

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

In the Matter of the Indefinite Suspension of the License of Tatiana Bullock to Provide Family Child Care FINDINGS OF FACT, CONCLUSIONS, RECOMMENDATION AND MEMORANDUM

A hearing in this matter took place on March 31, 2004, in Minneapolis, Minnesota before Allan W. Klein, Administrative Law Judge. The record closed on May 20, upon receipt of the final submission from counsel.

Appearing on behalf of the Department of Human Services and the Ramsey County Community Human Services Department was David F. MacMillan, Assistant County Attorney, 50 West Kellogg Blvd., Suite 560, St. Paul, MN 55102-1556.

Appearing on behalf of Tatiana Bullock was Marc G. Kurzman, of the firm of Kurzman, Grant & Ojala, 219 S.E. Main Street, Suite 403, Minneapolis, MN 55414.

NOTICE

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 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 this 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 learn 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. 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 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.

STATEMENT OF ISSUE

Should the Order of Indefinite Suspension, which suspended the family child care license of Tatiana Bullock because of (1) the disqualification of her son who resides in the daycare home, which disqualification has not been set aside nor has a variance been granted, and (2) the son's failure to answer questions during the investigation, be affirmed?

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

FINDINGS OF FACT

Procedural History

1. On July 9, 2003, an incident occurred in the Bullock daycare facility. Licensee's 13-year old son, K.B., had sexual contact with a 7-year old daycare child, J.H. Tatiana Bullock promptly notified the Ramsey County Community Human Services Department ("RCCHS") of the incident. RCCHS and Ramsey County Child Protection immediately investigated the report, and on July 21, 2003, RCCHS recommended that the license be immediately suspended.^[1] On July 22, 2003, the Department issued an Order of Temporary Immediate Suspension based upon the allegation of maltreatment and also based upon licensee's alleged failure to cooperate with RCCHS during the course of the investigation.^[2] Licensee appealed the temporary immediate suspension, and a hearing was held on August 6, 2003 before Richard C. Luis, Administrative Law Judge. On September 9, 2003, the Commissioner issued an Order Affirming the Temporary Immediate Suspension of the family daycare license.^[3] Licensee then appealed that Order to the Court of Appeals. The Court of Appeals affirmed the issuance of the Order in an unpublished decision dated June 8, 2004.^[4]

2. On September 18, 2003, RCCHS determined that on July 9, K.B. had seriously maltreated a child in care and sent a letter indicating that he was disqualified from any position allowing direct contact with or access to persons receiving services from a licensed program.^[5] The notification letter indicated that he could request a reconsideration of the maltreatment decision by the county. He was also notified of a right to request reconsideration of the disqualification. No request for reconsideration of either determination was filed.^[6]

3. On October 15, 2003, RCCHS determined that K.B. was also disqualified because a preponderance of evidence demonstrated that he had committed criminal sexual conduct, fifth degree. He was notified of his right to request reconsideration of the disqualification.^[7] On October 22, 2003, K.B. did request reconsideration of the October 15 disqualification.^[8]

4. On January 12, 2004, the Department issued an Order of Indefinite Suspension indicating that the request for reconsideration had led to a determination that the disqualification should not be set aside and that a variance should not be

granted.^[9] The order went on to note that because K.B. is disqualified, and because Licensee failed to fully cooperate with the investigation, the license to provide family child care was indefinitely suspended. The notice went on to suggest that when K.B. no longer resides in the home, RCCHS could review the situation to determine whether the suspension should be lifted. Finally, the notice stated Licensee's right to appeal the decision, and that a consolidated contested case hearing could be held regarding both the suspension and the decision not to set aside the disqualification.

5. The consolidated hearing did, in fact, take place on March 31. Both sides were ably represented by counsel.

6. Prior to the March 31 administrative hearing, a criminal trial had been held concerning the same incident. By Order dated April 16, 2004, the Ramsey County Juvenile Court found, after a trial on the merits, that it had been shown by proof beyond a reasonable doubt that K.B. had committed acts which constituted criminal sexual conduct in the second degree.^[10] By agreement between counsel, the transcript of that juvenile criminal proceeding is part of the record in this administrative hearing.^[11] Similarly, the Findings of Fact, Conclusions of Law and Order issued by Judge Rosanne Nathanson has been provided to the Administrative Law Judge.^[12] The Administrative Law Judge has reviewed the transcript and the decision, and concludes that K.B. is now collaterally estopped from relitigating the question of whether or not the incident actually occurred.^[13] The Administrative Law Judge finds that the juvenile criminal proceeding was thorough (10 witnesses over parts of five different days) and Judge Nathanson had an opportunity to observe the demeanor of Licensee and her son. The hearing before the Administrative Law Judge was much shorter (less than half a day and only one witness) and did not allow for credibility determinations of K.B. or anyone else present in the home at the time of the July 9 incident. The Administrative Law Judge has no reason to doubt Judge Nathanson's Findings or Conclusions, and adopts them as his own.

The July 9 Incident and Investigation

7. On July 9, 2003, Licensee decided to have the children watch a video because it was raining at the time.^[14] J.H., a girl who was then 7 years old and Licensee's son, K.B., who was then 13 years old, sat next to each other on a couch while the video was playing. K.B. reached over and unsnapped and unzipped J.H.'s pants and placed his hand under her underwear and touched her vaginal area. She then got up and began to walk toward the bathroom. He got up and followed her, and went into the bathroom with her, closing and locking the door. He began to fondle her vaginal area. Drawn by the sound of the bathroom door being locked, Licensee immediately came to the bathroom door, discovered the two children in there and asked what was happening. J.H. told Licensee that K.B. had touched her privates. K.B. denied doing that, but Licensee immediately sent him to his room, and stepped out of the bathroom while J.H. used it. When J.H. came out of the bathroom, Licensee asked her to tell her what had happened, and J.H. again told Licensee that K.B. had touched her improperly. Licensee then called J.H.'s mother, and asked her to come and pick up her children (J.H. and her brother). Licensee called her licensing worker at RCCHS and

left a message (actually two messages) indicating that something serious had happened and that the worker should call her immediately.

8. It was the morning of the next day, July 10, when Kristin Vorpahl, a social worker at RCCHS, received the messages. She returned them, and spoke with Licensee. Licensee told her what had happened, but that her son denied doing anything wrong. Ms. Vorpahl called Ramsey County Child Protection and alerted them to the matter. She also spoke with J.H.'s mother, who basically confirmed what Licensee had told her, but added some additional information that her daughter had given her later in the evening. Vorpahl typed up a report and took it over to Child Protection. Later that day, Elmer Mack, a child protection worker, came to Vorpahl's office to let Vorpahl know that he would be investigating the matter. The next day, Vorpahl supplied Mack with a list of the names and addresses of all the parents whose children were attending Licensee's facility, and Mack began to set up interviews with them and others present in the home on July 9. During the next week (which began on July 14), Mack kept in touch with Vorpahl on a daily basis.

9. On or about July 15, Mack visited Licensee's home, and spoke with Licensee's husband, her son, K.B., and Dirk Schweigert, an attorney representing her son. K.B.'s father had hired Schweigert to represent K.B. Either at the meeting on the 15th, or at a different visit to the home near that time, Licensee had showed Mack around the house, showed him the living room and bathroom where the incidents had occurred, and introduced him to an adult assistant (Marina Shubina) whom he questioned. But on July 15, when Mack attempted to question K.B., Schweigert advised K.B. not to answer any questions, and K.B. advised Mack that he would not answer any questions.^[15]

10. Mack returned to the RCCHS office and informed Vorpahl that K.B. had refused to answer questions upon advice from an attorney. Vorpahl informed personnel at the State Department of Human Services of the situation, and Kristin Johnson, a supervisor, informed Vorpahl that it was the position of the Department that Minn. Stat. § 245A.04, subd. 5 and Minn. Rule 9502.0335, subp. 13, required the Licensee to cooperate with an investigation and that K.B.'s unwillingness to be interviewed constituted a violation of the statute and the rule. Johnson told Vorpahl that she would fax a memo to Vorpahl which Vorpahl was to hand-deliver to Licensee.^[16] Johnson did fax the memo to Vorpahl, and Vorpahl and Mack delivered it to Licensee in person.^[17] That occurred on Friday afternoon, July 18. Vorpahl told Licensee that she had until 10:00 on Monday morning to decide whether or not K.B. would be interviewed. Licensee responded that it was the lawyer's recommendation that her son not talk to investigators. On Monday morning, Licensee called Vorpahl and indicated that she (Licensee) felt she was in compliance with the statute and the rule by allowing access to her home, and by allowing Mack to meet her son, but that she couldn't control whether or not her son would talk to Mack.^[18] Vorpahl called Licensee back and explained that the state had advised Vorpahl that if K.B. would not talk with the investigators, the state viewed that as the license holder's failure to cooperate with an investigation, and that they would want a recommendation from Vorpahl for an immediate suspension of the license. Licensee responded that she felt that she was in compliance, and that Vorpahl

would have to do whatever she had to do.^[19] On that day, Vorpahl made the recommendation for an immediate suspension, and the next day the Department issued an Order of Temporary Immediate Suspension.^[20]

11. There is no evidence that either Licensee or her husband counseled their son not to speak with the investigator. In fact, her husband testified that when Mack asked whether he could speak with K.B., he (Licensee's husband) gave his permission.^[21] When asked why he had not told his son to ignore the lawyer's recommendation, he stated that "we [he and his wife] decided that we're not knowledgeable enough in the area to contradict his [the lawyer's] advice."^[22]

Licensee's Proposal for GPS Monitoring

12. At the hearing, and in post-hearing submissions, Licensee has consistently agreed to keep her son out of the house whenever daycare children are present. This has been her agreement since July 10, and there is no suggestion in the record that she violated that agreement. Her daycare operation was shut down by the Order of Immediate Suspension on July 22. At the hearing, and in post-hearing briefing in this administrative appeal, Licensee has suggested that GPS (Global Position System) technology be used to monitor K.B.'s absence from the daycare facility. Licensee points out that this technology is being used by Ramsey County to monitor certain sexual predators, and that there are a number of vendors offering equipment and services. Both Licensee and Ramsey County have submitted information from vendors as to what is available.^[23]

13. There are two basic GPS monitoring systems discussed in the materials submitted to the Administrative Law Judge. One is "passive" while the other is "active." The passive system involves the wearing of a GPS tracking device which records the person's whereabouts on a computer chip, which then can be downloaded into a reporting system for later review. That would enable Ramsey County (or any other designated monitoring agency) to determine whether or not K.B. had been at the facility, and when he had been there. This passive system does not provide real time notification if K.B. goes to the facility during hours when he is not supposed to be there. That "incident" would only be discovered well after the fact, when the material was downloaded and reviewed. To the extent the Commissioner is seeking immediate notification if K.B. enters the facility during certain designated hours, this passive system does not provide that immediacy.

14. The "active" GPS system does provide real time notification of the individual's location, and can alert personnel if a person enters a certain designated area during certain designated times. It requires two separate pieces of equipment. The first is a small ankle transmitter (approximately the size of a pack of playing cards), worn by the person. The second piece of equipment is somewhat larger, being two inches wide, four inches tall, and six inches thick (approximately the size of a small paperback book). It weighs 3.8 pounds.^[24] It uses a wireless network to report the

person's location at all times. The vendor, Pro Tech, can monitor the information on a real time basis. An "exclusion zone" can be programmed into the system, along with "exclusion hours," so that if the wearer enters the exclusion zone during the exclusion hours, an alarm is sounded at the Pro Tech tracking center, and personnel there can telephone designated people to report a violation of the exclusion rule. For example, if the exclusion rule were violated and K.B. went to his house during the designated exclusion hours, an alarm would sound at the Pro Tech tracking center. A person there would telephone RCCHS (or the Ramsey County Sheriff, or whomever has been designated) to report the incident. It would then be up to someone in Ramsey County to investigate the matter and take action. The portable tracking device must be kept within 125-150 feet of the ankle transmitter. That would mean, as a practical matter, that K.B. would have to carry it around with him at all times. Licensee has indicated that she is willing to pay all costs and fees associated with the monitoring.^[25] See, Memorandum.

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 in this matter pursuant to Minn. Stat. § § 14.50 and 245A.07, subds. 1 and 3, as well as 245A.04, subd. 5.

2. The Department gave proper and timely notice of the hearing, and has complied with all substantive and procedural requirements.

3. Minn. Stat. § 245A.07, subd. 1 allows the Commissioner to suspend a license when the license holder does not "comply with applicable law or rule." That subdivision further provides that when applying sanctions authorized under the 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."

4. Minn. Stat. § 245A.07, subd. 3 provides that the Commissioner may suspend a license if a license holder "fails to comply fully with applicable laws or rules, or knowingly withholds relevant information from ... the Commissioner ... during an investigation."

5. Minn. Stat. § 245A.04, subd. 5 requires that the Commissioner "must be given access to the physical plant and grounds where the program is provided, documents, persons served by the program, and staff whenever the program is in operation ... failure or refusal of an applicant or license holder to fully comply with this subdivision is reasonable cause for the Commissioner to ... immediately suspend ... the license."

6. Minn. Rule pt. 9502.0335, subp. 13(c) requires providers to give authorized representatives of the Commissioner access to the residence during the hours of operation, including "non-interference in interviewing all caregivers and household

members present in the residence on a regular basis and present during the hours of operation.”

7. Minn. Rule pt. 9502.0335, subp. 6(D) provides that a license shall be suspended if a person living in the daycare residence or present during the hours children are in care has a disqualification under Minnesota Statutes Section 245C.14.

8. Minn. Stat. § 245C.14, subd. 1, provides that the Commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with persons receiving services upon receipt of information showing a conviction to one or more crimes listed in Section 245C.15; or a preponderance of the evidence indicates that the individual has committed an act or acts that meet the definition of any of the crimes listed in Section 245C.15, unless the Commissioner has set aside the disqualification or a variance has been granted.

9. Minn. Stat. § 245A.08, subd. 2a(e) provides that in the case of the disqualification of an individual other than the license holder, where the maltreatment determination or disqualification was not set aside or was not rescinded and is the basis for a licensing sanction, then the hearings of all parties may be consolidated into a single contested case hearing upon consent of all parties and the Administrative Law Judge. In this case, K.B.’s disqualification (the decision not to set it aside) and the indefinite suspension of the license were consolidated with the consent of all parties and the Administrative Law Judge.

10. K.B. is disqualified because he has been found, beyond a reasonable doubt, to have committed criminal sexual conduct in the second degree. K.B. lives in the daycare residence. Minn. Rule pt. 9502.0335, subp. 6, quoted above, therefore requires revocation or suspension of the license.

11. There is no statute, rule, or controlling Court decision cited in this record which permits a negative licensing action when a person living in the daycare residence refuses to answer questions upon advice of counsel during an investigation. Neither Minn. Stat. § 245A.07 nor Minn. Rule pt. 9502.0335, subp. 13 authorizes a negative action under the circumstances of this case.

12. Minn. Stat. § 245C.22, subd. 4 contains standards for the Commissioner’s set aside of a disqualification. It generally provides that the Commissioner must find that the individual does not pose a risk of harm to a person served by the license holder, considering eight specified factors. That same statute, in subdivision 3, directs the Commissioner to “give preeminent weight to the safety of each person served by the license holder ... over the interests of the license holder” Using that standard, and the criteria listed in subdivision 4(b), the Administrative Law Judge cannot conclude that K.B. does not pose a risk of harm to the children served by the program. Despite advances in GPS technology, the infrastructure supporting its use in the case of a daycare program does not give adequate assurance that the risk of harm has been eliminated.

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

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner's Order of Indefinite Suspension be AFFIRMED.

Dated this 21st day of June 2004.

s/Allan W. Klein

ALLAN W. KLEIN
Administrative Law Judge

Recorded: Tape recorded.
No transcript prepared.

MEMORANDUM

This is the second hearing concerning the incident of July 9 at the Bullock daycare facility. First, there was a hearing on the temporary immediate suspension, which resulted in a final order affirming it. However, in that final order, the Commissioner made it clear that the standard used in a temporary immediate suspension is different from the standard to be used in a subsequent licensing action. The issue in the first hearing was whether or not the temporary immediate suspension should remain in effect pending the Commissioner's final order on a licensing sanction. In the temporary immediate suspension proceeding, the Commissioner concluded that the suspension must remain in effect because of the serious nature of the alleged maltreatment and the risk of harm to persons served by the program.

The most difficult question posed by this second proceeding is whether or not Licensee ought to be given a chance to operate her facility so long as K.B. stays out of the house. Licensee has stated, since early in July of 2003, that she would keep her son out of the house while any daycare children were present. For the 10 days that the facility remained in operation before the Temporary Immediate Suspension, she succeeded in keeping him out of the house when daycare children were present. She has indicated that if given a chance, she would be sure that he was never in the house when the children were present, and she has agreed to incur the fairly substantial financial cost of GPS monitoring, even "active" GPS monitoring if required, in order to verify her compliance. The County, however, argues that even if she were to pay for

the active GPS monitoring, there is no assurance that a daycare child might not arrive early, or remain later than the exclusion hours programmed into the device. The County fears that K.B. might become ill at school, and be sent home. The County points out that there are numerous school holidays and vacations, including summer vacation, when K.B. would have to be excluded from home. The County points out that even under the best of circumstances, if the GPS device indicated a violation, by the time a worker could leave the RCCHS office in downtown and drive to Ms. Bullock's house (which is in New Brighton), there would have been more than enough time for a second incident to occur. The County's final memorandum suggests that the only way it believes that Licensee could resume her work would be if she did it in a different location away from the family home.

The Administrative Law Judge cannot really argue with the County's concerns, even though he believes the risk of K.B. being allowed in the home while children are present is extremely low. Coupling that low risk with the low risk that K.B. would repeat his sexual conduct leads to a conclusion that the likelihood of a repeat incident is negligible. But the Administrative Law Judge is not the Commissioner, and given the statutory preeminence afforded to protecting the children, he cannot say that the Commissioner's initial decision not to set aside the disqualification is erroneous. The decision not to grant a variance is not appealable in this hearing. See Minn. Stat. § 245C.30, subd. 5.

The Administrative Law Judge cannot agree with the Commissioner, however, that Licensee failed to cooperate in the investigation. Licensee showed real foresight in retaining an attorney for her son promptly after the incident occurred. The subsequent criminal prosecution (actually, a juvenile proceeding) showed that there was good cause for serious concern about what might happen to her child. The first Administrative Law Judge report^[26] contains a thorough legal analysis, which is adopted for purposes of this proceeding. The long and short of the matter is that the clear language of both the statute and rule do not require the Licensee to force someone (other than the Licensee) to answer questions. In this case, there was a clear divergence of interests between the mother and the son. To force the son to answer questions which might well lead to his criminal prosecution by using the threat that if he did not answer, his mother's livelihood would be taken away, is simply not permissible. And in this particular case, it was not necessary. The mother had already reported the incident, and the victim had been providing verification (and additional information) to the investigators. Despite the son's denials, the investigators had a pretty accurate idea of what had happened, and they were able to proceed without his answering any questions.

The plain language of the statute and the rule do not require the son to answer questions. If the Commissioner wants to attempt to achieve that result, then the rule must be amended to require it. But, under the current language, it just is not required.

^[1] Test. of Kristin Vorpahl, *Bullock I*, Tr. P. 41. This is the transcript of the August 6, 2003 hearing before ALJ Richard C. Luis on the Temporary Immediate Suspension, OAH Docket No. 7-1800-15505-2. At the time of the March 31, 2004 hearing, counsel agreed to the use of this transcript in lieu of recreating the testimony.

^[2] *Id.* At pp. 41-42; Findings of Fact, Conclusions and Recommendation dated August 25, 2003 from ALJ Richard C. Luis, as amended by the Commissioner's Order of September 9, 2003 in OAH Docket No. 7-1800-15505-2.

^[3] *Id.*

^[4] In the Matter of the Temporary Immediate Suspension of the Family Child Care License of Tatiana Bullock, Case No. A03-1536 issued June 8, 2004 (Minn. App.)(unpublished).

^[5] Ex. 4.

^[6] Ex. 9, at p. 3.

^[7] Ex. 7.

^[8] Ex. 8.

^[9] Ex. 9.

^[10] Findings of Fact, Conclusions of Law and Order, In Re the Welfare of Konstantin Bullock, Ramsey Co. Juvenile Court File No. JX-03-554659, filed April 16, 2004.

^[11] Letters dated March 26, 2004 from MacMillan and Kurzman.

^[12] See Footnote 10.

^[13] Travelers Insurance Company v. Thompson, 281 Minn. 547, 163 N.W. 2d 289 (1968); In the Matter of the Welfare of M.D.O., 462 N.W. 2d 370 (Minn. 1990).

^[14] Ex. 1 (Juvenile Proceeding Transcript) March 2, 2004, at p. 34.

^[15] Op. cit., Footnote 2, Finding 5; see also Footnote 21.

^[16] Testimony of Kristin Vorpahl, *Bullock I*, Tr., P. 38.

^[17] *Id.*, p. 39.

^[18] *Id.*, p. 40.

^[19] *Id.*, p. 41.

^[20] *Id.*, pp. 41-43.

^[21] Test. of William Bullock, *Bullock I*, Tr. Pp. 79-82.

^[22] *Id.*, p. 83.

^[23] See letter from Marc G. Kurzman dated April 8, 2004 and Ex. 1 attached to Commissioner's Argument by David F. MacMillan dated May 17, 2004.

^[24] *Id.*, Kurzman letter of April 8, 2004.

^[25] Letter from Marc G. Kurzman dated May 19, 2004.

^[26] Op. cit. at Footnote 2.