

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES**

In the Matter of the Order to Forfeit a Fine
against the License of Judith Teed
2136 County Road 10 SE
Dover, MN 55929

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

to provide family child care under Minnesota
Rules, parts 9502.0300 to 9502.0445

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 10:00 a.m. on Wednesday, June 9, 2004, at the Olmsted County Attorney's Office, 3rd Floor Government Center, 151 4th Street, S.E., in Rochester, Minnesota. The OAH record closed when the hearing ended on June 9, 2004.

Geoffrey A. Hjerleid, Assistant Olmsted County Attorney, 3rd Floor Government Center, 151 4th Street, S.E., Rochester, Minnesota 55904-3710, appeared at the hearing as attorney for Olmsted County (the County). Judith Teed, 2136 County Road 10 S.E., Dover, Minnesota 55929, was not represented by an attorney and appeared at the hearing on her own behalf.

**THESE FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS
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.

The record of this contested case proceeding 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. 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.^[2]

STATEMENT OF THE ISSUE

Whether or not Ms. Teed should forfeit a fine of \$200 for violating a licensing statute prohibiting use of a substitute caregiver for whom a background study had not been initiated.

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

FINDINGS OF FACT

1. During all times important to this proceeding, Judith Teed, resided at 2136 County Road 10 S.E., Dover, Minnesota 55929. Since 1995, Mrs. Teed has been licensed to provide Class C3 group family child care at that address. She currently has twelve children under care.^[3]

2. On July 1, 2003, Angela Jensen, a social worker employed by the County to license child care homes, conducted an interview with Ms. Teed about a number of issues relating to Ms. Teed's license to provide family day care. During the course of that interview, Ms. Jensen asked Ms. Teed to identify any substitute care givers who had assisted in providing day care services. At that time, Ms. Teed identified four persons—namely, individuals named Gloria, Melissa, and Aloha, and a fourth individual, K.Y.^[4]

3. On July 9, 2004, K.Y. prepared a Parent Evaluation of Family Day Care Home Services that was subsequently submitted to the County. Question No.18 of the evaluation form asked the following questions, to which K.Y wrote the following answers:

QUESTION: "Do you know of or have you observed a helper or substitute assisting with the day care children?"

ANSWER: "Yes."

QUESTION: "Was the provider present at the time?"

ANSWER: "Sometimes."

QUESTION: If your answer is "YES," please list name(s):

ANSWER: Gloria Fortsch, Missy Fortsch or myself.

QUESTION: How often is a substitute or helper used?

ANSWER: Mainly only for outings away from home or if Judy has a funeral.

4. Based on the interview that Ms. Jensen conducted with Ms. Teed and the written comments recorded in the parent evaluation form that the County received from K.Y., the County issued a correction order to Ms. Teed on July 11, 2003, that, among other things, cited her for a violation of Minnesota Rules, part 9543.3040, based on Ms. Teed's use of K.Y. as a substitute without first having requested a background check on K.Y. ^[5]

5. Ms. Teed responded to the County's correction order on September 2, 2003, asserting that K.Y. "was used as a shapperone (sic) not a substitute."

6. On one occasion prior to July 11, 2003, K.Y. accompanied Ms. Teed and the children under her care to a parade being held in conjunction with a local town festival. During the parade, K.Y. was involved in supervising some of the children under Ms. Teed's care. But the child that K.Y. primarily supervised on that occasion was K.Y.'s own child, and all of K.Y.'s supervision occurred in the presence of Ms. Teed. ^[6]

7. On another occasion, after K.Y. arrived at Ms. Teed's day care home to pick up her own child, K.Y. helped prepare a meal while Ms. Teed was supervising the children under care. ^[7]

8. At no time did K.Y. act as a substitute care giver for Ms. Teed while Ms. Teed was attending a funeral. ^[8]

9. On September 4, 2003, the County submitted a written recommendation to the Department to make Ms. Teed's license conditional for a period of six months. The recommendation was based primarily on two incidents that occurred on November 22, 2002, and June 26, 2000, but also on "other licensing violations," which included the use of a substitute care giver without first obtaining a background check as set forth in the correction order of July 11, 2003. ^[9]

10. On February 25, 2004, the Department served Ms. Teed with a combined Order to Forfeit Fine and Order of Conditional License. ^[10] The Order to Forfeit Fine fined Ms. Teed the sum of \$200 based on the following violation

"Violation: The licensing worker determined that you were using a substitute caregiver (K.Y.) for which a background study had not been initiated. You were issued a correction order on August 18, 2003, for this violation.

11. On March 22, 2004, Ms. Teed submitted a written appeal of the Order to Forfeit Fine, and she requested a contested case hearing.^[11]

12. On March 30, 2004, the Department issued and served Ms. Teed with a Notice of Hearing in this matter, and this contested case proceeding ensued.

13. 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.

14. 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.

15. 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 authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations or a final order, as the case may be.^[12]

2. The Department and the County gave proper and timely notice of the hearing, and it has also fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

3. The Department has the burden of demonstrating reasonable cause for the negative licensure actions taken against Ms. Teed's family day care license.^[13] And at the hearing, the Department did establish reasonable cause for its negative licensure action.

8. Because the Department established reasonable cause for the action taken, Ms. Teed has the burden of proving by a preponderance of the evidence that she was in full compliance with the licensure statutes or rules that the Department alleges were violated at the time those violations allegedly occurred.^[14]

9. Minnesota Statutes, section 245C.03, subdivision 1, provides, in part, that:

Subdivision 1. **Licensed programs.** The commissioner shall conduct a background study on:

* * *

(1) the applicant;

(2) an individual age 13 and over living in the household where the licensed program will be provided;

(3) current employees or contractors of the applicant who will have direct contact with persons served by the facility, agency, or program;

(4) volunteers or student volunteers who will have direct contact with persons served by the program to provide program services if the contact is not under the continuous, direct supervision by an individual listed in clause (1) or (3);

10. Minnesota Statutes, section 245C.04, subdivision 1(d), provides that:

(d) Applicants for licensure, license holders, and other entities as provided in this chapter must submit completed background study forms to the commissioner before individuals specified in section 245C.03, subdivision 1, begin positions allowing direct contact in any licensed program.

11. Minnesota Statutes, section 245C.02, subdivision 11, defines "direct contact" as:

Subd. 11. **Direct contact.** "Direct contact" means providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to persons served by the program.

12. A preponderance of the evidence established that Ms. Teed had not submitted a completed background study form to the Commissioner for the individual, K.Y., whom the Department alleges was a substitute caregiver under Minnesota Statutes, section 245C.04, subdivision 1(d).

13. Ms. Teed established by a preponderance of the evidence that at the times relevant to this proceeding, K.Y. was not a current employee or contractor of hers who had direct contact with persons served by Ms. Teed's family child care program within the meaning of Minnesota Statutes, section 245C.03(3).

14. A preponderance of the evidence established that at the times relevant to this proceeding, K.Y. was occasionally a volunteer who had direct contact with persons served by Ms. Teed's family child care program within the meaning of Minnesota Statutes, section 245C.03(4). But Ms. Teed established by a preponderance of the evidence that at those times, K.Y. was under Ms. Teed's continuous, direct supervision.

15. Mrs. Teed therefore established by a preponderance of the evidence that she was in full compliance with Minnesota Statutes, section 245C.04, subdivision 1(d), at the times the Department alleged that she had violated that statute.

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

17. 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 therefore respectfully RECOMMENDS that the Commissioner DISMISS the Department's Order to Forfeit a Fine dated February 25, 2004.

Dated this 16th day of June 2004.

S/ Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

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

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NOTICE

Under Minnesota law,^[15] the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

There was no dispute over the fact that during the times germane to this proceeding, Ms. Teed had not submitted a completed background study form to the Department for K.Y., as required by Minnesota Statutes, section 245C.04, subdivision 1(d). Rather, the question is whether or not K.Y. was a person for whom the law required a background study.

In an interview with Ms. Teed on July 1, 2003, County licensing worker Angela Jensen indicated that Ms. Teed had identified K.Y. as a “substitute caregiver.”^[16] But there was no evidence that Ms. Teed herself had used that term to describe K.Y. Rather, the evidence suggested that “substitute caregiver” was a term Ms. Jensen had used to describe what she believed K.Y.’s association with Ms. Teed had been. Moreover, Ms. Teed’s testimony and her subsequent actions tended to establish that Ms. Teed did not clearly understand what Ms. Jensen had meant by “substitute caregiver” and what the legal implications of such a characterization might be.

The other evidence that the County and Department rely on to establish a violation of Minnesota Statutes, section 245C.04 was a parent evaluation form that K.Y. herself completed and submitted to the County.^[17] In response to questions posed in Item 18, K.Y. indicated that she had observed “a helper or substitute assisting with day care children,” and that Ms. Teed was present while this was occurring “sometimes.”^[18] When asked if she knew the name of the substitute or helper, K.Y. identified “Gloria Fortsch, Missy Fortsch or myself.” And when asked how often a substitute or helper was used, K.Y. responded: “Mainly only for outings away from home or if Judy has a funeral.”^[19] Notes and recollections of what was said during the July 1, 2003, interview and what was written on K.Y.’s evaluation form were all of the evidence that the County relied on in making its recommendation to the Department.^[20] And although ambiguities in that evidence fall short of substantiating the charge that Ms. Teed violated Minnesota Statutes, section 245C.04, it did establish reasonable cause, which shifted the burden of proof onto Ms. Teed.

First of all, the language used in the interview and in the evaluation form to described K.Y.’s association with Ms. Teed’s child care program is ambiguous. Neither “substitute caregiver,” “helper,” nor “substitute” has any defined legal meaning in Chapter 245C. Rather, Minnesota Statutes, section 245C.03, subdivision 1, identifies six classes of persons for whom the Commissioner must conduct background studies. But none of those six classifications employs the terms “substitute caregiver,” “helper,” or “substitute.” So using any one of those terms to describe a person involved with a family child care program is insufficient, by itself, to determine whether or not that person needs to have a background study.

Minnesota Statutes, section 245C.03, subdivision 1(3), requires “current employees or contractors of the applicant who will have direct contact with persons served by the facility, agency, or program” to have a background study. But there was no evidence in the record to establish or even to support an inference that K.Y. was ever an employee or contractor of Ms. Teed in connection with the operation of her child

care program. To the contrary, Ms. Teed testified that K.Y. was only involved with her program as a volunteer on two occasions—once when K.Y. helped make dinner while Ms. Teed was supervising the children in care and a second time when K.Y. accompanied Ms. Teed and her children in care on a field trip to a local parade.^[21]

Minnesota Statutes, section 245C.03, subdivision 1(4), requires “volunteers ... who will have direct contact with persons served by the program” to have a background study. The law defines “direct contact” as “face-to-face care, training, supervision, counseling, consultation, or medication assistance to persons served by the program.” So, even though K.Y. may have assisted by preparing dinner while Ms. Teed was directly involved with the children in care, that kind of involvement with the program falls short of the statutory definition of direct contact, which requires face-to-face involvement with children under care

On the other hand, if K.Y. actually had supervised and cared for children under care while Ms. Teed was absent at a funeral, the law would have required K.Y. to have a background study pending or completed. But what K.Y. wrote on her evaluation form in that respect was ambiguous. K.Y. did not explicitly indicate that she had been the substitute while Ms. Teed was at a funeral.^[22] Rather, a preponderance of the evidence established that the substitute caregiver on any such occasion was someone other than K.Y. After receiving the evaluation, the County did not seek further information to determine which of the three individuals identified by K.Y. may have acted as a substitute while Ms. Teed was at a funeral.

Finally, Minnesota Statutes, section 245C.03, subdivision 1(4), requires volunteers having contact with children under care to have background studies, but only “if the contact is not under the continuous, direct supervision by [the licensee, among others].” Ms. Teed testified that K.Y. had once accompanied her and the children under care to a parade. Although Ms. Teed indicated that K.Y. had primarily accompanied and supervised her own child, one could at least infer that K.Y. had also been involved in supervising some of the other children under care. But even if that were the case, the evidence established that any supervision that K.Y. may have provided was done in Ms. Teed’s presence and, therefore under her direct supervision. A statement by K.Y. corroborated Ms. Teed’s testimony in that regard. In short, K.Y.’s volunteer activities on that occasion did not require her to have a background study.

In short, the ALJ concludes that Ms. Teed did establish by a preponderance of the evidence that K.Y. did not perform any activities as a volunteer caregiver that required K.Y. to have a pending or completed background study. Ms. Teed therefore established by a preponderance of the evidence that she was in full compliance with Minnesota Statutes, chapter 245C, with respect to the charge asserted in the Order to Forfeit Fine, and the ALJ recommends that the Order be dismissed.

B. H. J.

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

^[2] See Minnesota Statutes, section 14.62, subdivision 2a.

^[3] Testimony of Judith Teed; Exhibit 4.

^[4] Testimony of Angela Jensen; Exhibit 1. Ms. Teed testified that she did not recall identifying K.Y. as a substitute care giver during that conversation with Ms. Jensen. But even if one accepts Ms. Jensen's recollection of the conversation, it would not affect the outcome of this matter. See discussion in the Memorandum that follows.

^[5] Testimony of Angela Jensen; Exhibit 5, Attachment 5. The 2001 legislature repealed Minnesota Rules, part 9543.3040 and replaced it with Minnesota Statutes, Chapter 245C effective July 1, 2001. In any event, when the Department issued its Order to Forfeit a Fine on February 25, 2004, it properly cited as authority a violation of Minnesota Statutes, sections 245C.03 and 245C.04.

^[6] Testimony of Judith Teed.

^[7] Testimony of Judith Teed.

^[8] Testimony of Judith Teed.

^[9] Testimony of Angela Jensen; Exhibit 5. The letter to the Commissioner and many of the attachments contain information relating to other alleged licensure violations committed by Ms. Teed. But the Department's Order to Forfeit Fine is based only on allowing a person without a background check to have "direct contact" with children within the meaning of Minnesota Statutes, section 245C.02, subdivision 11. The ALJ therefore concluded that any evidence of other alleged licensure violations was irrelevant in this particular contested case proceeding.

^[10] There is no right of appeal of an Order of Conditional License in a contested case proceeding under Chapter 14, so only the Order to Forfeit Fine is at issue here.

^[11] Exhibit A.

^[12] Minnesota Statutes, sections 14.50, 14.57, 14.69, and 245A.01 through 245A.16.

^[13] Minnesota Statutes, section 245A.08, subdivision 3.

^[14] Minnesota Statutes, sections 245A.08, subdivision 2a.

^[15] Minnesota Statutes, section 14.62, subdivision 1.

^[16] Exhibit 2; testimony of Angela Jensen.

^[17] Exhibit 3.

^[18] Exhibit 3.

^[19] Exhibit 3.

^[20] After receiving the evaluation form, the County apparently never conducted a follow-up interview of K.Y. to determine what her exact involvement with Ms. Teed's child care program might have been. Additionally, the County received K.Y.'s evaluation form on or after July 9, 2002—after its July 1st interview with Ms. Teed. After receiving that evaluation, the County apparently did not re-interview Ms. Teed for additional information or explanation.

^[21] Testimony of Judith Teed.

^[22] In her testimony, Ms. Teed expressly denied using K.Y. as a substitute while she was absent at a funeral. And in a written (but unsworn) statement, admitted into evidence without objection, K.Y. stated that she "was never by myself or in charge of the children." (Exhibit B)