

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Indefinite Suspension
of the License of Nicolette Buege
1628 2nd Avenue N.E.
Rochester, MN 55906-4112
to provide family child care under
Minnesota Rules, parts 9502.0300 to
9502.0445

**FINDINGS OF FACT,
CONCLUSIONS,
RECOMMENDATIONS
AND MEMORANDUM**

Administrative Law Judge Allan W. Klein conducted a hearing in this contested case proceeding at 10:00 a.m. on May 21, 2003, at the Olmstead County Government Center, Rochester, Minnesota. The OAH record closed on July 11, 2003 upon receipt of a complete version of an incomplete exhibit.

Geoffrey A. Hjerleid, Assistant Olmstead County Attorney, 151 4th Street S.E., Rochester, Minnesota 55904-3710, appeared at the hearing as attorney for Olmstead County (the County) and the Minnesota Department of Human Services (the Department). Nicolette Buege, 1628 2nd Avenue N.E., Rochester, Minnesota 55906-4112, was not represented by an attorney but appeared at the hearing on her own behalf.

THESE FINDINGS OF FACT, CONCLUSIONS, RECOMMENDATIONS AND MEMORANDUM ARE PUBLIC, BUT THE HEARING RECORD ON WHICH THEY ARE BASED CONTAINS INFORMATION THAT IS NOT PUBLIC.

NOTICES

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after reviewing the administrative record. The Commissioner may adopt, reject or modify these Recommendations. Under Minnesota law,^[1] the Commissioner may not make his final decision until after the parties have had access to this report for at least ten days. During that time, the Commissioner must give each party adversely affected by this report an opportunity to file exceptions and present argument to him. Parties should contact the office of Kevin Goodno, Commissioner of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155, to find out how to file exceptions or present argument.

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. In order to comply with this statute, 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 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 the Administrative Law Judge of the date on which the record closes.

Under Minnesota law,^[2] the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

STATEMENT OF ISSUES

(1) Whether the Licensee, Nicolette Buege, should be indefinitely suspended from providing family day care for failing to inform the Department of an adult living in the day care premises.

(2) Whether the Licensee should be indefinitely suspended from providing family day care for failing to file the appropriate forms to allow a background check to be conducted on an adult living at the daycare premises.

(3) Whether the Licensee should be indefinitely suspended from providing family day care for her failure to cooperate with the Department's investigation into a domestic dispute on the day care premises.

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

FINDINGS OF FACT

1. Nicolette Buege has been involved in various aspects of child care for most of her working life. She has done in-home care, managed a YMCA day care facility, and has operated her own facility since 1997. She is now about 42 years old. During all times important to this proceeding, Ms. Buege has lived at 1628 2nd Avenue N.E., Rochester, Minnesota with her three children, ages 8, 11 and 14.^[3] Licensee has maintained a relationship with Jeffrey Charles Hart for many years. Mr. Hart maintains a residence in Chatfield, Minnesota, but spends significant time in the daycare premises. On some of these occasions he is present during daycare hours.

2. The Licensee has been licensed to provide family child care at her home since 1997. As part of the licensing process, Ms. Buege has been in contact with Angie Jensen, the County License Worker since 1998. On January 14, 2002, Ms. Buege telephoned Ms. Jensen to tell her about concerns that a child in Ms. Buege's day care

had been physically abused.^[4] During the telephone call, Ms. Buege indicated that she had observed evidence of abuse of that child on a number of occasions dating back to October 2001. Ms. Jensen told Ms. Buege that the observations needed to be reported to the crisis intake worker. Immediately after that conversation, Ms. Buege reported the suspected abuse to the appropriate person. Ms. Jensen issued a correction order regarding the failure to report the earlier suspected abuse.^[5]

3. Ms. Buege's family child care program license was renewed in 2002. Sometime in February 2002, Ms. Jensen sent Ms. Buege the Family Child Care Licensing Checklist that was to be completed and returned prior to March 12, 2003. Ms. Buege failed to return the Checklist on time.

4. Ms. Buege submitted the checklist to the County on July 2, 2002. In the Checklist, Ms. Buege responded to the question, "Have there been any changes in the regular membership in you household," by marking both the "yes" and "no" answers and adding "not regular."^[6] The next question, asking whether the changes have been reported to the agency, was not answered. In the notes, Ms. Buege wrote, "Boyfriend stays overnight occasionally wakes for one hour – showers, leaves during daycare hours. send info. forms if needed."^[7] Ms. Jensen did not send any background consent forms to Ms. Buege at this time. It was not until January 29, 2003 that Ms. Jensen gave a background consent form to Ms. Buege for Mr. Hart to complete.^[8] But the ALJ concludes that Ms. Buege did not submit the necessary forms for a background study of Mr. Hart, which is required by Minnesota law of all persons 13 years of age and older who are living in a day care premises.^[9]

5. On September 8, 2002, at 12:30 a.m., the Rochester Police Department responded to a report of a domestic disturbance at Ms. Buege's home and conducted an investigation.^[10] Ms. Buege and Mr. Hart both indicated that each had been struck by the other. Ms. Buege indicated that she wanted Mr. Hart to "leave for the night."^[11]

6. On January 1, 2003, at 2:00 a.m., the Rochester Police Department responded to a call from Ms. Buege's home and conducted an investigation.^[12] The officers concluded that there had been no domestic assault, but that Ms. Buege and Mr. Hart had been arguing. Mr. Hart left the residence in a cab.

7. On January 15, 2003, at 6:30 a.m., the Rochester Police Department responded to a domestic disturbance call from Ms. Buege's home and conducted an investigation.^[13] The call was placed by one of Ms. Buege's children. The officers interviewed both Ms. Buege and Mr. Hart about the dispute that had prompted the call. Mr. Hart indicated he lived at the daycare premises and that he had been defending himself against an assault by Ms. Buege. Ms. Buege indicated that Mr. Hart had attacked her, striking her on her face and arms. The officers noted the smell of alcohol on Ms. Buege's breath.^[14] The officers arrested Mr. Hart and transported him to an adult detention center. While there, the officers administered an alcohol breath test and received a result of 0.13 BAC (blood alcohol content). As a result of that investigation, Mr. Hart was charged with fifth degree domestic assault, disorderly conduct, and

providing a false name to a police officer, all of which are misdemeanors.^[15] Mr. Hart pled guilty to disorderly conduct.^[16]

8. Both Ms. Buege and Mr. Hart had been awake all night. January 15, 2003 (a Wednesday) was a regularly scheduled daycare day. The officers spoke to Ms. Buege about conducting daycare that day, in light of her current condition. Ms. Buege agreed with the officers that she should not take children into her care that day.

9. On January 29, 2003, Ms. Jensen and Lisa Riettmann (a County child protection worker) visited Ms. Buege to discuss the January 15 incident. Two preschool age daycare children were present. After advising Ms. Buege about the nature of their visit, Ms. Jensen indicated that they wanted to discuss the specifics of the incident. Ms. Buege declined to discuss the incident, asserting that the incident did not take place during daycare hours, so she should not have to talk about it. Ms. Jensen indicated that failing to answer their questions could be considered non-cooperation and could have an adverse effect on Ms. Buege's day care license.^[17] Ms. Buege declined to discuss the incident at that time and made no effort to discuss the incident with Ms. Jensen before this licensing action was taken.

10. On January 30, 2003, the County recommended that the Department immediately suspend Ms. Buege's day care license. The Department disagreed with the recommendation for immediate suspension. On February 7, 2003, the Commissioner of Human Services issued an Order of Indefinite Suspension of Ms. Buege's day care license. The reasons for the indefinite suspension were the failure to have the background check completed on Mr. Hart, the failure to report that Mr. Hart was living in the day care premises, and the failure to cooperate with the Department's investigation into the January 15, 2003 incident.^[18]

11. On February 6, 2003, Ms. Buege returned Mr. Hart's signed background consent form to Ms. Jensen.^[19]

12. Ms. Buege subsequently made a timely appeal of the Department's Order of Indefinite Suspension.^[20] A Notice and Order for Hearing was issued on February 26, 2003 that initiated this contested case proceeding.^[21]

13. On March 26, 2003, Ms. Buege met with Ms. Jensen and Ms. Riettmann and spoke about the January 15 incident. Ms. Buege maintained at this meeting that she had decided to not discuss it at the earlier home visit due to the presence of day care children.^[22] Ms. Buege described the incident as her fault, blamed an illness as an underlying cause of conflict between her and Mr. Hart, and minimized the conflict between them. Ms. Riettmann suggested that Ms. Buege and Mr. Hart participate in counseling to develop the means of coping with disagreements without fighting.

14. On March 26, 2003, Ms. Buege met with David Miller, B.S., L.A.D.C., of Miller Chemical Health Services, for a chemical dependency evaluation. Mr. Miller's description of Ms. Buege's answers showed that she was not cooperating with the

evaluation. For example, Ms. Buege denied living with anyone with a current alcohol problem and denied experiencing physical or emotional abuse at any time in her life.^[23]

15. The County conducted an assessment and concluded that maltreatment occurred when Mr. Hart assaulted Ms. Buege on January 15 with her children present.^[24] The County relied upon Ms. Buege's denial of domestic violence and chemical use issues in concluding that a deadline for cooperation should be set before a CHIPS (children in need of protective services) petition is filed.^[25]

16. No child in Ms. Buege's care has suffered injury or harm as a result of her care, nor has she provided substandard care to any day care child.

17. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

18. The Memorandum that follows explains the reasons for these Findings of Fact, and to the extent that the Memorandum may contain additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

19. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

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

CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge and the Commissioner of Human Services authority to conduct this contested case proceeding and to make findings, conclusions, recommendations, and final decisions as the case may be.^[26]

2. The Department and the County gave proper and timely notice of the hearing.

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

4. Minn. Stat. § 245A.07, subd. 3, authorizes the Commissioner of Human Services to impose sanctions on a license where the license holder fails to comply fully with applicable law or rules.

5. Under Minn. Stat. § 245A.08, subd. 3 if the Department demonstrates that reasonable cause exists to take adverse action against a license holder, the burden of proof in hearings involving revocation of a child care license shifts to the license holder

to demonstrate by a preponderance of the evidence that the license holder was in full compliance with laws and rules allegedly violated.

6. Reasonable cause exists to take adverse action against the Ms. Buege's family day care license. She therefore bears the burden of proof to show by a preponderance of the evidence that she was in full compliance with the laws and rules identified in the Notice of Hearing.

8. In the context of investigations and the conduct of background studies, Minnesota Statutes, section 245A.04, subdivision 3(n) provides in pertinent part:

The failure or refusal of an applicant, license holder, or registrant under section 144A.71, subdivision 1, to cooperate with the commissioner is reasonable cause to disqualify a subject, deny a license application or immediately suspend, suspend, or revoke a license or registration.

9. Minnesota Rules, part 9502.0345, subp. 1.H. indicates that the Department will maintain the "arrest, conviction, or criminal history records ... on any person living or working in the day care residence."

10. Minnesota Rules, part 9502.0375, subp. 2.A. requires a licensee to inform the Department "within 30 days of any change in the regular membership of the household within the day care residence."

11. Ms. Buege failed to establish by a preponderance of the evidence that she was in full compliance with the laws and rules requiring her to report the presence of an adult living in her household, to conduct a background study of such person before allowing contact with persons in care, and to cooperate with the Department's investigation.

12. Minnesota Statutes, section 245A.07, subdivision 1, states:

Sanctions available. In addition to making a license conditional under section 245A.06, the commissioner may propose to suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

13. By not reporting the presence of an adult in the household for a long period of time, not obtaining a background study on this person, and not cooperating with the Department's investigation, the Licensee has violated the applicable law and rules for a significant length of time. The violation did not have a severe effect on the health, safety or rights of persons in the Licensee's day care, since any background study conducted in a timely fashion would not have resulted in the disqualification of Mr. Hart from the premises. Ms. Buege's failure to cooperate with the Department is a

moderate violation, since it modestly impaired the Department from promptly resolving issues regarding Mr. Hart's conduct on January 15, 2003.

14. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

15. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the these Conclusions, 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 impose a sanction on the license of Nicolette Buege to provide family child care:

Dated this 15th day of July 2003.

/s/ Allan W. Klein

ALLAN W. KLEIN

Administrative Law Judge

Reported: Tape Recorded (two tapes), No Transcript Prepared.

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MEMORANDUM

The record in this matter is clear that Mr. Hart was residing at the daycare premises for over a year before Department was informed of his presence. The Licensee was under an obligation to report that fact and ensure that a background study could be conducted. Ms. Buege failed to meet her obligation and this constitutes a violation of the law and rules governing day care licensure.

When the Department became aware of his presence in the day care premises, the Licensee was under an obligation to cooperate with the Department's investigation. Ms. Buege failed to cooperate in several distinct respects. On January 29, 2003, she refused to answer questions about an incident directly affecting whether Mr. Hart should be disqualified from contact with children in the daycare. On March 26, 2003, she answered questions about the incident to investigators, but her answers were not candid. Also on March 26, 2003, she provided inaccurate information to a chemical

dependency counselor regarding her relationship with Mr. Hart, the degree of his alcohol use, and the existence of domestic violence in the relationship.

While the Licensee's actions prevented the Department from conducting a background study of Mr. Hart, there was nothing in his record prior to September 8, 2002 to raise the possibility that he could be disqualified from living at the day care premises. The only clearly disqualifying event occurred on January 15, 2003, long after any background study should have been completed. Similarly, Ms. Buege's lack of candor in the subsequent investigation made the Department's task more difficult, but only in regard to reaching conclusions about Mr. Hart's conduct. Ms. Buege's conduct with day care children has never been an issue in this proceeding.^[27]

A.W.K.

^[1] Minnesota Statutes, section 14.61 (2002). (Unless otherwise specified, citations to Minnesota Statutes refer to the 2002 edition.)

^[2] Minn. Stat. § 14.62, subd. 1.

^[3] Exhibit 14.

^[4] Exhibit 1. The date identified in Ms. Jensen's notes for the telephone call is January 29, 2002, but the notation of that date is in error.

^[5] Exhibit 2.

^[6] Exhibit 15, at 8.

^[7] Exhibit 15, at 9.

^[8] Exhibit 8.

^[9] Minnesota Statutes, section 245A.04, subdivision 3(c)(2).

^[10] Exhibit 4.

^[11] *Id.*

^[12] Exhibit 5.

^[13] Exhibit 6.

^[14] The officers performed a breath test on Ms. Buege, which yielded a result of 0.04 BAC.

^[15] Minnesota Statutes, sections 609.2242, subd. 1, 609.72, and 609.506, subd. 1.

^[16] Exhibit 12.

^[17] Testimony of Angie Jensen; Exhibits 8 and 17.

^[18] Exhibit 19.

^[19] Exhibit 21.

^[20] Exhibit 10.

^[21] Notice of and Order for Hearing.

^[22] Exhibit 17 (tape recorded interview of Ms. Buege).

^[23] Exhibit 13, at 3. The criminal record of Mr. Hart, prior to the January 15, 2003 incident, consists of a number of alcohol-related traffic infractions. Exhibit 22. Ms. Buege noted at other times that Mr. Hart's domestic disputes arose when he had been consuming alcohol.

^[24] Exhibit 14. The maltreatment determination has been appealed and that matter is separate from this one.

^[25] Exhibit 14.

^[26] Minnesota Statutes, Sections 14.50, 14.57, 14.69, and 245.08.

^[27] The only correction order that she received relates to her status as a mandatory reporter of suspected child abuse. Exhibit 2. Ms. Buege has adequately explained her reasons for believing that she was complying with her obligations at that time.