

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

In the Matter of the Proposed Revocation  
of the Family Child Care License of Dawn  
Maag

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

The above-entitled matter came on for hearing before Administrative Law Judge (ALJ) Richard C. Luis, on June 5 and June 30, 2000. The hearing was conducted by video conference, with the Administrative Law Judge appearing on each occasion at the Department of Human Service's facility in St. Paul, and all other participants at the Clay County Human Services Department's facility in Moorhead.

Michelle C. Winkis, Assistant Clay County Attorney, Clay County Courthouse, 807 11<sup>th</sup> Street North, PO Box 280, Moorhead, Minnesota 56561-0280, appeared on behalf of the Clay County Department of Human Services (County). The Licensee, Dawn Maag, 58 King Street, Moorhead, Minnesota 56560, appeared on her own behalf on June 5, 2000. On June 30, the Licensee was represented by Craig A. Peterson, Esq., Peterson Law Office, 100 4<sup>th</sup> Street South, Suite 412, Fargo, North Dakota 58103. The record closed on September 1, 2000.

**NOTICE**

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department 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 may not be made until this Report has been made available to the parties to the proceedings for at least 10 days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions or present argument to the Commissioner. Parties should contact the office of Michael O'Keefe, Commissioner of Human Services, 444 Lafayette Road, Saint Paul, Minnesota 55155 for information regarding the filing of exceptions or presentation of argument.

**STATEMENT OF ISSUE**

Whether the Order of Revocation of the Family Child Care License of Dawn Maag should be affirmed because of Ms. Maag's disqualification from performing child care services at a licensed facility, and because of her failure to request reconsideration of a disqualification determination issued against her on October 26, 1999, which disqualification was imposed because of a past forgery charge and for alleged serious maltreatment of a child in her care in August, 1999.

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

### **FINDINGS OF FACT**

1. On September 3, 1999, LW, the mother of one of the Licensee's day care children, contacted the Clay County Human Services Department's Child Protection Office and reported that her daughter, AW, who was 28 months old at that time, had come home with scratch marks or bruises on her neck and arms. Another of LW's daughters, JG, age 8, had reported to her mother that Ms. Maag had dragged her little sister around by her arm. On September 9, 1999, JG told a county investigator that Ms. Maag, on a different occasion than the arm-dragging incident, had grabbed AW around the neck to get her back inside after breaking up a dispute on "she thought" August 31, 1999. The investigation of LW's complaint was overseen by Kathleen Cardinal, a Licensing Specialist in Family Child Care for the County. Ms. Cardinal concluded, after investigating LW's complaint, that Ms. Maag had committed acts of recurrent maltreatment against AW, a child in her care.

2. On September 15, 1999, a 3 month-old baby died of Sudden Infant Death Syndrome (SIDS) while in the care of Ms. Maag. A police investigation into the incident exonerated her of any responsibility, but the Licensee was traumatized by the incident.

3. On October 21, 1999 the County notified Ms. Maag in writing that the Child Protection Specialist assigned to the case, Cindy Fogel, had determined that the Licensee had abused AW. The notice specified:

"Your rights: If you do not agree with the county's determination that abuse occurred, you may ask the county to reconsider its determination. You must send your request for reconsideration within 15 calendar days of receiving this letter. If you still do not agree with the county's final decision after reconsideration, or if the county fails to respond to your request, you may ask the Commissioner of Human Services for a hearing. The instructions for seeking an agency reconsideration and for requesting an appeal hearing are attached."

Ms. Maag received the notice, but never filed for reconsideration of the determination that abuse had occurred.

4. On October 26, 1999 the County, by way of a written notice to Ms. Maag from Kathleen Cardinal, disqualified Ms. Maag from providing further child day care services. The reasons stated were a "serious maltreatment" determination, based on the investigation noted in finding 1, and the discovery by the County that Ms. Maag had been charged with forgery in South Dakota in 1993. Ms. Maag received the notice of disqualification on September 27, 1999. The notice states, in part:

"You have the right to submit a written request to the Commissioner for reconsideration of the disqualification. You must initiate the request within 30 days after receiving this notice of the disqualification. ....Your application to continue as a licensed provider may be denied unless the Commissioner sets

aside the disqualification. Failure to request reconsideration will be treated by the Commissioner as acceptance by you of the disqualification.”

Ms. Maag never requested a reconsideration of the determination of disqualification.

5. Ms. Maag, after more than 15 days elapsed from issuance of the October 21, 1999 determination of abuse, contacted by phone the Child Protection Specialist who wrote the determination and notice of the right to request reconsideration. The Specialist, Ms. Fogel, informed Ms. Maag that she could still appeal the disqualification that had been issued on October 26, 1999. The licensee then contacted by telephone Ms. Cardinal, the Licensing Specialist who issued the disqualification/notice. After their conversation, during which Cardinal explained to Ms. Maag her right to appeal the disqualification in writing, Cardinal mailed to Maag forms or instructional material regarding how to file a request for reconsideration. Maag never filed a request for reconsideration of the October 26, 1999 disqualification determination.

6. Maag alleges that she did not file requests for reconsideration of either the October 21 or October 26 determinations because her impaired mental state at the time (due to the SIDS) left her unable to understand the reconsideration process and unable to attend to such details. Other than Maag’s testimony, there is no corroborating evidence or documentation about her mental or emotional states as they may relate to the competency to understand her legal rights and obligations during the fall of 1999.

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

### **CONCLUSIONS**

1. Any of the above Findings of Fact more properly considered Conclusions are hereby adopted as such.

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

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

4. The Department and Clay County have complied with all substantive and procedural requirements of law and rule.

5. Minn. Stat. § 245A.04, subd. 3b(a) provides, in pertinent part:

“Reconsideration of disqualification. (a) The individual who is the subject of the disqualification may request a reconsideration of the disqualification.

The individual must submit the request for reconsideration to the Commissioner in writing.... within 30 calendar days of the disqualified individual’s receipt of the notice of disqualification. ...Removal of a

disqualified individual from direct contact shall be ordered if the individual does not request reconsideration within the prescribed time..."

6. By operation of the above-quoted statute, the determination to disqualify Ms. Maag from contact with day care children has become final due to her failure to request reconsideration.

7. Minn. Stat. § 256.045, subd. 3(a)(8) provides that state agency hearings are available for individuals or facilities determined to have maltreated a minor after the individual or facility has exercised the right to administrative reconsideration. Hearings for individuals or facilities under clause (8) of the statute are the only administrative appeals to the final agency determinations specifically.

8. In that connection, Minn. Stat. § 256.045, subd. 3b provides that the Commissioner's determination as to maltreatment is conclusive.

9. By operation of the above-noted statute, the determination that Ms. Maag abused AW has become final due to her failure to request reconsideration.

10. Under Minn. Rule 9502.0335, subpart 6.D, revocation of Dawn Maag's License for family child care is mandatory because she is disqualified from any position allowing direct contact with persons receiving services from her as a license holder for substantiated serious or recurring maltreatment of a minor within the meaning of Minn. Stat. § 245A.04, subd. 3d. That statute refers to Minn. Stat. § 626.556 for the parameters of what constitutes "substantiated serious or recurring maltreatment".

Under Minn. Stat. § 626.556 subd. 10e(a)(1), "maltreatment" means physical abuse as defined at Minn. Stat. § 626.556, subd. 2(d). That subdivision defines "physical abuse" as any physical injury inflicted by a person responsible for a child's care on a child other than by accidental means, or any physical injury that can not reasonably be explained by the child's history of injuries.

11. Under Minn. Stat. § 245A.04 subd. 3d, "abuse resulting in serious injury" falls within the definition of serious maltreatment under that statute. Under that same statute, bruises are included within the definition of abuse resulting in serious injury. Also under that subdivision, "recurring maltreatment" means more than one incident of maltreatment for which there is a preponderance of evidence that the maltreatment occurred, and that the subject was responsible for the maltreatment. By her failure to request reconsideration of the determinations that she physically abused AW and that she was disqualified from providing family child care services, Ms. Maag has allowed to become final determinations that she engaged in conduct constituting serious and recurring maltreatment of a minor within the meaning of Minn. Stat. § 245A.04 subd. 3d.

12. The County has established reasonable cause for revocation of Ms. Maag's license by showing her failure to request reconsideration of her disqualification from providing family child care services as an individual, which failure made the disqualification determination final and provided grounds for revocation of her license under Minn. Stat. § 245A.04, subd. 3d.

13. Ms. Maag has failed to establish by a preponderance of the evidence that her failure to request reconsideration of the disqualification determination against her within 30 days was due to mental or emotional conditions that operated to toll the 30-day deadline for requesting reconsideration.

14. Under Minn. Stat. § 245.A.04, subd. 3d, it is appropriate to order revocation of the child family care license of Dawn Maag.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

**RECOMMENDATION**

IT IS RECOMMENDED that the Family Child Care License of Dawn Maag be REVOKED.

Dated this 15<sup>th</sup> day of September, 2000.

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RICHARD C. LUIS  
Administrative Law Judge

Reported: Videotaped (2 Tapes), No Transcript Prepared.

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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**

It is the opinion of the Administrative Law Judge that the Licensee's failure to request reconsideration of the County's determination that she should be disqualified has made that determination final. She has not shown sufficient cause to excuse her failure to seek reconsideration. Her case in that regard is an allegation that she did not understand her obligations to protect herself during the time after she received the determination that she should be disqualified for the forgery charge and serious maltreatment of a child. Without corroborating, independent (preferably from a medical or psychological professional) evidence indicating that Ms. Maag was incompetent to understand the significance of a communication that explained clearly that she had 30

days to request reconsideration and that failure to do so would constitute her acceptance of the disqualification, the Administrative Law Judge is unable to recommend that her failure to make the request be excused, or to refer such a determination to the Commissioner.

Ms. Maag was disqualified for serious maltreatment of a child, which is within the scope of the Minn. Stat. § 245A.04, subd. 3d. As result, under Minn. Rule 9502.0335, subp. 6D., it is mandatory that her license be revoked.

The merits of Ms. Maag's defenses on both the "forgery" and the maltreatment allegations may be worthy, and they are on the record for consideration by the Commissioner, but the ALJ believes they are immaterial. Since Ms. Maag failed to request reconsideration of the disqualification based on those factors, the Judge is persuaded that the Commissioner lacks jurisdiction to review the factual merits of the bases for disqualification.

If he were to assess the merits of the factual allegations, the Administrative Law Judge would have serious doubts about Ms. Maag's credibility. She testified that she had no other criminal charges relating to checks except for the 1993 incident in South Dakota which formed one of the bases for the determination of disqualification. Exhibit 19 establishes that the Licensee was arrested and convicted in North Dakota on two misdemeanor counts of writing insufficient funds (NSF) checks during the fall of 1996, for which she was ordered to pay restitution over \$500.00 and \$100.00 in court fees, with 30 days' jail time stayed for each offense. The Judge does not believe Ms. Maag simply forgot about these incidents when she testified that she had no other criminal charges against her.

The Administrative Law Judge has discounted the fact that Ms. Maag's failure to request reconsideration also made final the allegation that she was guilty of forgery of the type contemplated under Minn. Stat. § 609.631. Exhibit 11 makes clear that her conviction in South Dakota was for insufficient funds (NSF) at a misdemeanor level. Minn. Stat. § 245A.04 calls for disqualification for check-related offenses only if the convictions are for forgeries at a felony or gross misdemeanor level. There was, however, a sufficient basis to allow the County to believe the allegations of physical abuse. As of October 1999, the issuance of determinations of abuse and disqualification on October 21 and October 26, respectively, were not unreasonable. Ms. Maag lost her opportunity to test the correctness or appropriateness of these allegations by failing to request reconsideration of either determination.

**R.C.L.**