

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

In the Matter of the Immediate
CONCLUSIONS
Suspension of the License of
Mary Atkins to provide
Family Day Care

FINDINGS OF FACT,
AND RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Robert J. Alfton on July 18, 1996, at 9:30 a.m. in the Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minn. 55401-3128. Joel A. Seltz, Attorney at Law, 6600 France Avenue South, Suite 425, Minneapolis, Minn. 55435, appeared on behalf of the Licensee, Mary Atkins, Robert R. Distad, Assistant Hennepin County Attorney, and Daniel Rasmus, Civil Service Law Clerk, 525 Portland Ave., Suite 1210, Minneapolis, Minn. 55415, appeared on behalf of the Hennepin County Department of Children and Family Services and the Minnesota Department of Human Services. The record remained open until July 29, 1996.

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject, or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. Sec. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Maria R. Gomez, Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minn. 55155-3815, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether the Licensee's license to provide family day care should be immediately suspended because a child, while under the care of the

licensee, was sexually abused by the Licensee's husband and as a consequence the health, safety, or rights of the children in care are thereby in imminent danger.

PROCEDURAL ISSUES

1. That the name of a juvenile sexual abuse victim is by agreement of the parties not referred to in the record and is instead referred to as G. F.

2. That by Order of George H. Elwell, Administrative Law Judge, dated July 8, 1996, the out-of-court statements made by G. F. relating to alleged sexual abuse to Mary Kay Popko, Hennepin County Child Protection Services Social Worker, on March 15, 1996, and to Mary Mingo, Hennepin County Child Protection Services Worker on April 3, 1996, were deemed to be admissible as hearsay evidence having probative value at the hearing on the merits.

3. That by agreement of the parties the judge excluded non-essential persons from the hearing room during the testimony of Dr. Mary Youngquist and certain portions of the testimony of Mary Kay Popko which testimony contains non public data.

4. That the testimony of Mary Mingo was taken by video deposition and admitted by stipulation of the parties as Exhibit #2.

5. I have admitted that portion of the testimony of Dr. Mary Youngquist, Mary Kay Popko, and Mary Mingo, in which they each describe certain behavioral traits and characteristics typically found in sexually abused children and those which each of them had observed in G. F.'s conduct and demeanor. State v. Myers, 359 N.W.2d 604 (Minn. 1984). I am, however excluding expert testimony concerning the truth or falsity of the allegations of a witness. State v. Myers, supra. Furthermore, the danger of unfair prejudice would outweigh whatever probative value the opinions may have. See State v. Erickson, 454 N.W.2d (Minn. App. 1990); State v. Miller, 377 N.W.2d 506 (Minn. App. 1985). I find this conclusion particularly true in this case where the testimony of G. F. is in the record as hearsay. I thus sustain the objection of the Licensee to the testimony of Dr. Mary Youngquist, Mary Kay Popko, and Mary Mingo, as to their opinions as to the credibility of G. F.

Based upon all the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Licensee, Mary Atkins, has been licensed as a day care provider in Minneapolis since 1977. The Licensee is licensed to operate a C1 Family Day Care

session with G. F. and Youngquist. Her attendance was for a termination interview, in that the Child Protection case services were being transferred to Child Welfare. Youngquist had told Popko that the foster mother had reported to her that G. F. had told another child in her foster home about the day care abuse and that child had told the foster mother. The foster mother had also told G. F. that she needed to talk about the conduct to Youngquist. G. F. knew the purpose of the meeting. Popko's interview with G. F. commenced with Popko saying that Youngquist had told her that she had remembered being sexually abused while in a day care home. Did she want to tell her about it? G. F. related she had been attending Jefferson Elementary School and because her dad worked five days a week she and her brother were placed in day care. When the other children were watching a video or TV in the family room he would say to G. F. that he needed to talk to her a minute. Mary would be either in the kitchen or in the room the day care children used. He would unzip his pants, take out his penis, put it in her hand and ask her to rub it. In response to questions she said he did not otherwise touch her, she kept her clothes on, he kept his clothes on, and he did not hurt or threaten her. G. F. had never before told anyone else but she had never forgotten that it happened. Popko related G. F.'s response as to the frequency of the abuse as it happened approximately once a week.

5. Popko related certain indicators which support credibility. Popko also admitted that some of the indicators also are indicative of someone making up a story. Popko related that in some respects the sexual abuse allegations were similar to those which G. F.'s father had committed. On March 15, 1996, Popko verbally reported to a Hennepin County Child Protection Services screener the abuse allegations of G. F.

6. Kurt B. Hannes, a Hennepin County Child Protection Services Intake Social Worker, was assigned the case by his supervisor, Terry Stark, and began his investigation on March 21, 1996. Hannes made a written report to the Minneapolis Police Department but is unaware of any action taken on that report. Hannes made contacts with Youngquist, DCFS day care licensing, and the DCFS social worker assigned to G. F. On March 26, 1996, Stark related that Corner House, a structured institutional setting, would not be immediately available for an interview of G. F. because of a backlog. Stark directed that the interview of G. F. be arranged in consultation with Youngquist and be done by a female social worker in his unit. On March 27, 1996, an institutional meeting called by Hannes was held at which Hannes was more fully informed of the case history of G. F. That on or about March 28, 1996, Mary Mingo, an experienced social worker in the unit volunteered to interview G. F.

On April 4, 1996, Hannes interviewed Mary Atkins, the licensee, and her husband, Richard Atkins, at their residence. They were both cooperative. Hannes advised that CPS had received an allegation relating to possible contact between

10. A third interview of G. F. was taken by Mary Mingo, a Hennepin County Child Protection Worker, on April 3, 1996, at G. F.'s foster home. The interview was

audio taped but the tape is described as inaudible. G. F. related to Mingo that the abuse took place when she was between seven and nine years old; that it occurred in the afternoon; that Mary Atkins and the other children would be watching a movie downstairs; that Mary knew about it; that he would say he needed to talk to her and take her upstairs; and that he would unzip his fly, pull out his penis, ask her to rub it, and take her hand and make her rub it. The events occurred upstairs in the hallway and once in the bedroom. The abuse occurred more than once but G. F. could not remember how many more times. She never told anyone about the abuse until she reported it to a new therapist, Dr. Youngquist, and she reported it to Youngquist because Youngquist was taking a sexual abuse history. During the interview G. F. was very soft spoken, answered questions with shrugs of the shoulder or shakes or nods of the head, and sat closed in and hunched. She did not make a lot of eye contact and cried most of the time. G. F.'s foster mother told Mingo that she didn't know whether to believe G. F. or not. (Exhibit #2).

11. Amy F. Poehling, a Hennepin County senior social worker assigned to Hennepin County Day Care Licensing Division has been assigned the Atkins file for one month. Atkins has had a C-1 license since 1985 and has been otherwise licensed since 1977. A C-1 license authorizes ten children maximum. Her review of the file indicated no other activity requiring negative action on the license or allegations of sexual abuse. The Division's recommendation for an immediate suspension is based on the conclusion by Child Protection that maltreatment had occurred; that the circumstances under which it occurred had not changed; and that the Division could not be certain that the maltreatment would not be repeated. Significant was the lack of supervision over the children and the possibility of reoccurrence. Parents of current children in the day care had been notified of the alleged abuse. No parent expressed concern regarding the risk. Most parents had sent letters opposing the termination.

12. On April 16, 1996, the Hennepin County Children and Family Services Department recommended to the Commissioner of the Minnesota Department of Human Services that the Family Day Care license of Mary Atkins be immediately suspended and ultimately revoked based on Minnesota Rules 9502.0341, Subp. 9 (Negative Licensing Actions) and 9502.0315 to 9502.0445. (Exhibit #3).

13. On April 17, 1996, the Minnesota Department of Human Services, Division of Licensing, notified the Licensee that upon recommendation of the Hennepin County Children and Family Services Department her license to provide family day care was immediately suspended effective April 19, 1996. (Exhibit #4).

14. Sara Dahl, 18 years old, attended the Atkins day care from when she was six

18. G. F. and her brother were in Mary Atkins care from 1988 through September of 1990. About a year ago Atkins heard from mutual friends of the abuse

by G. F.'s father and of the foster care placement. She described G. F. as a troubled child. She had two or three moms, her dad was very busy at work, she was lonely. She liked to be hugged a lot. At times her behavior was that of a much older child.

19. After Hannes' telephone call on April 4, 1996, Atkins called her husband at work and he said he would be right home and further that whatever it is it will be OK. In the interview Hannes asked whether either of them recalled any instances which could be interpreted as sexual abuse. Mary Atkins could not remember any. Richard Atkins voluntarily recalled the two incidents involving G. F. Mary Atkins had not heard of the two incidents before that day. G. F. never said to Mary Atkins anything about Richard Atkins that had any sexual impropriety connotations. She never observed her husband taking G. F. upstairs. G. F.'s father or stepmother did not make any allegations of sexual impropriety. Mary Atkins offered Hannes a list of previous parents and asked for a number of his business cards to give to parents. She immediately contacted all of the parents. None of the parents took their children out of the day care after being notified by her and the County. All of the parents have remained supportive.

20. Richard H. Atkins, 54, has been employed for 32 years as a steelworker at Joseph T. Ryerson and Son. He has been married 30 years and has four adult children. He has never been arrested or charged with a crime. There is not history of sexual abuse in his family.

21. On April 4, 1996, Atkins' wife called him at work saying a person from Hennepin County Child Protection had called. He left work to be at the interview with Hannes. Hannes said there was an allegation of sexual misconduct with a girl and was there anything that they could recall. In response Atkins related two incidents with G. F. The first in which he had come home from work and needing to go to the bathroom ran up the stairs and began urinating. All of a sudden he heard a voice saying can she touch it. He looked and saw G. F. standing outside the bathroom. She said to him that her father lets me touch his and her brother giggles when she touches his. Atkins response was to turn sideways so his back was to her. When he finished and turned around she was no longer there. He closed the door. He drew bath water and bathed. He did not report the incident because he believed that G. F. fabricated stories. A second incident also involved G. F. when he was laying on the couch in the T.V. room with his foot on the floor for balance. All the kids were asleep on the floor. He awoke feeling G. F.'s bottom rubbing his foot. He pulled his foot back and went to sleep. He told Hannes of these two incidents because in all the years his wife had operated a day care those were the only events he could think of which came close to a sexual impropriety.

22. Richard Atkins denies ever asking G. F. to come upstairs to talk to him; that he never unzipped his pants and took out his penis; that he told her to touch his penis; or that he placed her hand on his penis and asked her to rub it. Atkins remembers both G. F. and her brother as troubled. G. F. would at times fabricate

answers. He does not believe that G. F. is telling the truth but whether she believes the events happened he has no idea. He believes that in her mind she thinks she is telling the truth.

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. Secs. 14.50, 245A.05, and 245A.08.

2. Proper notice of the hearing was timely given, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. That the Commissioner has authority to immediately suspend a family day care license under the following circumstances:

If the commissioner finds that the health, safety, or rights of the children in care are in imminent danger, the commissioner shall immediately suspend

and the license. The provider shall be informed by personal service and informed of the right to appeal the decision within five days. The appeal

does not stay the decision of the commissioner to immediately suspend the license. Minnesota Rules part 9502.0341, Subp. 9.

4. The governing statute describes the burden of proof in hearings regarding immediate suspension of a family day care license as follows:

At a hearing regarding . . . immediate suspension . . . of a license for family

day care . . . , the commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate

the allegations that the license holder failed to comply fully with applicable law or rule. If the commissioner demonstrates that reasonable cause existed,

the burden of proof in hearings involving . . . immediate suspension . . . of a family day care . . . license shifts to the license holder

to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that

the commissioner alleges the license holder violated, at the time that the commissioner alleges the violations of law or rules

occurred. Minn. Stat. Sec. 245A.08, subd. 3(b).

occurring upstairs in the home. Statement of Facts, p. 1.

2. Likewise the Commissioner's Memorandum in Support of the Motion in Limine describes the alleged abuse as occurring simply upstairs . At p. 2.

3. In final argument the Commissioner describes the location of the alleged abuse as follows: Dick Atkins would take G. F. to a separate room. Final Argument Supporting the Commissioner's Decision to Immediately Suspend, dated July 29, 1996, pp. 1.

There is also a suggestion that there may be potential confusion by G. F. with the abusive conduct by her father.

Consequently, I have concluded that inconsistencies in the hearsay testimony of G. F., without further explanation of the inconsistencies, make the testimony less credible and less reliable. Notwithstanding the fact the hearsay evidence in question was admissible and entitled to probative effect it is not of the quality, certainty, and credibility, standing alone to support the Commissioner's action. Further the Commissioner has not provided any substantial measure of evidence which would support the allegation of G. F.

In response, the Licensee has provided testimony that:

- Richard Atkins strongly denies the allegations.
- Mary Atkins strongly denies any knowledge of the allegations and alleges that she was always with her children when caring for them.
- The current day care parents have no knowledge of sexual abuse and are strongly supportive of the immediate suspension being repealed.
- No other allegations or complaints of sexual abuse have ever been made.
- That the Atkins family has no history of sexual abuse.

I have on the basis of the whole record before me, concluded that the Licensee has demonstrated by a preponderance of the evidence, that there does not exist an imminent danger to the health and safety of the children currently in her care.

R. J. A.

August 21, 1996

Maria R. Gomez,
Commissioner
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Re: In the Matter of the Immediate Suspension of the License of Mary Atkins
to provide Family Day Care (OAH Docket NO. 104 - 1800 - 10501 -2)

Commissioner and Gentlemen:

Enclosed please find, served upon each of you by United States Mail, a copy of the Findings of Fact, Conclusions and Recommendation in the above entitled matter.

Sincerely,

Robert J. Alfton
Administrative Law Judge