OAH 21-1800-36265

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Thomas and Diane Zolondek of the Order of License Revocation of their Child Foster Care License	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

The above-entitled matter came before Administrative Law Judge Kimberly Middendorf for a hearing on October 7, 2019. On November 1, 2019, the Administrative Law Judge issued an order for briefing. The record closed on November 15, 2019.

Paul R. Ellison, Assistant Chisago County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department). Thomas and Diane Zolendek (Appellants or the Zolondeks) appeared on their own behalf without legal counsel.

STATEMENT OF THE ISSUES

Did the Department properly revoke Appellants' foster care license based on the licensing violations detailed in the Order of License Revocation dates July 1, 2019, pursuant to Minn. Stat. § 245A.07, subds. 1 and 3 (2018)?

SUMMARY OF RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner rescind the order of license revocation dated July 1, 2019.

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

FINDINGS OF FACT

1. Appellants received their license to provide foster care for two great-grandchildren in Winona County, Minnesota on May 2, 2018.[1] The children were aged three and five years old at the time.[2]

2. Appellants' granddaughter, Misty, is the children's biological mother.[3]

[1] Exhibit (Ex.) 1; Testimony (Test.) of Diane Zolondek.
[2] Test. of D. Zolondek.
[3] *Id.*

3. On October 8, 2018, a Winona County Licensing Social Worker (LSW) contacted Mr. Zolondek and informed him that Misty had failed a urine analysis (UA) for methamphetamines earlier that same day. The LSW informed Mr. Zolondek that "Misty is not allowed to be in [Appellants'] home and see the children until she tests clean for methamphetamines."[4]

4. The next day, on October 9, 2018, Mr. Zolondek called the LSW regarding Misty's urine analysis. He informed the LSW that he "wanted to check to ensure that they were not doing anything wrong." The LSW confirmed that Misty's urine analysis that morning was negative for methamphetamines and that Misty could visit her children.[5]

5. On October 11, 2018, the LSW, Child Protection Social Worker, and guardian ad litem (GAL) met with Appellants at their home. According to the LSW's notes of that meeting, Mrs. Zolondek informed her that Appellants "didn't know when Misty could have contact and wanted to make sure they [were] following the rules." The LSW noted that at that time, Misty could see the children unless Appellants were informed otherwise by the County.[6]

6. The LSW described the Appellants' home during the October 11 visit as "chaotic with the children running around/crying." She considered it chaotic because it was loud, the two children were running around and crying, and the television was on.[7] In her notes of the visit, the LSW documented that "[i]t appeared as thought [sic] [Appellants] were not listening to the SW's [sic] throughout."[8]

7. On January 7, 2019, the LSW informed the Zolondeks:

> Misty is not allowed to be living in your home or spending the night without prior approval. Misty has indicated she stays in your home the majority of the time. Due to this, I have also attached a correction order as this is not following the case/visitation plan put in place.[9]

8. The January 7, 2019, correction order indicates a violation of Minn. R. 2960.3080, subp. 9 (2019), which is described only as "[l]icense holder following the visitation plan."[10] The Zolondeks did not appeal the January 7, 2019, correction order.[11]

9. On January 14, 2019, the child protection investigator, Carrie Meiners (Meiners), sent an email to the LSW and other county staff. In her email, Meiners claimed:

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[4] Ex. 2 at 1.
[5] *Id.* at 2.
[6] *Id.*
[7] Test. of Rachel Madison.
[8] *Id*.
[9] Ex. 3 at 1.
[10] Ex. 4.
[11] Test. of R. Madison; Ex. 16.

> Misty confirmed today during our meeting that she has been living at [the Zolondeks'] home since being sober (end of November 2018). She told me she stayed there the whole month of December and continues staying there. She told me she is there 90% of the time[.] . . . It would be terrible to have to move these children due to the Zolondek's [sic] unwillingness or inability to abide by court orders.[12]

10. Meiners and the Zolondeks did not have a positive relationship.[13]

11. Misty did not reside at the Zolondeks' home during December 2018 and January 2019.[14]

12. In January 2019, reunification efforts were underway to reunite Misty with her children.[15]

13. On March 18, 2019, the LSW sent a letter to the Zolondeks stating:

> . . . due to not receiving relicensing paperwork back by the requested return dates, we assume you wish to close your foster care license. If this is not correct, relicensing paperwork needs to be returned. If not returned by 3/27/19, I will be closing your license.[16]

14. The LSW issued a correction order dated March 18, 2019, to the Zolondeks.[17]

15. The Zolondeks relied on the County's representation that the license would be closed or allowed to expire and did not submit a completed background study form or relicensing paperwork. The Zolondeks also did not appeal the March 18, 2019, correction order.[18]

16. On March 29, 2019, the County recommended to the Department that a fine be issued to the Zolondeks for the March 18, 2019, correction order, and informed the Department that Winona County was going to close the license.[19] The Department issued a revocation order instead, based upon the two correction orders, and because "Winona County determined that you knowingly withheld relevant information or provided false or misleading information related to your compliance with licensing rules and laws."[20]

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[12] Ex. 5.
[13] Test. of D. Zolondek; *see also* Ex. 2 at 1 and Ex. 3 at 1.
[14] Test. of D. Zolondek.
[15] *Id.*; *see also* Exs. 5, 100.
[16] Ex. 9.
[17] Ex. 10.
[18] Test. of D. Zolondek; *see also* Ex. 7.
[19] Ex. 12.
[20] Ex. 16.

17. Winona County did not determine that the Zolondeks knowingly withheld relevant information or provided false or misleading information in violation of Minn. Stat. § 245A.07, subd. 3.[21]

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

CONCLUSIONS OF LAW

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 245A.08 (2018).

2. Appellants received proper and timely notice of the hearing and the Department complied with all procedural requirements of statute and rule.

3. The Commissioner may suspend or revoke a license if the license holder fails to comply fully with applicable law or rules.[22]

4. Pursuant to Minn. Stat. § 245A.08, subd. 3(a), the Commissioner has the burden of proof to demonstrate that reasonable cause existed for the revocation of the Zolondeks' foster care license. The Commissioner may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the Licensee failed to comply fully with applicable law or rule.

5. If the Commissioner demonstrates that reasonable cause existed, the burden of proof shifts to the Licensee to demonstrate by a preponderance of the evidence that it was in full compliance with those laws or rules that the Commissioner alleges the license holder violated.[23]

6. The Department did not establish that the Zolondeks violated Minn. R. 2960.3080, subp. 9, and Minn. Stat. § 245C.03, subd. 1(2).

7. The Department failed to establish that the Zolondeks immediately failed to report changes in their household members, in violation of Minn. R. 2960.3020, subp. 7, or knowingly provided false or misleading information related to their compliance with licensing rules or laws in violation of Minn. Stat. § 245A.07, subd. 3(a)(3).

8. The Department failed to establish reasonable cause existed to revoke the Zolondeks' foster care license.

9. The Commissioner must make a determination as to the level of appropriate sanction upon consideration of "the nature, chronicity, or severity of the

[21] *See* Ex. 12.
[22] Minn. Stat. § 245A.07, subd. 3.
[23] Minn. Stat. § 245A.08, subd. 3(a).

violations of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program."[24]

10. The Department failed to establish any negative effect of the alleged violations on the health, safety, or rights of the Zolondeks' great-grandchildren.

11. The Commissioner's choice of sanction must not exceed the seriousness of the violation and must be supported by the record.[25]

12. The proposed revocation greatly exceeds the seriousness of the alleged violations and has no support in the record.

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

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner rescind the order of license revocation dated July 1, 2019.

Dated: December 6, 2019

KIMBERLY MIDDENDORF
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Human Services (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

[24] Minn. Stat. § 245A.07, subd. 1.
[25] *In re Revocation of Family Child Care License of Burke*, 666 NW2d 724, 728 (Minn. Ct. App. 2008).

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

The Department seeks to revoke the Zolondeks' foster care license. This record does not support a conclusion that the Zolondeks committed any violations of licensing standards or that they may have threatened the health, safety, or rights of their great-grandchildren, requiring the revocation of their license.

The Zolondeks did not appeal two correction orders that cited violations of Minn. R. 2960.3080, subp. 9, and Minn. Stat. § 245C.03, subd. 1(2) (2018). The Department maintains that the violations are conclusive because they were not appealed, and points to Minn. Stat. § 245A.06, which allows licensees to seek reconsideration of correction orders they believe to be incorrect. The disposition of a request for reconsideration of a correction order is final and is not subject to appeal under Minn. Stat. ch. 14 (2018). Unlike determinations related to maltreatment or disqualification, which become conclusive if a party fails to request reconsideration or a hearing,[26] the failure to request reconsideration of a correction order is not deemed conclusive by statute.[27] The absence of such an explicit statutory directive regarding correction orders weighs against considering the correction orders to be conclusive.[28] Further, the correction did not warn Appellants that the identified violations would be conclusively established in future proceedings unless they did so.

In addition, the County's communications with the Zolondeks created confusion about what actions were being taken against them, and what they needed to do to protect their license. The County told the Zolondeks that "a background study would be necessary if [the Zolondeks] keep the CFC [child foster care] license open."[29] Accordingly, the Administrative Law Judge declines to consider the violations as established by the failure to appeal.

Just as importantly, the facts to support these violations in the record are limited and of questionable reliability. The Administrative Law Judge concludes that the Department did not establish reasonable cause to believe that the Zolondeks violated foster care standards for the following reasons.

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[26] *See* Minn. Stat. § 245C.29, subds. 1(2)-(3), 2(2)-(3) (2018).
[27] Minn. Stat. § 245A.06, subd. 2.
[28] *See In re Ball*, 2011 WL 977606 (affirming the administrative law judge's findings of facts related to violations that were the subject of corrections orders that were not appealed).
[29] Ex. 6.

The Department contends that the Zolondeks violated the visitation plan. However, the visitation plan is not in the record. Further, the record indicates that the County's various directives to the Zolondeks are at least partly responsible for creating a misunderstanding regarding Misty's access to the children. It is undisputed that the County told the Zolondeks that Misty could visit her children if her UAs were clean. The record establishes that Misty was clean in December 2018 and January 2019. There is no record of communication with the Zolondeks between the October 11, 2018, visit, and the issuance of the January 7, 2019, correction order for alleged failure to follow the visitation plan. On this record, the last word from the County is that Misty could visit the children until the Zolondeks were told otherwise, and there is no evidence that the County ever did tell them otherwise before concluding that they had allowed impermissible visitation.

Even more concerning is the lack of evidentiary support for the background study violation. Meiners' email about Misty residing with the Zolondeks is the only evidence in the record to support a finding that Misty was a resident of the Zolondek household or that the Zolondeks failed to report a change in household membership. Meiners did not testify, and the Administrative Law Judge cannot credit double hearsay as the sole basis for the serious sanction of revocation. This is especially true where there is credible evidence to the contrary, including Diane Zolondek's testimony about Misty's residence during the period in question. The reliability of Meiners' email is undermined by the fact that Meiners was frustrated with the Zolondeks.

Even if the Department had established these two technical violations of foster care requirements, the inquiry does not end there. The Department must establish that the nature, chronicity, or severity of the violations supports a sanction. How the Department determined to issue a revocation is unclear from the revocation order. The County recommended to the Department that a fine be issued because of the alleged background study violation. Nothing in the County's recommendation addresses the effect of the violations on the health, safety, or rights of the Zolondeks' great-grandchildren. The Department must show its rationale in applying a sanction and not simply recite the statutory standard for the imposition of sanctions.

While in many cases the failure to follow a visitation plan or to submit a background study could be presumed to pose a risk of harm to foster children, it is not reasonable to do so under the facts of this case. By all accounts, Misty - the children's mother and individual alleged to be residing in the Zolondeks' home – was sober, and reunification efforts between Misty and her children were underway. The Department has not shown a reasonable basis for seeking to sanction great-grandparents who stepped in to provide a loving, safe home for their great-grandchildren whose mom was unable to parent them while struggling with substance abuse.

K. J. M.