made the County's maltreatment determination with other County staff, and informed the Erichsruds of the determination.[27]

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[14] Test. of Jennifer Karge.
[15] *Id.*
[16] Test. of D. Mosloski; Test. of A. Fenton.
[17] Ex. 1 at 11; Test. of D. Mosloski; Test. of A. Fenton.
[18] Ex. 1 at 43.
[19] Test. of D. Mosloski; Ex. 1 at 6-7.
[20] Test. of A. Fenton; Ex. 1 at 6.
[21] Ex. 1; Test. of S. Erichsrud.
[22] Test. of D. Mosloski; Test. of A. Fenton.
[23] Ex. 1 at 10; Test. of D. Mosloski.
[24] Test. of D. Mosloski; Test. of A. Fenton; Test. of S. Erichsrud; Ex. 1 at 10-11. The evidence of the manner of the disposition of the claim is conflicting.
[25] Test. of A. Fenton.
[26] *Id.*
[27] *Id.*; Ex. 4.

16. Debra Mosloski is the County's social services supervisor, and supervised Fenton.[28] Mosloski conferred with Fenton regularly, often weekly, and advised her on process and procedures.[29] Mosloski took over the case after Fenton left the County.[30]

17. Bethany Noomen (formerly known as Bethany Jobe), was the County foster care licensor who worked with the Erichsruds.[31] Noomen did not conduct the investigation of the claim regarding Child A, but she did work with the Department on the negative licensing action.[32]

18. Vickie Savick was the County's social services program manager until she retired on March 31, 2018.[33] Savick supervised the licensing unit, including Noomen and Mosloski.[34] Savick was aware of the claim and investigation concerning Child A and spoke with her staff about it.[35] Savick oversaw the handling of the Erichsruds' request for reconsideration of the initial maltreatment determination, and made the County's final determination to affirm the maltreatment determination.[36]

19. Jennifer Karge is a County case aide.[37] Karge's duties largely involve transporting children to therapy sessions and supervising visits between children in care and their parents.[38] Karge witnessed Child A's parents interacting with Child A when Child A made statements about being hit by Shaun.[39]

II. The Investigation

A. Allegations and Interviews

20. On March 30, 2017, Karge was supervising a visit between Child A, Child A's sibling, and their parents.[40] During the visit, Child A stated he had been hit on the head and butt.[41] Child A's parents became very upset at hearing this and began asking Child A leading questions.[42] Child A's father shouted at him, "Does Shaun hit you?"[43] The parents created a chaotic scene in the restaurant where the visit occurred, and Karge ended the visit early as a result.[44] Child A's father was under the influence of

[28] Test. of D. Mosloski.
[29] *Id.*; Test. of A. Fenton.
[30] Test. of D. Mosloski.
[31] Test. of B. Noomen.
[32] *Id.*
[33] Test. of V. Savick.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] Test. of J. Karge.
[38] *Id.*
[39] *Id*; Ex. 1 at 32.
[40] Test. of J. Karge.
[41] *Id.*; Ex. 1 at 32.
[42] Test. of J. Karge; Ex. 1 at 32.
[43] Test. of J. Karge; Ex. 1 at 32.
[44] Test. of J. Karge; Ex. 3.

methamphetamine at the time.[45] At one point during the visit, Karge asked Child A if he had ever been "hurt" by Shaun, and Child A "smirked" at Karge.[46] Karge was not concerned by Child A's statement about being hit.[47]

21. On March 30, 2017, a report to local police was made based on Child A's statements about being hit.[48] The complaint was shared with County social services.[49] The police conducted the first interviews of Child A's parents and Karge on March 30.[50] There is no evidence Shaun was ever charged with a crime.

22. On March 31, 2017, Fenton and Cami Moore, the then licensor for the Erichsruds, interviewed Child A's parents.[51] No recording of the interview was made and kept.[52] Notes from the interview indicate Child A's parents made six claims:

1) That Child A does not want to stay in foster care with the Erichsruds because he is put in "time-out" and Shaun hits him on the butt and head;

2) That three weeks prior, during a visit, Child A was afraid to tell his biological mother that he had defecated in his pants because he was afraid he would be struck;

3) That Samantha did not inform the biological parents about a bald spot on Child A's head;

4) That Shaun is verbally abusive toward Samantha;

5) That one of their other children received foster care from the Erichsruds and "had issues going back," but never disclosed abuse occurring; and

6) That Samantha violates the Health Insurance Portability and Accountability Act of 1996 (HIPPA) because she discusses her foster children's cases with other parents.[53]

23. None of Child A's parents' claims have been substantiated.

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[45] Test. of J. Karge.
[46] *Id.*; Ex. 1 at 32.
[47] Test. of J. Karge; Ex. 1 at 32.
[48] Ex. 3.
[49] *Id.*
[50] *Id.*
[51] Ex. 1 at 31; Test. of A. Fenton.
[52] On October 3, 2018, the Department was ordered to provide its complete file on this matter to the Erichsruds by October 24, 2018. No recordings of any interviews were provided or later offered into evidence by either party.
[53] Ex. 1 at 31.

24. On March 31, Fenton, case worker Jordan Schmelzer, and a police officer picked up Child A and the child's sibling from the Erichsruds' home to interview them.[54] The children were clean, happy, energetic, and had no injuries.[55] The children were interviewed at the local police station, but no recording was made and kept.[56] Child A "was very energetic and preoccupied with things and people in the room."[57] A forensic interview was not conducted, and Child A repeated his statement that he had been hit on the head and butt by Shaun.[58] Evidence about the circumstances surrounding the child's claim was not collected, such as when, where, why, or how the child was "hit."[59] Child A's sibling, who was less than two years old, slept and was not interviewed.[60]

25. On March 31, Fenton and a police officer interviewed the Erichsruds at the police station.[61] The interview was not recorded. The interview lasted less than five minutes and did not reveal any evidence of abuse of Child A or any other children.[62] Samantha advised the interviewers that the discipline tools they used with children were time-outs and requiring children to apologize.[63] Shaun denied spanking any daycare or foster children.[64]

26. Fenton and Mosloski were interested in the pattern of reports of children being struck while in the Erichsruds' care.[65]

27. The next and final interview of the investigation occurred on May 4, 2017. Fenton interviewed Child B, Child B's sibling, and their mother.[66] Fenton followed up with Child B because of the report in 2016 that Samantha struck Child B.[67] The interview with the children and their mother was not a forensic interview and no recording was made or kept.[68] Child B claimed Samantha struck her twice with a wooden spoon in the kitchen over her clothes.[69] Child B's mother advised Fenton that she was aware of Child B's allegation and believed Child B exaggerated the story.[70] No evidence of Shaun hitting any foster care children was uncovered.[71]

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[54] Ex. 1 at 33; Test. of A. Fenton.
[55] Ex. 1 at 33; Test. of A. Fenton.
[56] Witnesses testified that the police made a recording, but the County advised the Judge following the hearing that no recording existed.
[57] Ex. 1 at 35; Test. of A. Fenton.
[58] Ex. 1 at 35; Test. of A. Fenton.
[59] Ex. 1 at 35; Test. of A. Fenton.
[60] Ex. 1 at 35.
[61] Ex. 1 at 34; Test. of A. Fenton.
[62] Ex. 1 at 34; Test. of A. Fenton; Test. of S. Erichsrud.
[63] Ex. 1 at 34; Test. of S. Erichsrud.
[64] Ex. 1 at 34; Test. of A. Fenton.
[65] Ex. 1 at 34; Test. of A. Fenton; Test. of D. Mosloski.
[66] Ex. 1 at 43-44; Test. of A. Fenton.
[67] Ex. 1 at 43; Test. of A. Fenton.
[68] Ex. 1 at 43-44; Test. of A. Fenton.
[69] Ex. 1 at 43.
[70] *Id.*; Test. of A. Fenton.
[71] Ex. 1 at 43-44; Test. of A. Fenton.

28. No additional interviews or other investigation was conducted by the County.[72]

B. Polygraph, Initial Maltreatment Determination, and Reconsideration

29. Following the interviews on May 4, 2017, Fenton and Mosloski discussed the case.[73] They knew there was not enough evidence to make a maltreatment finding, so Mosloski directed Fenton to talk to the County Sheriff's Department about conducting a polygraph examination of the Erichsruds.[74]

30. The investigation remained open past the 45-day deadline because Fenton tried to obtain a polygraph examination through the Sheriff's Department.[75] On July 12, 2017, Samantha called Fenton about the investigation and Fenton advised her that the County wanted Samantha and Shaun to take polygraph examinations.[76] Fenton advised Samantha that she had been waiting to hear back from law enforcement about the tests.[77] The Erichsruds did not agree to take polygraph examinations.[78] Fenton asked Samantha, "if nothing happened[,] why [are you] so strongly defensive against the test[?]"[79]

31. On August 7, 2017, Samantha advised Fenton, over the telephone, that the Erichsruds would surrender their foster care license and said they would not submit to polygraph examinations.[80] Fenton responded that "refusing to complete the polygraph will result in a maltreatment determination" which would also affect Samantha's daycare license.[81] Shortly thereafter, the County made its determination that Shaun maltreated Child A.[82]

32. In a letter dated August 21, 2017, the County informed the Erichsruds of its determination.[83] The rationale for the determination was "a preponderance of evidence supporting [physical] discipline being [used], and a refusal to complete a polygraph in response to concerns for physical discipline being used on foster child."[84]

33. The Erichsruds requested reconsideration of the maltreatment determination.[85] A meeting was held on September 22, 2017, between the Erichsruds and Program Manager Savick to discuss the case.[86] No record of the meeting was

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[72] Ex. 1; Test. of A. Fenton; Test. of D. Mosloski; Test. of V. Savick; Test. of S. Erichsrud.
[73] Test. of A. Fenton.
[74] *Id.*; Test. of D. Mosloski.
[75] Test. of A. Fenton; Ex. 1 at 61.
[76] Ex. 1 at 61; Test. of A. Fenton; Test. of S. Erichsrud.
[77] Ex. 1 at 61; Test. of A. Fenton; Test. of S. Erichsrud.
[78] Ex. 1 at 61; Test. of A. Fenton; Test. of S. Erichsrud.
[79] Ex. 1 at 61.
[80] *Id*. at 65.
[81] *Id.*
[82] Ex. 1 at 72-75.
[83] Ex. 4.
[84] *Id*.
[85] Test. of V. Savick; Test. of D. Mosloski.
[86] Test. of V. Savick.

created and kept by the County. According to a letter dated January 29, 2018, from Savick to the Erichsruds, the couple continued to deny the allegations against Shaun, and the Erichsruds agreed to complete the polygraph examinations.[87] However, the letter continues:

> Since the county had already closed the case the supervisor arranged for the sheriff's department to set up the polygraphs and then informed [the Erichsruds] that [the Erichsruds] would need to pay for them. From that point on you refused to talk to Debbie Mosloski, who had taken over your case, and you never completed the polygraphs. Because of your failure to follow through we are upholding the determination . . . .[88]

34. While the Social Services Information System case notes include records of frequent contacts between the Erichsruds and Noomen between September 2017 and January 2018, there are no records of contacts between the Erichsruds and Mosloski during that time.[89] On January 23, 2018, Mosloski told Noomen that, "[t]he original determination against Shaun was made because the family refused to complete a polygraph. The family appealed the original determination findings, but has not cooperated with the reconsideration process . . . ."[90]

35. The County's policy or practice was to require polygraph examinations in child protection investigations when there are significant allegations of physical or sexual abuse, or when licensees are not cooperating or are telling more than one story.[91] Under the County's practice, it considers a license holder who refuses a polygraph examination as being untruthful.[92]

III. The Department's Determination and Notice

36. On January 23, 2018, Cory Jelinek from the Department called Noomen for additional information about the investigation into Shaun. Jelinek wanted to know if the maltreatment determination had been appealed, "the type of maltreatment determination made, [and] if the child protection unit disqualified Shaun."[93] Jelinek also advised Noomen that a $1,000 fine should be imposed against the Erichsruds and that a conditional license should be considered.[94]

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[87] Ex. 5.
[88] *Id.*
[89] Ex. 1 at 79-102; Test. of D. Mosloski. Mosloski testified that she could not remember going to the Erichsruds' home, but claimed she could not reach them by telephone. There are no records of attempted phone calls, emails, letters, or home visits by Mosloski.
[90] Ex. 1 at 93.
[91] Test. of D. Mosloski; Test. of V. Savick. Interestingly, Mosloski and Savick gave different reasons for the practice, all of which are reflected in this finding. Mosloski testified that the reason for a polygraph was when there are serious or significant allegations of physical or sexual abuse. Savick testified that the County uses polygraphs when licensees are not cooperating or are telling multiple stories.
[92] Test. of D. Mosloski; Test. of V. Savick.
[93] Ex. 1 at 94; Test. of B. Noomen.
[94] Ex. 1 at 94; Test. of B. Noomen.

37. On January 26, 2018, Noomen informed Jelinek that the County was upholding the maltreatment determination following the Erichsruds' request for reconsideration.[95]

38. Later on January 26, 2018, Jelinek called Noomen and gave her information on the next steps for licensing of the Erichsruds.[96] Jelinek again told Noomen that she would have to issue a fine, and that the County would have to determine whether a conditional license would be required.[97] Jelinek told Noomen that the Department would require documentation:

> regarding the allegations, investigation, request for reconsideration, such as: case notes (from child protection and licensor), the original determination letter, the request for reconsideration from the license holder, notice of determination letters, recommendation letter from the licensor, [and] results of the request for reconsideration.[98]

39. Subsequently, on February 9, 2018, Noomen received Savick's letter denying the Erichsruds' request for reconsideration.[99] Noomen then asked Mosloski for the other documents requested by the Department.[100] On February 22, 2018, Noomen followed up on her request of Mosloski.[101]

40. On or about March 13, 2018, Noomen sent a negative action recommendation to the Department.[102] On March 16, 2018, Jelinek called Noomen to tell her that "a fine isn't good enough, and that a greater action needs to be taken."[103] On April 9, 2018, the Department advised Noomen that it had received her recommendation for a negative licensing action.[104]

41. On August 8, 2018, the Department issued its Order to Pay a Fine (Order).[105] The fine was $1,000 for the determination of maltreatment of a child.[106] According to the Department's Order:

> As a result of the investigation of the report [filed March 30, 2017], it was determined that you repeatedly used corporal punishment as a means of disciplining foster children, including hitting on the head, spanking, and pulling their hair. Human Services of Faribault and Martin Counties

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[95] Ex. 1 at 100; Test. of B. Noomen.
[96] Ex. 1 at 101.
[97] *Id.*
[98] *Id.*
[99] *Id*. at 105.
[100] *Id.*
[101] *Id.* at 106.
[102] *Id.* at 111-13.
[103] *Id.* at 112.
[104] *Id*. at 116. A copy of the recommendation and supporting documents was not offered or made part of the record.
[105] Ex. 6.
[106] *Id.*

determined that maltreatment (physical abuse) occurred for which each of you were responsible.[107]

42. The Erichsruds timely appealed, and on September 7, 2018, the Department issued a Notice and Order for Prehearing Conference and Hearing (Notice), which included allegations that the County determined maltreatment by physical abuse occurred because the Erichsruds "repeatedly used corporal punishment as a means of disciplining foster children, including hitting children on the head, spanking, and pulling children's hair."[108] Additional specifics concerning who did what to whom and when were not included.

43. The parties stipulated at the start of the hearing that the maltreatment determination was only against Shaun.

44. Any finding of fact more appropriately considered a conclusion of law is hereby adopted as such. Any conclusion of law more appropriately considered a finding of fact is hereby adopted as such. Any material facts in the memorandum which are not specifically reflected in the findings of fact are hereby incorporated into the findings of fact.

Based upon these findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

I. Authority and Procedural Requirements

1. The Administrative Law Judge and the Commissioner of Human Services (Commissioner) have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, and .08 (2018).

2. The maltreatment determination and licensing sanction are consolidated in accordance with Minn. Stat. §§ 245A.08, subd. 2a(a), and 626.556, subd. 10i(f) (2018).

3. It is the duty of the Judge to, among other things, take "notice of the degree to which the agency has . . . (ii) fulfilled all relevant procedural requirements of law or rule . . . ."[109]

4. Child abuse investigations must be completed by the County within 45 days of receipt of a report of abuse.[110] The 45-day period may only be extended to permit

[107] *Id.* The parties stipulated that the Order should refer only to Shaun as being the person responsible for maltreatment. The Erichsruds did not stipulate that the determination was accurate, however.
[108] Notice and Order for Prehearing Conference and Hearing at 2 (Sep. 7, 2018).
[109] Minn. Stat. § 14.50.
[110] Minn. Stat. § 626.556, subd. 10e(a) (2018).

completion of a criminal investigation or to obtain expert information requested within the 45-day period.[111]

5. The County failed to complete the investigation within 45 days.

6. When issuing a maltreatment determination, the County must issue a notice to, among others, "the person determined to be maltreating the child . . . the determination and a summary of the specific reasons for the determination."[112] "The notice must also include a certification that the information collection procedures under subdivision 10, paragraphs (h), (i), and (j), were followed. . . ."[113]

7. When issuing a licensing sanction, the Department must provide notice that states in plain language the reasons for the sanction.[114]

8. Pursuant to Minn. R. 9543.0120, subp. 1(D) (2017), the County, on behalf of the Department, must "serve the notice of and order for hearing as provided in part 1400.5600 . . . ."[115] Minn. R. 1400.5600 (2018) requires that notice include, among other things, "[a] statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of the case . . . ."[116]

9. The Department and County failed to provide the Erichsruds adequate notice of the maltreatment determination, and accurate notice of the licensing sanction, when it stated incorrect reasons, and changed the reasons, for the maltreatment determination and the resulting sanction from August 2017 to August 2018.

II. Maltreatment Determination

10. The Department has the burden to prove, by a preponderance of the evidence, that a license holder is responsible for maltreatment of a child.[117]

11. "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 . . . ."[118]

12. The Department failed to prove that Shaun Erichsrud was responsible for maltreatment of a child by physical abuse because there is insufficient evidence he struck or injured a child.

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[111] *Id*.
[112] Minn. Stat. § 626.556, subd. 10f (2018).
[113] *Id.*
[114] Minn. Stat. § 245A.07, subd. 3(a).
[115] Minn. R. 9543.0120, subp. 1.
[116] Minn. R. 1400.5600, subp. 2(D).
[117] Minn. Stat. § 626.556, subd. 10e(e), Minn. R. 1400.8608 (2017).
[118] Minn. Stat. § 626.556, subd. 2(k).

III. License Sanction

13. The Commissioner may impose a fine as a licensing sanction against a license holder who does not comply with applicable statute or rule.[119] The Commissioner may demonstrate reasonable cause for a licensing sanction by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with statute or rule.[120] Maltreatment of a child under Minn. Stat. § 626.556 requires a fine of $1,000.[121]

14. Because the County's maltreatment determination is not based on a preponderance of the evidence, there is no violation of law warranting a licensing sanction. Therefore, the Department's levy of a $1,000 fine against the Erichsruds is in error.

Based upon the foregoing findings of fact and conclusions of law, the Administrative Law Judge makes the following:

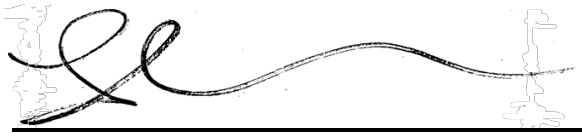
RECOMMENDATION

It is **RESPECTFULLY RECOMMENDED** that:

1. The Department's determination that Shaun Erichsrud was responsible for maltreatment of a minor by physical abuse be **REVERSED**.

2. The Department's imposition of a $1,000 fine against the Erichsruds be **RESCINDED**.

Dated: January 25, 2019



JIM MORTENSON
Administrative Law Judge

[119] Minn. Stat. § 245A.07, subd. 1(a).
[120] Minn. Stat. § 245A.08, subd. 3(a).
[121] Minn. Stat. § 245A.07, subd. 3(c)(4)(1).

NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2018), 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 64254, St. Paul, MN 55164-0254, (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 (2018). 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 (2018), 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

I. Procedural Errors: Untimely Investigation and Flawed Notice

A. Untimely Investigation

The County had 45 days from March 30, 2017, to complete its investigation of the alleged maltreatment of Child A.[122] While a criminal investigation had prompted the County's investigation, there was no apparent coordination of the investigations. None of the County witnesses knew whether or when the criminal investigation ended. That investigation was not the basis for exceeding the 45-day deadline. Nor was the County waiting for requested expert information. Without either of these reasons, there was no legitimate basis for the County to exceed the 45-day deadline to complete the maltreatment investigation. The Administrative Law Judge respectfully recommends the Commissioner ensure that Department and County staff are aware of the requirements for timely investigations under Minn. Stat. § 626.556 (2018).

B. Flawed Notice

At the start of the evidentiary hearing, the parties informed the Administrative Law Judge that the maltreatment determination was only against Shaun, not Samantha,

[122] Minn. Stat. § 626.556, subd. 10e(a).

Erichsrud. Upon review of the record, there are a number of additional flaws in the notice provided to the Erichsruds that must be addressed.

The Administrative Law Judge is required to report on the agency's fulfillment of "all relevant procedural requirements of law or rule."[123] A key procedural requirement is proper notice. Notice of a maltreatment determination must include "a summary of the specific reasons for the determination."[124] Notice of a licensing sanction "must state in plain language the reasons the license was suspended or revoked, or a fine was ordered."[125] The Department's hearing notice must include a "statement of the allegations or issues to be determined together with a citation to the relevant statutes or rules allegedly violated or which control the outcome of the case . . . ."[126] Adequate notice is a fundamental component of a license holder's due process rights. Without proper notice, including the facts that led the government to its conclusion, a person cannot reasonably defend against the claims of the government.[127]

The government has alleged facts in this case were a moving target, as were the "reasons" for the maltreatment determination. The County first informed the Erichsruds of the maltreatment determination in a letter dated August 21, 2017.[128] According to that letter, the recently concluded investigation was the result of a report that "*a* child in foster care may have been physically abused."[129] The letter did not include findings of fact. In fact, the letter included very little detail at all. The letter simply stated that a preponderance of the evidence showed "that maltreatment occurred, for which foster care provider/license holder was responsible . . . ."[130] The evidence was not shared.

There were two "reasons" for the determination. The first "reason" was the conclusion itself: "a preponderance of evidence supporting [physical] discipline being [used.]"[131] Such a tautological rationale does not stand. The second "reason" for the determination that maltreatment occurred was the Erichsruds' "refusal to complete a polygraph in response to concerns for physical discipline being used on foster child."[132] This also fails to support the Department's determination of maltreatment. A refusal to submit to a polygraph examination does not prove that maltreatment occurred for which either Erichsrud would be responsible.

Key information to support the maltreatment determination was lacking. When, where, and specifically how the maltreatment occurred were not included in the letter. The letter also fails to identify in any manner the alleged victim or victims, and alludes to both Erichsruds being the perpetrators, despite the County's intent to make the finding

[123] Minn. Stat. § 14.50.
[124] Minn. Stat. § 626.556, subd. 10f.
[125] Minn. Stat. § 245A.07, subd. 3(a).
[126] Minn. R. 1400.5600, subp. 2(D).
[127] *Goldberg v Kelly*, 397 U.S. 254, 267-68 (1970).
[128] Ex. 4.
[129] *Id.* at 131. Emphasis added.
[130] *Id.*
[131] *Id.*
[132] *Id.*

against Shaun only.[133] Without a summary of legitimate reasons for the maltreatment determination, the letter fails to provide the notice required by Minn. Stat. § 626.556.

On August 8, 2018, the Department issued an Order to Pay a Fine (Order) to the Erichsruds.[134] The Order provided additional detail that the County had not provided in its determination letter of August 21, 2017. According to the Order, a $1,000 fine was levied because *the Erichsruds* violated Minn. Stat. § 626.556.[135] The Order stated the following *incorrect* details:

> [I]t was determined that you *repeatedly* used corporal punishment as a means of disciplining foster *children*, including hitting on the head, spanking, *and pulling their hair*. Human Services of Faribault and Martin Counties determined that maltreatment (physical abuse) occurred for which *each of you* were responsible.[136]

The Notice and Order for Hearing repeated this erroneous description of the County's determination.[137]

The descriptions provided by the County and Department bore little resemblance to the basis for maltreatment that the County had investigated. There was no finding of "repeated" use of corporal punishment. Nor were multiple victims implicated. The County made no finding that either Erichsrud pulled on children's hair. The County only investigated whether Shaun had hit Child A on the bottom and head. The County's determination was only intended to be directed at Shaun involving Child A. While the August 2017 letter referred to the use of physical discipline, no details about what that consisted of and when it occurred were included. Furthermore, the County's other "reason" for determining maltreatment occurred - the Erichsruds' refusal to submit to a polygraph - was also not included.

Given that the claim was never actually substantiated with more evidence than Child A's unsubstantiated statement, and given that the County based its decision on the Erichsruds' refusal to take a polygraph, this reworking of the allegations and determination makes some sense. It attempts to cover for the County's failures.

Neither the maltreatment determination nor Notice and Order for Hearing included the detail necessary to inform the Erichsruds of the essential facts they required to mount a defense. While the parties agreed immediately before the hearing that the maltreatment determination was against Shaun only, the specifics of the maltreatment - such as who was allegedly abused, specifically how, and when - was absent. Obviously, this lack of detail should have captured someone's attention much earlier in the process. The

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[133] Ex. 1 at 73.
[134] Ex. 6.
[135] *Id.* at 137. Emphasis added.
[136] *Id.*
[137] Notice and Order for Prehearing Conference and Hearing at 2 (Sep. 7, 2018).

Administrative Law Judge respectfully recommends the Commissioner ensure that Department and County staff always provide full and proper notice to license holders.

II. Allegations of Maltreatment by Abuse Were not Substantiated

The County's flawed investigation failed to substantiate the child abuse claims. When an accusation of physical abuse is received by a local welfare agency, the agency must conduct an investigation and "make two determinations: first, whether the maltreatment occurred; and second, whether child protective services are needed."[138] The determinations "must be made based on a preponderance of the evidence . . . ."[139] A preponderance of the evidence means that the evidence to prove a fact must fairly outweigh the evidence in opposition to that fact and be of greater convincing force and effect.[140]

When conducting a maltreatment investigation, the investigating agency must collect "available and relevant information."[141] This includes:

> the person reporting the alleged maltreatment, including the nature of the reporter's relationship to the child and to the alleged offender, and the basis of the reporter's knowledge for the report; the child allegedly being maltreated; the alleged offender; the child's caretaker; and other collateral sources having relevant information related to the alleged maltreatment.[142]

State law specifically requires the following information to be "requested" by the agency during a maltreatment investigation:

> (1) the child's sex and age; prior reports of maltreatment, including any maltreatment reports that were screened out and not accepted for assessment or investigation; information relating to developmental functioning; credibility of the child's statement; and whether the information provided under this clause is consistent with other information collected during the course of the assessment or investigation;
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> (2) the alleged offender's age, a record check for prior reports of maltreatment, and criminal charges and convictions. The local welfare agency or the agency responsible for assessing or investigating the report must provide the alleged offender with an opportunity to make a statement.

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[138] Minn. Stat. § 626.556, subd. 10e(c).
[139] *Id.* at subd. 10e(e).
[140] *See Carpenter v. Nelson*, 257 Minn. 422, 427 (Minn. 1960); *City of Lake Elmo v. Metro Council,* 685 N.W.2d 1, 4 (Minn. 2004). *See also* Minn. Stat. § 256.0451, subd. 22(b) (2018). "The 'preponderance of the evidence' means, in light of the record as a whole, the evidence leads the human services judge to believe that the finding of fact is more likely to be true than not true." (Describing decision-making requirements for Department fair hearing judges in matters not heard by the Office of Administrative Hearings.)
[141] Minn. Stat. § 626.556, subd 10(i).
[142] *Id.*

The alleged offender may submit supporting documentation relevant to the assessment or investigation;

(3) collateral source information regarding the alleged maltreatment and care of the child. Collateral information includes, when relevant: (i) a medical examination of the child; (ii) prior medical records relating to the alleged maltreatment or the care of the child maintained by any facility, clinic, or health care professional and an interview with the treating professionals; and (iii) interviews with the child's caretakers, including the child's parent, guardian, foster parent, child care provider, teachers, counselors, family members, relatives, and other persons who may have knowledge regarding the alleged maltreatment and the care of the child; and

(4) information on the existence of domestic abuse and violence in the home of the child, and substance abuse.[143]

The agency is not precluded "from collecting other relevant information necessary to conduct the . . . investigation."[144] "[F]ace-to-face contact with the child reported to be maltreated and with the child's primary caregiver" must be conducted in order to ensure the immediate safety of the child.[145] In all interviews conducted as part of the investigation, the agency "shall use a question and answer interviewing format with questioning as nondirective as possible to elicit spontaneous responses."[146] This is commonly known as a forensic interview. An audio recording must be made "of all interviews with witnesses and collateral sources."[147]

The evidence collected establishes or supports factual findings. In a licensing investigation, evidence must be collected to:

A. make a determination that a licensing violation occurred, did not occur, or no determination can be made; and

B. if a violation occurred, issue a correction order or recommend a negative licensing action.[148]

A. Inadequate Investigation Resulted in Insufficient Evidence

The investigation into the alleged abuse in this case was minimal and turned up little evidence. Little to no information on the reporter's relationship to Child A and to Shaun was collected and made part of the record. All that is known is that Child A was in Shaun's and Samantha's care. This was apparently due to Child A's parents' drug abuse.

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[143] *Id.*
[144] *Id.*
[145] *Id.* subd. 10(j).
[146] *Id.* subd. 10(k).
[147] *Id.*
[148] Minn. R. 9543.0070, subp. 3 (2017).

It is apparent from the testimony of all of the witnesses that the adults associated with this case all know, or know of, each other.

Information regarding Child A's developmental functioning and credibility was not collected and made part of the record. Further, the lack of a recording of a forensic interview with Child A significantly hampered the investigation. What the child meant, if anything, when he said Shaun hit him on the head and butt is unknown. Child A may have been referring to being "hit" as a result of discipline or play or an accident. Any reasonable person with experience interacting with a three-year-old child understands that a child may say all kinds of things without fully understanding the language or words the child is using. This is why the forensic interview process is so important when interviewing a child, and without it, or without some other evidence, the statements alone do not provide a preponderance of evidence of maltreatment. It is also the reason evidence of the child's developmental progress is so important – to better gauge the child's understanding of what he or she is attempting to communicate.

There was no evidence of an injury to Child A as a result of being struck. While Child A had a bald spot, the County and Department collected no evidence to demonstrate this was related to the child's statements of being struck. The County and Department collected no medical or other treatment information. Without a real or threatened injury, there is no abuse.[149]

The County interviewed Shaun, but collected little of the required information about him. The County and Department did not consider Shaun's background and make it part of the record. The County had Shaun's age, but there is no evidence of a record check for prior criminal charges or convictions. Only one prior unconfirmed report of possible spanking was uncovered, but there were no reports of substantiated abuse or maltreatment.

On May 4, 2017, Fenton interviewed two additional foster children who had been in the Erichsruds' care (Child B and a sibling). Their ages are uncertain, but Child B was reported to be about five years old at the time.[150] The children were interviewed because in May 2016, Child B had reported to a County worker that Samantha spanked her.[151] That report was "screened out" and not further investigated. However, Child B's report was followed up on in 2017 because of the report concerning Child A. When interviewed by Fenton, Child B and her sibling did not report that Shaun spanked any foster children.[152]

Fenton also followed up on another previously screened-out report concerning Child C, one of Samantha's daycare children. In 2016, Child C's parent had made a report that Shaun had spanked Child C, and the County conducted interviews with Child C and

[149] Minn. Stat. § 626.556, subd. 2(k).
[150] Test. of A. Fenton.
[151] *Id.*; Ex. 1 at 43.
[152] Test. of A. Fenton; Ex. 1 at 43.

Samantha.[153] The claim was not substantiated. One fact that stood out for the County was that Shaun was usually at work during daycare hours.[154] Mosloski testified that just because an allegation is screened out, that does not mean it did not happen.[155] While this is true, in this case the County determined, without investigation, that Shaun had spanked Child C. As a result, the County determine there was a "pattern."[156] This is an illogical result. No new facts were uncovered that established that Shaun ever spanked Child C.

The Erichsruds were interviewed only once. The interview lasted less than five minutes and did not reveal any evidence to support a finding of maltreatment. In fact, the interview of the Erichsruds revealed evidence that no corporal punishment or physical abuse occurred. The Department did not have convincing evidence why this information was not trusted.

Finally, the County failed to make and keep any audio recordings of any of the interviews. The failure to meet this requirement negatively impacts the Department's ability to demonstrate its claims, and the Erichsruds' ability to defend themselves.

All of these investigative failures have resulted in a substantive failure: a lack of evidence to demonstrate maltreatment occurred. There simply is no credible evidence in the record that Shaun abused Child A in any way. The County never had a basis to make such a determination.

B. Polygraph Refusal did not Substantiate Allegations

Rather than timely close the investigation, Fenton felt "stuck" and asked her supervisor, Mosloski, for advice on what action to take. Mosloski advised Fenton to contact the sheriff to set up a polygraph examination of the Erichsruds.[157] Mosloski also advised Fenton (and the Administrative Law Judge) that if a person refused to take a polygraph examination, the test was presumptively positive for lying, and so the County would not believe the person.[158]

Nearly two months after the statutory expiration of the 45-day investigation deadline, Fenton informed the Erichsruds that the County wanted them to take a polygraph examination. Samantha refused.[159] On August 7, 2017, Fenton warned the Erichsruds that if they refused a polygraph examination, then maltreatment would be determined.[160] The Erichsruds did not participate in a polygraph examination, and by the end of August the County determined that Shaun committed maltreatment.[161] The basis for the determination was the report from Child A, a "pattern of behavior" based on the

[153] Ex. 1 at 10-12, 14, 19-21.
[154] Test. of D. Mosloski; Ex. 1 at 12.
[155] Test. of D. Mosloski.
[156] Ex. 6; Test. of A. Fenton; Test. of D. Mosloski.
[157] Test. of A. Fenton; Ex. 1 at 61.
[158] Test. of D. Mosloski; Ex. 1 at 65.
[159] Ex. 1 at 61.
[160] Ex. 1 at 65; Test. of A. Fenton.
[161] Ex. 1 at 73; Test. of A. Fenton.

unsubstantiated reports concerning Child B and Child C, and the Erichsruds' failure to take a polygraph examination.[162]

The County and Department have no authority to presume a refusal of a polygraph is conclusive evidence of abuse. A polygraph provides no probative evidence because it is not scientifically reliable.[163] In addition, a refusal to take a polygraph examination does not provide probative evidence.[164] The Department was obviously aware of this. It stripped any mention of polygraphs, and the Erichsruds' refusal to submit to such a test, from its Order of August 2018, and the Notice and Order for Hearing.

Nevertheless, the County staff testified, and both the original maltreatment determination and the reconsideration determination state, that the refusal to submit to a polygraph presumptively resulted in the maltreatment determination.[165] This was a gross error. Offers and refusals to take a polygraph cannot substantiate or support factual findings, conclusions, or determinations of maltreatment.

III. Maltreatment by Physical Abuse Requires More Than use of Physical Discipline

The use of physical discipline or corporal punishment does not, alone, constitute maltreatment by physical abuse under Minn. Stat. § 626.556. The statute defines physical abuse as:

> any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on the child other than by accidental means, or any physical or mental injury that cannot 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.
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> Abuse does not include reasonable and moderate physical discipline of a child administered by a parent or legal guardian which does not result in an injury . . . . Actions which are not reasonable and moderate include, but are not limited to, any of the following:
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> (1) throwing, kicking, burning, biting, or cutting a child;
> (2) striking a child with a closed fist;
> (3) shaking a child under age three;

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[162] Test. of A. Fenton; Test. of V. Savick; Ex. 1 at 93.
[163] *State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985).
[164] *State v. Dressel*, 765 N.W.2d 419, 424-25 (Minn. Ct. App. 2009); *citing State .v. Anderson*, 261 Minn. 431, 437 N.W.2d 4, 8 (Minn. 1962); *and State v. Kolander, 236 Minn. 209, 221-23, 52 N.W.2d 458, 465-66* (Minn. 1952).
[165] The reconsideration process, not central to this report and recommendation, also focused on the Erichsruds taking a polygraph, at their own expense. Their ultimate refusal resulted in the denial of their request for reconsideration. Ex. 5 "Because of your failure to follow through [with the polygraphs] we are upholding the determination . . . ."

(4) striking or other actions which result in any nonaccidental injury to a child under 18 months of age;
(5) unreasonable interference with a child's breathing;
(6) threating a child with a weapon, . . .
(7) striking a child under age one on the face or head;
(8) striking a child who is at least age one but under age four on the face or head, which results in an injury; . . . .[166]

Further, "[p]ersons who conduct . . . investigations under this section shall take into account accepted child-rearing practices of the culture in which a child participates . . . which are not injurious to the child's health, welfare, and safety."[167]

There are no substantiated facts to support any finding of physical abuse under Minn. Stat. § 626.556. The initial notice of maltreatment simply refers to "physical discipline" being used. The initial complaint was that Shaun had "hit" Child A on the butt and head. The Order and subsequent Notice provided additional specifics of the alleged discipline: spanking, hitting of the head, and pulling the hair of children. However, there are simply no substantiated facts to support any findings that corporal punishment was used or that physical abuse occurred.

Under the rules of the Department, foster children are not to be subjected to corporal punishment.[168] Under the foster care rules, corporal punishment includes, but is not limited to, "rough handling, shoving, ear or hair pulling, shaking, slapping, kicking, biting, pinching, hitting, throwing objects at the child, or spanking."[169] The Department must apply the correct legal standards or its determination will be determined arbitrary and capricious upon judicial review.[170]

There is no evidence of any injury or threat of injury to Child A caused by Shaun. No current or prior medical records were examined. No interviews with any of Child A's health care providers were conducted and no medical records reviewed. Further, a preponderance of evidence showing that any abusive actions occurred is lacking. As a result, the maltreatment determination was in error.

IV. Conclusion

The Department failed to demonstrate a preponderance of evidence that Shaun Erichsrud physically abused any of his foster children. Thus, there can be no determination that maltreatment occurred. Because no maltreatment occurred, no licensing sanction for maltreatment is warranted and the $1,000 fine must be rescinded.

J. R. M.

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[166] Minn. Stat. § 626.556, subd. 2(k).
[167] Minn. Stat. § 626.556, subd. 2(r).
[168] Minn. R. 2960.3080, subp. 8(A) (2017).
[169] *Id.*
[170] *In re Temporary Immediate Suspension of the Family Child Care License of Strecker*, 777 N.W.2d 41, 46 (Minn. Ct. App. 2010).