

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

In the Matter of the Revocation of  
the Family Child Care License of  
Angela Schwalbe

**RECOMMENDED ORDER GRANTING  
THE DEPARTMENT'S MOTION  
FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Allan W. Klein pursuant to a Notice of and Order for Hearing dated February 6, 2002. On August 9, 2002, the Department of Human Services filed a Motion for Summary Disposition. On September 6, 2002, the Licensee filed a response in opposition to the motion. The Administrative Law Judge noted that an issue in dispute was the status of the Licensee's appeal of a maltreatment determination. On September 22, 2002, the Administrative Law Judge issued a Recommendation that this matter be stayed pending resolution of the maltreatment issue. On February 26, 2003, the Administrative Law Judge was informed that the Commissioner had affirmed the maltreatment determination and that no further appeals had been taken. The Department renewed the Motion for Summary Disposition. On March 4, 2003, the Administrative Law Judge requested a response from the Licensee. No response has been received from the Licensee.

Thomas W. Haines, Assistant Carver County Attorney, 604 E. 4<sup>th</sup> Street, Chaska, MN 55318-2102, represents the Department of Human Services ("DHS" or "the Department"). Marc G. Kurzman, Kurzman, Grant & Ojala, 219 S.E. Main Street, Suite 403, Minneapolis, MN 55414, represents the Licensee, Tracy Stewart.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY RECOMMENDED that the Motion for Summary Disposition filed by the Department of Human Services be GRANTED.

Dated: April 25, 2003.

\_\_\_/s/Allan W. Klein

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ALLAN W. KLEIN  
Administrative Law Judge

## NOTICE

This Order 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 Recommended Order of the Administrative Law Judge. Pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Recommended Order has been made available to the parties to the proceeding for at least ten days and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Parties should contact the Office of the Commissioner, Minnesota Department of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155; telephone 651-296-2701, for further information regarding the filing of exceptions and the presentation of argument.

Pursuant to 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. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Recommended Order will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with Minn. Stat. § 14.62, subd. 2a, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the Recommended Order 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 the Administrative Law Judge of the date on which the record closes.

## MEMORANDUM

In this contested case proceeding, Angela Schwalbe has appealed the Department's decision to revoke her family child care license. The Department has moved for summary disposition on the grounds that there are no material issues of fact in dispute and it is entitled to disposition of this case in its favor as a matter of law. Summary disposition is the administrative equivalent of summary judgment.<sup>[1]</sup> Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>[2]</sup> A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>[3]</sup>

The moving party must demonstrate that no genuine issues of material fact exist.<sup>[4]</sup> If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts are in dispute that can affect the outcome of the case.<sup>[5]</sup> The existence of a genuine issue of material fact must be established by substantial evidence; general averments are not enough to meet the nonmoving party's burden.<sup>[6]</sup> The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.<sup>[7]</sup> The nonmoving party also has the benefit

of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party.<sup>[8]</sup>

## **Factual Background**

The Department's Motion for Summary Disposition is supported by a statement of undisputed facts and supplemented by information received after the submission of the Motion. Based upon these materials, it appears that the facts in this matter relevant to the Motion for Summary Disposition are as follows. The Licensee holds a family day care license issued by the Department. The Department issued an Order of Immediate Suspension on June 14, 2001, due to the Licensee's use of corporal punishment toward a child in her daycare.<sup>[9]</sup> The Licensee appealed the immediate suspension. Administrative Law Judge Barbara L. Nielson recommended that the suspension be upheld. The Commissioner's Order upheld the suspension.

On January 15, 2002, the Department issued an Order of Revocation, relying on the immediate suspension and the filing of a false document during that appeal of that suspension as the basis for revoking the Licensee's family day care license. The Licensee appealed the Order of Revocation.

A criminal complaint was brought against the Licensee, charging her with Malicious Punishment of a Child in violation of Minn. Stat. § 609.377 and Forgery in violation of Minn. Stat. § 609.63. The malicious punishment charge arose from the corporal punishment and the forgery charge arose from the introduction of a falsified document in the appeal of the immediate suspension.

On May 7, 2002, the Licensee entered a plea to the forgery charge under ***State v. Goulette***, 258 N.W.2d 758, 760 (Minn. 1977). Such pleas, more widely known as ***Alford*** pleas (after ***North Carolina v. Alford***, 400 U.S. 25 (1970)), allow a trial court to "accept a plea of guilty by an accused even though the accused maintains that he or she is innocent, provided the plea is 'voluntarily, knowingly, and understandingly entered,' and provided the court first questions the accused, analyzes the facts offered in support of the plea, and concludes that the evidence would support a jury verdict of guilty."<sup>[10]</sup> The charge of malicious punishment was dismissed and the Licensee entered the ***Alford*** plea to the forgery charge. District Court Judge Simonette found the Licensee guilty of felony forgery, stayed imposition of the sentence on condition that the Licensee complete 100 hours of community service, pay a \$350 fine, and successfully complete probation.

Where an allegation of maltreatment in a licensed day care is made, the Department is obligated to investigate.<sup>[11]</sup> A finding of maltreatment disqualifies a person from direct contact with persons served by DHS-licensed programs.<sup>[12]</sup> An appeal process that is separate from the license appeal process is provided for maltreatment decisions. The Department found that the Licensee had committed maltreatment and the Licensee appealed that finding. Due to the ongoing criminal process, the Department stayed its consideration of the Licensee's maltreatment finding appeal.

On January 13, 2003, the Department Appeals Referee affirmed the finding that the Licensee had committed maltreatment. The Licensee did not request reconsideration of the maltreatment finding, and did not appeal the maltreatment finding to the District Court.<sup>[13]</sup>

The Department asserts that two issues are appropriate for summary disposition. The first issue is whether the fact of the Licensee's immediate suspension is sufficient basis for license revocation. The second issue is whether the false information that formed the basis of the Licensee's **Alford** plea is a basis for license sanctions. These issues will be discussed individually.

### **Immediate Suspension**

In support of its immediate suspension argument, the Department relies upon Minn. Stat. § 245A.07, subd. 3.<sup>[14]</sup> The Department also cites Minn. Rule 9543.1060, subd. 4.A. as authority for its position. The Licensee, however, maintains that an immediate suspension proceeding applies a lower burden of proof than a revocation and therefore the immediate suspension proceeding is not controlling in this matter.

The pertinent portion of the Department's statutory authority to sanction the Licensee states:

**Subd. 3. License suspension, revocation, or fine.**

The commissioner may suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules, or knowingly withholds relevant information from or gives false or misleading information to the commissioner in connection with an application for a license, in connection with the background study status of an individual, or during an investigation. A license holder who has had a license suspended, revoked, or has been ordered to pay a fine must be given notice of the action by certified mail. The notice must be mailed to the address shown on the application or the last known address of the license holder. The notice must state the reasons the license was suspended, revoked, or a fine was ordered.<sup>[15]</sup>

The Licensee's failure to fully comply with applicable laws or rules is demonstrated by the immediate suspension of her license. But the statute does not explicitly authorize using the immediate suspension process, without more, to impose license revocation.

The Department also relies upon Minn. Rule 9543.1060, subd. 4 as supporting its assertion that no material issues of fact remain for hearing in this matter. The rule states in pertinent part:

**Subd. 4. Revocation of license.** The commissioner shall revoke a license when continued operation of the program is not in the best interest of persons served by the program and would pose an unacceptable risk of

harm to persons served by the program. Violations that are grounds for license revocation are:

- A. immediate suspension of a license under subpart 3;
- B. a disqualification under the applicant background study under Minnesota Statutes, section 245A.04;
- C. substantiated abuse, neglect, or maltreatment;

\* \* \* \* <sup>[16]</sup>

The rule language of subpart 4.A. expressly authorizes revocation as sanction when an immediate suspension has been imposed. Items B and C have been included because both of these grounds support the Department's position in this matter.<sup>[17]</sup> There is no genuine issue of fact remaining concerning the Licensee's immediate suspension. Similarly, there are no genuine issues of fact that maltreatment has been substantiated and that the Licensee is disqualified under Minn. Stat. § 245A.04.<sup>[18]</sup>

### **False Information**

The Department maintains that the Licensee's forgery conviction is a basis for revocation of her license. The Licensee maintains that her **Alford** plea is not the same as a guilty plea and therefore, she has not admitted to providing false information.<sup>[19]</sup> To support this assertion, the Licensee cites a disqualification case, **Dozier v. Commissioner of Human Services**.<sup>[20]</sup> However, the holding of that case states:

Because the DHS licensure rules do not require a conviction, the Commissioner properly relied upon Dozier's guilty plea as an admission of the facts constituting the offense.<sup>[21]</sup>

The mechanics of an **Alford** plea distinguish it from a guilty plea. The defendant does not admit to committing the offense. The defendant also does not contest the facts presented to the judge under an **Alford** plea. The judge then proceeds to examine the facts and, if sufficient, find the defendant guilty of the offense and sentences the defendant accordingly.<sup>[22]</sup> While the Licensee is correct that an **Alford** plea is not truly a guilty plea, the Licensee was nevertheless convicted of the offense and sentenced accordingly.<sup>[23]</sup> There are no genuine issues of material fact remaining regarding that conviction. The Department can rely upon the Licensee's conviction of forgery as a conclusive demonstration of the underlying conduct that supported the conviction.

Forgery is a disqualifying offense under Minn. Stat. § 245A.04, subd. 3d(2). Minn. Stat. § 245A.07, subd. 3, authorizes the Department to "revoke a license ... if a license holder ... knowingly ... gives false or misleading information to the commissioner ... during an investigation." There is no dispute that the forged document was submitted to the ALJ in the hearing on the immediate suspension contested case. The purpose of the contested case was to provide a recommendation to the Commissioner of Human Services. Submitting a forged document under such circumstance is, as a matter of law, knowingly giving false or misleading information to

the Commissioner under the meaning of Minn. Stat. § 245A.07, subd. 3. The Department has demonstrated that summary disposition is appropriate on the false information issue.

There is no genuine issue of material fact remaining for hearing and the Department is entitled to prevail as a matter of law. Accordingly, it is recommended that the Department's order revoking Angela Schwalbe's family day care license be affirmed.

A.W.K.

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<sup>[1]</sup> Minn. R. 1400.5500 (K).

<sup>[2]</sup> **Sauter v. Sauter**, 70 N.W.2d 351, 353 (Minn. 1955); **Louwagie v. Witco Chemical Corp.**, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03; Minn. R. 1400.5500 (K).

<sup>[3]</sup> **Illinois Farmers Insurance Co. v. Tapemark Co.**, 273 N.W.2d 630, 634 (Minn. 1978); **Highland Chateaux v. Minnesota Department of Public Welfare**, 356 N.W. 2d 804, 808 (Minn. App. 1984).

<sup>[4]</sup> **Theile v. Stich**, 425 N.W.2d 580, 582 (Minn. 1988).

<sup>[5]</sup> **Highland Chateau**, 356 N.W.2d at 808; **Hunt v. IBM Mid America Employees**, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>[6]</sup> *Id.*; **Murphy v. Country House, Inc.**, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); **Carlisle v. City of Minneapolis**, 437 N.W.2d 712, 715 (Minn. App. 1988).

<sup>[7]</sup> **Carlisle**, 437 N.W.2d at 715 (citing **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)).

<sup>[8]</sup> See **Celotex**, 477 U.S. at 325; **Thiele v. Stich**, 425 N.W.2d 580, 583 (Minn. 1988); **Greaton v. Enich**, 185 N.W.2d 876, 878 (Minn. 1971); **Dollander v. Rochester State Hospital**, 362 N.W.2d 386, 389 (Minn. App. 1985).

<sup>[9]</sup> Unless otherwise stated, these facts are drawn from exhibits to the statement of undisputed facts.

<sup>[10]</sup> **Perkins v. State**, 559 N.W.2d 678, 682 (Minn. 1997)(citing **Goulette**).

<sup>[11]</sup> Minn. Stat. § 626.556, subd. 10d.

<sup>[12]</sup> Minn. Stat. § 245A.04, subd. 3d.

<sup>[13]</sup> Fahey February 26, 2003 Letter.

<sup>[14]</sup> Department Brief, at 7.

<sup>[15]</sup> Minn. Stat. § 245A.07, subd. 3

<sup>[16]</sup> Minn. Rule 9543.1060, subd. 4.

<sup>[17]</sup> The Department did not use the other two grounds since neither was finally decided when the Motion for Summary Disposition was submitted.

<sup>[18]</sup> The Licensee did not request reconsideration of the maltreatment determination and therefore that determination is final and cannot be considered as part of this proceeding. Minn. Stat. § 245A.03c.

<sup>[19]</sup> Licensee Brief, at 4.

<sup>[20]</sup> **Dozier v. Commissioner of Human Services**, 547 N.W.2d 393, 395 (Minn.App. 1996), *rev. denied* (Minn. July 10, 1996).

<sup>[21]</sup> **Dozier**, 547 N.W.2d at 395.

<sup>[22]</sup> **State of Minnesota v. Samuel Linneaus Sylvester**, Docket No. C5-98-1793 (Minn.App. April 6, 1999)(withdrawal of **Alford** plea appropriate because plea was not voluntarily or intelligently made due to misleading legal advice - counsel had characterized plea as not resulting in conviction).

<sup>[23]</sup> This distinction has not always been strictly adhered to in descriptions of the **Alford** plea process. See **State of Minnesota v. Anthony Olson**, Docket No. C6-99-579 (Minn.App. December 14, 1999)(**Alford-Goulette** plea described as a guilty plea).