

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

In Re the Immediate Suspension of the
Licenses of Paul and Roberta Pogalz,
307 4th Avenue NW, Kasson, MN 55944
to Provide Child Foster Care under Minn.
Rules pts. 9545.5105 to 9545.0445 and
family child care under Minn. Rules pts.
9502.0300 to 9502.0445.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before George A. Beck, Administrative Law Judge, on Thursday, June 15, 2000 in the Dodge County Courthouse in Mantorville, Minnesota. The record closed on the date of the hearing.

Gary ReMine, Assistant County Attorney, 22 Sixth Street East, P.O. Box 295, Mantorville, Minnesota 55955-0295, appeared on behalf of Dodge County Human Services and the Department of Human Services. The Licensees, Paul and Roberta Pogalz, were represented by Bruce K. Piotrowski, Esq., of the firm of George F. Restovich & Associates, 117 East Center Street, Rochester, Minnesota 55904.

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 Recommendation. Under Minn. Stat. § 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 Michael O'Keefe, Commissioner, Minnesota Department of Human Services, Second Floor Human Services Building, 444 Lafayette Road, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this case is whether or not the immediate suspension of the foster care license and the family child care license of Paul and Roberta Pogalz should be affirmed.

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

FINDINGS OF FACT

1. Roberta and Paul Pogalz have been licensed as daycare providers in Dodge County since 1993 and as foster parents since November of 1996. In January of 1997, a boy, T.V., came to live with them as a foster child.

2. T.V. was two and one half years old in February of 1998.

3. On February 4, 1998, T.V. and another child were playing "dress up" and were wearing some of Roberta's clothing. T.V. had on Roberta's tennis shoes.

4. At about 11:00 a.m. that day Roberta proceeded to the basement to collect some laundry. While she was down there she heard someone coming down the stairs and when she looked saw that T.V. was sitting near the first landing on the steps. Roberta told T.V. to remain where he was and then turned back towards the laundry. Generally T.V. did what Roberta told him to do.^[1]

5. T.V. then fell down the stairs and landed on the cement floor of the basement. T.V. fell down approximately six carpeted stairs. T.V. had previously negotiated the steps on numerous occasions without incident.^[2]

6. Roberta immediately took T.V. to the Kasson Clinic where he was examined by Dr. Bernard. T.V. was crying but quieted down after being left alone for a while. The doctor noticed some abrasions but noted that all extremities were moving.^[3] The doctor suggested cold compresses and Tylenol for T.V. and told them to return if he was not his normal self later that afternoon.

7. Roberta put T.V. down for a nap after lunch and when he woke up about 2:00 p.m., he screamed when picked up and would not walk.

8. Roberta returned with T.V. to the Kasson Clinic where he was again examined by Dr. Bernard. Dr. Bernard noted that T.V. cried whenever he moved his left leg and observed a swelling at the distal mid-left tibia. Dr. Bernard also observed a bruise on T.V.'s penis. When asked about that Roberta speculated that his brother may have grabbed him while in the bathtub. An x-ray disclosed a broken left leg. A splint was placed on T.V.'s leg and he was transferred to St. Mary's Hospital to have a cast placed on his leg.^[4]

9. Dr. Bernard felt that Roberta's explanation of the accident was not consistent with the injury.^[5]

10. T.V. was examined in the emergency room of St. Mary's Hospital by a Dr. Johnson. He found a left tibia fracture of the lower leg. He also noticed the bruise on the side of the penis and an older bruise on T.V.'s face. Dr. Johnson submitted a report of possible child abuse or neglect because he felt that the injury to the penis was

unlikely to have been caused as explained by the foster mother and because of the older bruise under T.V.'s left eye.^[6]

11. T.V. was also examined by a Dr. Bonkers who thought that the broken leg raised concern because it takes a tremendous amount of force to break a bone in a young child.^[7]

12. T.V. was removed from the Pogalz home the evening of February 4, 2000. Dodge County Human Services subsequently recommended in a letter dated February 19, 1998, that the Department of Human Services immediately suspend the daycare and foster care licenses of Roberta and Paul Pogalz. The department issued an Order of Immediate Suspension dated February 20, 1998 which alleged that children in the licensee's care had not been adequately supervised at all times.

13. The licensees exercised their right to appeal the temporary suspension and on February 27, 1998 the Department issued a notice of an Order for Hearing setting the hearing in this matter for August 27, 1998 in Mantorville.

14. The hearing was continued to June 12, 1998 at the request of the licensees in order to allow time to prepare for the hearing. By agreement of both parties, the hearing was then continued indefinitely due to the ongoing appeal process on the finding of maltreatment.

15. The maltreatment of a minor case was heard by an appeals referee of the Department of Human Services on January 13, 1999.^[8] The Referee subsequently made a determination that no maltreatment had occurred. This determination was reversed by the Chief Appeals Referee for the Department. The Chief Appeals Examiner found that the licensee's practice of allowing T.V. unsupervised access to the stairs given his age and corresponding lack of physical coordination and strength constituted neglect.^[9]

16. The maltreatment determination was then appealed to Dodge County District Court. In an Order dated October 15, 1999, the District Court reversed the decision of the Department of Human Services that the licensees had committed neglect, on the grounds that the decision was not supported by substantial evidence.^[10] During the District Court proceeding a pediatrician, Dr. Neil Olson, testified that based upon his examination of the medical records, the leg fracture and the bruise on the penis could have occurred from the fall suffered by T.V.^[11]

17. The District Court determined that the record contained no evidence that licensees allowed T.V. "unsupervised access" to the stairs leading to the laundry or that T.V.'s age and physical coordination made the stair unreasonably dangerous. The Court noted that T.V. had gone up and down the stairs on several prior occasions without any apparent problem. The Court determined that there was no evidence that the stairway constituted a "serious and imminent" danger and further noted that while the licensee may not have taken the best possible action, the action taken was not unreasonable in the circumstances.^[12]

18. During a prehearing conference on March 22, 2000, this matter was set for hearing on May 12, 2000 in Mantorville. It was continued, due to a conflict on the part of the licensee's attorney, to June 15, 2000 on which date the matter was heard.

19. Dodge County Human Services has indicated that as of May of 2000 they would relicense Mr. and Mrs. Pogalz to do daycare if the Department approves.^[13]

20. Roberta Pogalz was highly regarded as a daycare provider by daycare parents, neighbors, and relatives.^[14]

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter under Minn. Stat. § § 14.50 and 245A.08.

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

3. The Department and Dodge County Human Services have complied with all substantive and procedural requirements of law and rule.

4. Minn. Stat. § 245A.07, subd. 2, provides in part as follows:

"If the license holders failure to comply with the applicable law or rule has placed the health, safety, or rights of persons served by the program in imminent danger, the Commissioner shall act immediately to suspend the license."

5. Minn. Rule pt. 9543.1010, subp.8, provides:

"Imminent danger" means a child or a vulnerable adult is threatened with immediate and present abuse or neglect that is life threatening or likely to result in abandonment, sexual abuse, or serious physical injury.

6. Minn. Rule pt. 90545.0190, subp. 4 provides as follows:

Supervision of children. Children in care shall be adequately supervised at all times.

7. Minn. Rule pt. 9402.0315, subp. 29a provides as follows:

Supervision. "Supervision" means a caregiver being within sight or hearing of an infant, toddler, or pre-schooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child. For the school age child, it means a caregiver being available for assistance and care so that the child" health and safety is protected."

8. Under Minn. Stat. § 245A.08, subd. 3, the Commissioner must demonstrate reasonable cause for the immediate suspension upon which the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that she was in full compliance with those laws or rules that the Commissioner alleges the license holder violated.

9. That the Department and Dodge County did demonstrate "reasonable cause" to immediately suspend the daycare and foster care licenses held by Paul and Roberta Pogalz.

10. That the licensees have demonstrated, by a preponderance of the evidence, that they were in full compliance with the laws or rules allegedly violated.

Based upon the foregoing Conclusions, and for the reasons discussed in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED: That the Commissioner reinstate the child foster care and family child care licenses of Paul and Roberta Pogalz.

Dated this 6th day of July 2000.

S/ George A. Beck

GEORGE A. BECK

Administrative Law Judge

Reported: Taped, One Tape, No Transcript
Prepared.

NOTICE

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

MEMORANDUM

The Commissioner of Human Services immediately suspended the child care and foster care licenses of Paul and Roberta Pogalz on February 20, 1998 after their foster child fell down the basement stairs and sustained injuries. The Commissioner is required to suspend a license when a rule violation by a licensee has placed the safety of children in the program in imminent danger. In February of 1998 the physician who initially examined the child stated that the accident as described by the licensee was not consistent with the injury. A second physician submitted a report of possible child

abuse or neglect because he felt that an injury to the child's penis was unlikely to have been caused by another child pulling on it. He believed this explanation had been offered by the licensee. A third physician questioned whether a two and one-half year old would break a leg in falling down the stairs. Given the facts and the position of Dodge County and the Department in February of 1998, an immediate suspension was justified and required under the statute.

The County and the licensees decided that an appeal of the separate maltreatment determination by the Department should be completed before this suspension proceeding was pursued. It was a reasonable decision to pursue only one appeal process at a time. The Department's appeals examiner found no physical abuse or neglect after a hearing in January of 1999. That determination, however, was reversed by the chief appeals examiner who determined that neglect had occurred by allowing the child unsupervised access to the stairs. On appeal to the District Court the decision of the chief appeals examiner was reversed since the Court could not find substantial evidence in the record to support a finding of neglect. A pediatrician of 20 years experience testified in the hearing before the appeals examiner that the leg fracture and bruise on the penis could have occurred from the fall suffered by the child.

The licensees argued at this suspension hearing that the district court decision should preclude any finding of a rule violation in this case because a finding of no neglect means that there was adequate supervision. The Department's position after the district court decision apparently was that even though no physical abuse or neglect had been proved, there could still be a violation of the supervision rule that applies to foster care and child care licensees.

Whether or not the district court decision technically precludes or estops a finding of lack of supervision in this case, it certainly provides strong support for the conclusion that there is little evidence in the record of any action, or lack of action, by the licensee that was not reasonable. It seems clear that the caregiver was within sight or hearing of the child to allow her to intervene to protect the safety of the child within the meaning of Minn. Rule pt. 9502.0315, subp. 29a. The record also contains evidence that this child, and most 2 ½ year old children, are able to negotiate stairs like those in question. The record also indicates that the child had been cooperative with the caregiver in the past and that she was therefore justified in believing that he would stay seated on the stairs as she directed him to. The evidence in the record preponderates in favor of a conclusion that the licensee's supervision of the child was adequate. As the district court indicated, she may not have made the best possible decision in returning to the laundry, but that does not mean that her supervision was inadequate.

The initial decision to suspend was justified based upon the medical opinion at the time. However, it later became clear that the licensee was not claiming that the penis bruise had been caused by her own son in the bathtub. Rather, at one point she speculated that this was a possibility and one of the physicians concluded that she was offering this as the only explanation. A subsequent opinion by a pediatrician with 20 years experience indicates that both the broken leg and the penis bruise could have occurred in the fall down the stairs. It appears that this incident occurred as the licensee described it. It also appears that the record does not support the conclusion that the licensee was not in a position to provide adequate supervision to the child.

At the hearing in this matter the Dodge County Department of Human Services offered only one exhibit, County Exhibit 1 which is the transcript of the hearing before the appeals referee on January 13, 1999. The Assistant County Attorney then made a statement for the record that objected to the actions of the Department in this matter. He stated that subsequent to the finding that there was no maltreatment in this matter, Dodge County suggested that Ms. Pogalz be issued a probationary license subject to conditions, but that the Department denied this suggestion. He suggested that the action of the Department meant that the County lost control of this case and that the State's conduct had the effect of "wearing the licensee down" without any fair or prompt resolution of the matter.

In fact, the statutory scheme for the resolution of license matters and maltreatment did not function efficiently in this situation. The accident occurred in February of 1998. The hearing of the appeals referee was held in January of 1999. Although Minn. Stat. § 626.556, subd. 10i(d) requires the Department to reach a decision on a contested maltreatment determination within 90 days of a request for a hearing, it does not appear that deadline was met in this case. The district court decision was issued in October of 1999. The temporary suspension case was reset for hearing in March of 2000. The parallel proceedings for the license matters and the maltreatment determination contributed to the delay in the resolution of this matter. The licensees have been "temporarily" suspended now for over two years. The County's frustration was evident from the words of the Assistant County Attorney and the communication from the county human services department which indicated that when they talked to the department "They just tell us they are working on it and will get back to us in the near future. The near future has now been over two years...If DHS wants to reinstate her, we'll license her and she can start doing daycare again. We simply don't have any control over the issue or new information to offer."

The lengthy time needed to resolve this matter should prompt attention to a reform of the process for dealing with these questions. The licensees, whom the record indicates were good child care and foster care providers, have lost their licenses for over two years. Whether or not a violation is ultimately sustained, licensees, child care parents, and the children involved all deserve a prompt determination of the type of claims made in this proceeding.

G.A.B.

^[1] Ex. 26, 35, Co. Ex. 1, p. 50.

^[2] Co. Ex. 1, p. 64.

^[3] Ex. 17, Ex. 30.

^[4] Ex. 17, Co. Ex. 1, p. 65.

^[5] Ex. 36.

^[6] Ex. 22.

^[7] Ex. 29.

^[8] County Ex. 1.

^[9] Respondent's Ex. 48.

[\[10\]](#) Respondent's Ex. 48.

[\[11\]](#) Ex. 18.

[\[12\]](#) Respondent's Ex. 48.

[\[13\]](#) Letter dated May 4, 2000 from Gary ReMine.

[\[14\]](#) Exs. 1-16.