OAH No. 12-1800-15552-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the License of Shari Boettner to Provide Family Day Care	**FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATION**

This matter was heard by Administrative Law Judge Steve M. Mihalchick on November 6, 2003, in Meeting Room 3 of the Clay County Family Services Center, 715 N. 11th St, Moorhead, Minnesota.

Michelle C. Winkis, Assistant Clay County Attorney, 807 11th St. N, Moorhead, MN 56561-0280, appeared for the Minnesota Department of Human Services (the Department) and the Clay County Social Services Department (the County). Shari Boettner, 2933 Heatherwood Circle, Moorhead, MN 56560, appeared on her own behalf.

Testimony was provided by Kathleen Cardinal, the Clay County Child Care Licensor; Licensee; and Licensee's husband, Dan Boettner. The hearing record closed upon adjournment of the hearing November 6, 2003.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after reviewing the contested case record and may adopt, reject, or modify these Recommendations. 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 the Report to file exceptions and present argument to the Commissioner. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155 to ascertain the procedure for filing exceptions or presenting 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. 2. The record closes upon the filing of comments, 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.

STATEMENT OF ISSUES

Whether Licensee violated family day care rules as alleged in the Order of Revocation regarding failure to adequately supervise children in her care; exceeding

capacity limitations; placing an sleeping infant in an improper sleeping space; having bedrooms and hallways used for sleeping infants and toddlers that were cluttered with toys, clothing, bedding, and laundry; and failure to obtain and maintain required records for each child in care.

Whether Licensee's license should be revoked based upon such violations, and previous and subsequent violations, correction orders, conditional licenses, reports, and investigations.

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

FINDINGS OF FACT

1. Licensee applied for a family day care license in Clay County in 2000, shortly after she and her husband and their two children moved to Moorhead, Minnesota. They had previously lived in Douglas County, Minnesota, where Licensee had been licensed as a family day care provider from 1996 to 1999. After Douglas County, the family had lived in Fargo, North Dakota, a short while before moving to nearby Moorhead. Licensee did day care in Fargo while living there.

2. Kathleen Cardinal, Clay County's Child Care Licensor, investigated the application. She obtained information from the Douglas County Licensor that caused her great concern. The Douglas County Licensor reported several instances of inability and failure to supervise infants and toddlers, including her own son; inadequate supervision, injuries to children in care, one of which required emergency surgery and which she did not report, and some resulting from her inability or failure to manage her son's behavior of injuring other children. Douglas County Child Protection determined that maltreatment occurred regarding an infant who received a steam or water burn due to Licensee's poor judgment and failure to identify that the child was injured.[1] Licensee had been given several correction orders in Douglas County for failure to supervise and intervene, using a car seat for napping infants, being overcapacity because of overlap of children arriving before others are picked-up, and other violations. On September 25, 2000, Cardinal wrote to the Department recommending that Licensee's application be denied based upon the numerous health and safety concerns in Douglas County.[2]

3. While waiting for her license, Licensee began providing unlicensed day care in her home. On February 21, 2001, Cardinal made an unannounced visit to the residence. At that time, Licensee was caring for her own children, a nephew, and two other children of two other families not related to her. Licensee told Cardinal that she knew she could only care for one unrelated child without a license, but that the parents insisted and that they would be picking up the children within minutes. Cardinal observed that the house was extremely cluttered and dirty. Licensee's three year old daughter's room was so cluttered it was difficult to open the door. Unpacked boxes from the prior summer's move were in the living room. Cardinal observed that Licensee's son was very loud and ordering the other children around and that Licensee did nothing to intervene. Licensee told Cardinal that her son throws things and doesn't

listen. Cardinal returned later that afternoon. The nephew was gone, but the other two children were still there.[3]

4. On March 30, 2001, still before she had received a license, Cardinal investigated a complaint alleging that Licensee was sleeping while children were in care and that the problem had begun when Licensee started working nights. Licensee told Cardinal that her husband was not making the money he used to and that they had problems with bills. She had started working full-time on the grave yard shift from 11:00 p.m. to 7:00 a.m. and tried to sleep only when the children napped. She told Cardinal she had rarely fallen asleep. But parents had reported finding her sleeping and difficult to awaken several times when they dropped off or picked up their children. Cardinal asked about a report she had that her son had picked up and dropped an infant. Licensee said her son did hit other children, and they hit him, but she wasn't aware of the dropping incident. Cardinal also asked Licensee whether her husband was abusive, to which she responded by crying and saying she couldn't believe anyone would say that. Cardinal passed this information on to the Department in a letter of March 30, 2001.[4]

5. On July 19, 2001, the Department issued an Order of Conditional License to Licensee. It cited the complaint investigation of March 30, 2001, regarding inadequate supervision of children in care and stated that the license would be issued on conditional status for one year to monitor compliance with supervision more closely. It required Licensee to obtain six hours of additional training in child development and to submit a plan for supervision of children in care to her licensor for approval.[5]

6. On July 31, 2001, Licensee submitted a daily schedule as her supervision plan. Cardinal asked her to add statements describing how she would supervise the children. Licensee added some statements about what she would be doing to guide the children in those activities. Licensee did obtain the additional training.[6]

7. Because of the conditional license, Cardinal made several unannounced visits to Licensee's home to monitor the areas of concern. Most often she found Licensee in violation of at least one day care rule. On August 6, 2001, she found one child lacking the required immunization record. She also observed Licensee's son hit and spit on another child. Licensee warned him to stop, but took no further action to protect the other child until Cardinal intervened. Cardinal added a violation to the correction order for failure to use appropriate behavior guidance.[7] Cardinal called Licensee later that day to recommend that Licensee contact the Healthy Families program for help. Licensee did contact them about a month later.[8] At the hearing, Licensee and her husband testified that the other child had punched her son before Cardinal had arrived and that when Cardinal was there, her son was hitting him back. License's husband referred to the other child as "the ADHD child."[9]

8. On August 23, 2001, December 14, 2001, and March 28, 2002, visits, Cardinal issued correction orders to Licensee for record-keeping violations.[10] The repeated record-keeping violations were usually the result of Licensee failing to require

parents to provide the information on a timely basis.[11] On October 17, 2001, and March 7, 2002, visits, no correction orders were issued.[12]

9. On April 15, 2002, Cardinal received a report from a parent regarding an incident in February, 2002. The parent reported that Licensee had called her that day to say she might have to go to Minneapolis because her father-in-law was ill and she might not be there when the school-age children got off the school bus. The parent claimed to have told Licensee to call her when she knew, so that other arrangements could be made to pick him up. Licensee's version is only slightly different. On April 23, 2002, she told Cardinal, who visited Licensee to discuss the parent's report, that that parent was the first she had called that morning and had told the parent she'd call back if she did have to go to Minneapolis. The parent called Licensee back to say a relative could pick up her son, but that Licensee should call her back when she knew for sure if she was leaving. Licensee said she tried to call the parent back, but got no answer or busy signals and even tried reaching her later from Minneapolis. She did reach the other parents, all of whom made other arrangements. In any event, Licensee left the day care unattended without reaching the parent to confirm that she would not be there and, as a result, the child sat outside alone in the yard from 3:45 to 6:30.[13]

10. On the April 23, 2002, visit, Cardinal found that two drop-in children were lacking all paperwork and that the immunization record update was missing for another child. She issued a correction order for the violation that day.[14]

11. Cardinal also asked Licensee about her son that day. Licensee reported that they had started with Healthy Families because her son was having problems dealing with his grandfather's death. She also reported an incident that had occurred a month earlier in which neighborhood kids had thrown snowballs at her son while waiting for the school bus near Licensee's home. Her son returned to the house, got a plastic bat and went back and started hitting the other children with it.[15] Licensee's husband was outside that day and observed the incident. He yelled at them to stop. He felt that his son was justified in his retaliation.[16]

12. Cardinal also spoke with the worker from Healthy Families later on April 23, 2002. The worker reported that on one occasion while visiting the home, Licensee went upstairs leaving her son and the day care children in the basement, along with the worker. Licensee's son, without provocation, knocked over another boy and the worker yelled at him to stop, which she had to do three times. When Licensee returned, the worker told her what had happened. Licensee told the worker that the other child was a bully and gave both children a time out.[17]

13. On April 24, 2002, Cardinal spoke with Licensee about her son's aggressive behavior toward other children. She required Licensee to agree to keep her son constantly in her sight when day care children were present and to never leave him alone with day care children, and to amend her supervisory plan to say so.[18]

14. On May 16, 2002, Cardinal conducted a relicensing visit. On that date she wrote correction orders listing six violations. They were for:

> All records needed “no insurance” notice form; one child’s record needed a copy of the contract.
>
> Furnace needed inspection.
>
> Licensee needed First Aid and CPR training.
>
> Fire extinguisher needed service.
>
> Because of a broken lock, cleaning supplies in bathroom needed to be made inaccessible.
>
> Smoke alarm not working.[19]

15. On May 24, 2002, Cardinal wrote the Department requesting that Licensee’s conditional status be continued based upon issues described above.[20]

16. On June 20, 2002, Cardinal returned on a follow-up inspection. She found three of the items for which she had issued the May 16, 2002, correction order still uncorrected: the inoperable smoke alarm, lack of “no insurance” notices, and the uninspected furnace.[21] While there, Cardinal noticed the Head Start Bus outside and told Licensee. Licensee went up toward the door to get the child coming from the bus, leaving her son alone with the day care children until Cardinal reminded her of her obligation to keep him in her sight. Cardinal reported these events to the Department that day.[22]

17. On July 15, 2002, the Department issued another Order of Conditional License, placing Licensee on conditional status for another year for repeated failure to comply with all rule requirements during the first conditional license period. It cited the behavior guidance violation regarding the incident of her son hitting and spitting on a day care child; the several record-keeping violations; the physical environment violations for smoke alarms, fire extinguisher, and furnace; and the sanitation and health violation for accessible cleaning supplies. It required her to obtain another additional six hours of training, comply with the supervision plan, and gather and maintain admission and immunization records for all children in care.[23]

18. Licensee obtained the additional training. From August 16, 2002, to March 5, 2003, Cardinal made six unannounced visits to Licensee’s home. She issued correction orders five of those times.[24]

19. On August 16, 2002, Licensee answered the door, leaving her son alone with the day care children downstairs. Cardinal did not write a correction order for that, but did write one for records that were missing that day.[25]

20. On November 5, 2002, Licensee answered the door, leaving a two month old infant on the sofa alone.[26] Licensee had been on the floor near the sofa playing with the older children. She felt there was no danger because the infant was too small to roll over. She admitted that she probably should have had the infant on the floor or in

an appropriate crib or device.[27] Cardinal wrote a correction order for this item under Minn. R. 9502.0435, subp. 6, because she considered it a hazardous activity.[28] She also wrote up two record-keeping violations she discovered that day.[29]

21. On November 21, 2002, Licensee was on the lower level when Cardinal arrived. As Cardinal observed through the glass in the door, Licensee went upstairs and picked up an infant before answering the door. Licensee's son was also on the second floor, alone with the infant.[30] Licensee had been upstairs with the infant and her son making pizza rolls and had just taken the pizza rolls down to the other children when Cardinal arrived.[31] Cardinal reminded Licensee of the supervision plan, but did not write a correction order.[32]

22. On January 29, 2003, Cardinal visited and found the lower level hallway and bedrooms (where day care children napped) dirty and extremely cluttered with laundry, clothes, and toys. She wrote a correction order for that and for not having a contract for a new family. The items were corrected when Cardinal returned two days later.[33]

23. On March 4, 2003, Cardinal made an unannounced visit and found Licensee with 13 children, three over her licensed capacity of ten. Nine of them were less than school age, one more than allowed under her license. Licensee testified that a parent was late picking up two children and that it did not happen very often.[34] Her own son had missed the school bus that afternoon and was not there when Cardinal arrived, or Licensee would have been even more over capacity. Cardinal also observed an infant sleeping in a car seat on the floor that was unbuckled. She wrote correction orders for over capacity, missing records, inappropriate activity for infant (sleeping in unbuckled car seat), and inappropriate equipment for infant (use of car seat). Cardinal was concerned that the infant could fall out of the car seat or be trampled by the other children.[35]

24. On March 5, 2003, Cardinal visited again. Licensee was within her licensed capacity, but Cardinal found Licensee's son's room to have been trashed—with clothes, toys, and bedding all over—while a preschooler was sleeping in a playpen in the room. Cardinal wrote a correction order citing it as "hazardous activity materials" under Minn. R. 9502.0435, subp. 6.[36]

25. On March 6, 2003, Cardinal wrote to the Department recommending that Licensee's Conditional License be revoked based upon the numerous health and safety concerns that had been ongoing issues in Licensee's home, as well as her previous history in Douglas County.[37]

26. On May 27, 2003, Cardinal conducted an unannounced relicensing visit. Licensee had 11 children in care that day, including two infants. Cardinal issued correction orders that day for over capacity, a missing handrail on the deck and stairs, plastic bag accessible to children in the kitchen, and a missing fire/storm drill log.[38]

27. On July 31, 2003, the Department issued the Order of Revocation, citing the supervision violations of leaving children unattended to answer the door or go from one level to the other; the over capacity violation of March 4, 2003; the infant sleeping space violation of March 4, 2003; the repeated sanitation and health violations regarding cluttered rooms and hallways; and the numerous and repeated record keeping violations. The Order informed her of her right to appeal and to a contested case hearing and the means for appealing.[39] Licensee properly appealed the revocation. The Notice of and Order for Hearing was served on Licensee by mail on September 18, 2003.

28. On August 27, 2003, Cardinal made another unannounced visit. When she arrived, a preschool girl who lived nearby was in the front yard waiting to be let in. Licensee, who already had ten children in care that day, lied to Cardinal and said the child had come to see if Licensee's daughter could play. Cardinal again found paper work missing and went to her car to write the correction order. Licensee came out to talk to Cardinal about their new puppy, leaving the ten children alone inside. Cardinal reminded Licensee that she had to go back in the house to supervise the children. As she worked on the correction order, Cardinal saw the neighbor girl return with her school-age brother and mother and enter Licensee's home. The mother left the home, then Licensee came out. The children had been left for day care and Cardinal had to tell Licensee they couldn't stay because it would make her over capacity. Cardinal saw the mother and told her that Licensee was over capacity. She took the two children. Licensee again came out of the house, leaving the children unattended, and told Cardinal she had thought the children were coming the next day. Cardinal wrote correction orders for missing paper work, over capacity, and failure to supervise.[40]

29. On October 31, 2003, Cardinal tried to call Licensee, but the phone had been disconnected. Cardinal wrote a correction order for not having a working phone.[41]

30. Licensee never requested reconsideration of any of the Orders of Conditional License or Correction Orders.[42]

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner have authority to consider and rule on the issues in this contested case pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. The Department must demonstrate reasonable cause existed to sanction the license. If the Department makes that showing, the burden of proof shifts to the licensee to demonstrate by a preponderance of the evidence that she was actually in compliance with the rules at the time the violations were alleged to have occurred.[43]

4. Under the Family Child Care rules, children in care must be “supervised” by a caregiver.[44] The level of supervision required varies with the age of the child. Supervision of an infant, toddler, or preschooler requires that the caregiver keep the child within sight or hearing at all times and be capable of intervening and protecting the health and safety of the child. Supervision of a school age child requires that the caregiver be available to protect the health and safety of the child.[45]

5. Licensee repeatedly failed to provide the level of supervision required by and in violation of Minn. Rules 9502.0365, subp. 5, and 9502.0315, subp. 29a, repeatedly placing the health and safety of children in her care at risk. In addition, Licensee failed to properly supervise her son, also placing the health and safety of children in her care at risk.

6. A provider licensed under Minn. R. 9502.0367 C.(1), such as Licensee, may care for up to 10 children, of which no more than eight may be under school age. Of the children under school age, no more than three may be infants and toddlers, and no more than two of those three may be infants. Licensee has violate this rule on several occasions by having more children in care than allowed by the rule.

7. Minn. R. 9502.0425, subp. 9, requires a safe, comfortable sleeping space for each infant or newborn. Licensee violated that rule by leaving a sleeping infant in an unbuckled car seat on the floor. That exposed the infant to dangers of falling and of being hurt by the other children playing nearby. Licensee had been given a correction order for napping a child in a car seat previously.

8. Minn. R. 9502.0435, subp. 1, requires the day care residence to be free of accumulations of dirt, rubbish, and peeling paint. The bedrooms cluttered with toys, clothing, and bedding on several occasions violated the rule. The accumulations of items, while not always “dirty,” were so severe as to make it difficult to enter and move about in the rooms, endangering the children who were placed there for naps.

9. Minn. R. 9502.0435, subp. 6, requires that knives, matches, plastic bags, and other potential hazards be kept out of the reach of infants, toddlers, and preschoolers and that the use of potentially hazardous materials and tools be supervised. Plastic bags were accessible to children in violation of the rule on one occasion. However, the November 5, 2002, incident of leaving an infant unattended on the couch to answer the door was not a violation of this rule. Cardinal reasoned that the couch was a hazard in this situation. But that interpretation is not consistent with a normal reading of the rule. A couch is not something you lock up or put out of the reach of children. As Cardinal did recognize, this was a failure to protect an infant from an obvious hazard. It was yet another failure by Licensee to recognize a hazard and to adequately supervise a child in care. Licensee had made herself temporarily not available to intervene to protect the health and safety of a child. This failure could have be written up under the supervision requirements of Minn. Rules 9502.0365, subp. 5, and 9502.0315, subp. 29a.

10. Minn. R. 9502.0405, subps. 3 and 4, and Minn. Stat. § 245A.145, require licensees to obtain, create, and maintain several types of records. Licensee repeatedly failed to obtain or create such records, in violation of the rules and statute.

11. Licensee's violations of the rules were serious and repeated, exposed children in her care to serious risk of harm to their health and safety, and justify imposition of disciplinary action.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Human Services take appropriate disciplinary action against the family day care license of Shari Boettner.

Dated: November 24, 2003

s/Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Minnesota Department of Health is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape recorded (2 tapes). No transcript prepared.

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[1] There is no allegation in this case that Licensee has a disqualification based upon that maltreatment determination.
[2] Ex. 23; Testimony of Cardinal.
[3] Ex. 25; Testimony of Cardinal.
[4] Ex. 26.
[5] Exs. 22 and 24.
[6] Exs. 10 and 27; Testimony of Cardinal and Licensee.
[7] Ex. 14.
[8] Ex. 10; Testimony of Cardinal.
[9] Testimony of Licensee and Dan Boettner.
[10] Exs. 15, 16, and 17.
[11] Testimony of Cardinal and Licensee.

[12] Ex. 10.
[13] Ex. 10.
[14] Exs. 10 and 18; Testimony of Cardinal.
[15] Ex. 10; Testimony of Cardinal.
[16] Testimony of Dan Boettner.
[17] Exs. 10 and 11; Testimony of Cardinal.
[18] Exs. 12 and 27; Testimony of Cardinal and Licensee.
[19] Exs. 19 and 20.
[20] Ex. 10.
[21] Ex. 21. On June 27, 2002, Licensee reported that she had corrected all those items.
[22] Ex. 13.
[23] Ex. 9.
[24] Ex. 2.
[25] Exs. 2 and 4.
[26] Testimony of Cardinal.
[27] Testimony of Licensee.
[28] Ex. 5; Testimony of Cardinal.
[29] Ex. 5.
[30] Ex. 2; Testimony of Cardinal.
[31] Testimony of Licensee.
[32] Ex. 2.
[33] Exs. 2 and 7.
[34] Testimony of Licensee.
[35] Exs. 2 and 6; Testimony of Cardinal.
[36] Exs. 2 and 8.
[37] Ex. 2.
[38] Ex. 28.
[39] Ex. 1.
[40] Exs. 3, 29, 30, 31, 32.
[41] Ex. 33.
[42] Testimony of Cardinal.
[43] Minn. Stat. § 245A.08, subd. 3(a).
[44] Minn. R. 9502.0365, subp. 5.
[45] Minn. R. 9502.0315, subp. 29a.