

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Maltreatment
Determination, Disqualification Not Set
Aside, and Revocation of the Family
Child Care License of Kelly McMahon-
Bloch

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

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 27 and 28, 2004, at the Washington County Government Center in Stillwater, MN. The record closed on November 15, 2004, upon receipt of post-hearing submissions from the parties.

Nancy C. Nelson, Assistant Washington County Attorney, Washington County Government Center, 14949 – 62nd Street North, P.O. Box 6, Stillwater, MN 55082-0006, appeared for the Minnesota Department of Human Services (Department) and Washington County Community Services Department (County).

Louise Miller O'Neil, Attorney at Law, 701 Summit Avenue, St. Paul, MN 55105, appeared for Kelly McMahon-Bloch (Licensee).

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. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon 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 Department 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 ISSUES

Whether the determination of maltreatment by neglect based upon circumstances surrounding a burn injury sustained by one of Licensee's daycare children should be affirmed? The Administrative Law Judge concludes that it should.

Whether the disqualification of Licensee based upon the finding of serious maltreatment should be affirmed? The Administrative Law Judge concludes that it should.

Whether the disqualification of Licensee should be set aside? The Administrative Law Judge concludes that by law it cannot be set aside.

Whether the revocation of Licensee's Family Child Care license based upon the maltreatment determination, the disqualification, and failure to supervise demonstrated by the circumstances surrounding the burn injury should be affirmed? The Administrative Law Judge concludes it should.

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

FINDINGS OF FACT

1. Licensee is a resident of Washington County, licensed as a Family Child Care Provider for approximately sixteen years. She provides childcare at her residence in Cottage Grove.

2. Licensee cares for seven to nine children at any given time, three of which are her grandchildren.^[1] She began caring for two-year-old C.E. when he was approximately seven months old.

3. The day care is operated on the main level of the house, but the changing and napping areas are on the upper level. The basement is off limits to the children. Licensee has a red rug just inside her front door that is a designated location where the children gather when instructed to wait for meals and for their parents to pick them up.

4. As reported by Licensee,^[2] on January 23, 2004, Licensee had six children in her care.^[3] At approximately 11:00 a.m., Licensee gathered the children on the red rug before washing their hands for lunch. Licensee had prepared chicken

noodle soup with dumplings for lunch and had placed the Dutch oven full of soup on the corner of the kitchen table to cool while she got the children ready for lunch.^[4] One of Licensee's grandchildren, B.J., walked into the kitchen, followed by C.E. B.J. climbed up to stand on one of the chair seats and C.E. stood on the bottom rung of one of the table's chairs located near the soup. C.E. asked Licensee what was in the pot and she told him, at which point Licensee told both boys to get down from the table and turned to address the other children sitting on the rug.^[5] It is not clear if she waited to see if the two boys obeyed.^[6] Almost immediately, C.E. began to scream. Licensee turned around to find that C.E.'s hands were in the soup. Licensee immediately removed his hands from the Dutch oven, put the soup out of reach, and ran cold water over his hands.^[7] She attempted to wrap his hands up in a towel and noticed that they were very red and peeling.

5. Licensee called C.E.'s father and he arrived at approximately 11:15 a.m. C.E.'s father noticed that his son's hands were very swollen and that the skin was peeling off. He proceeded to wrap each hand individually before bringing C.E. to the emergency room at Regions Hospital.^[8] At no time did Licensee call 911.

6. In the Burn Center at Regions Hospital, Dr. William Mohr observed that C.E. had suffered second and third degree surface area burns over 2% of both hands.^[9] The circumferential burns covered all four fingers of each hand and a liquid demarcation line was evident midway up the palm. Dr. Mohr dressed the burns and admitted C.E. to the hospital. In his progress notes, Dr. Mohr expressed that the burn pattern was suggestive of abuse,^[10] and a hospital employee reported the situation to the Cottage Grove Police Department (CGPD). That same day, police officers obtained statements from Licensee and C.E.'s parents.^[11]

7. On January 26, 2004, Dr. Mohr discharged C.E. from the hospital with a follow-up appointment scheduled for January 30, 2004. Upon C.E.'s discharge, the Burn Center at Regions Hospital issued a letter to the County indicating that the burn pattern was consistent with non-accidental immersion, and recommended that the incident be investigated as a probable case of child abuse.^[12] The County received the referral, categorized it as an institutional assessment of neglect,^[13] and assigned Karla Sabaska, Senior Social Worker, to the matter.

8. On January 27, 2004, Ms. Sabaska and CGPD Investigator Tom Ueland interviewed Licensee at her home and C.E.'s parents at their home. Licensee described again the events of January 23, and stated that she should have served the soup from the stove, as was her usual practice. Licensee was not aware of the severity of C.E.'s injuries. C.E.'s father expressed some concern that C.E. would sometimes return home from Licensee's house with small bruises.^[14] Both parents were concerned that C.E.'s burns might not have been accidental. Investigator Ueland explained that his role in the investigation was to determine if criminal charges should be brought.

9. Ms. Sabaska completed her assessment on February 23, 2004, and concluded that maltreatment did occur in the form of neglect under Minn. Stat. 626.556, meaning that Licensee failed to protect C.E. from conditions that seriously endangered

his physical health.^[15] By letter dated February 23, 2004, she informed Licensee that neglect had occurred, but that child protective services were not needed, citing Minn. Stat. § 626.556, subd. 10.^[16] The letter contained notice to Licensee of her right to request reconsideration of the maltreatment finding.

10. Ms. Sabaska then conferred with Jan Rudich, the County licensing worker assigned to Licensee. By letter dated March 1, 2004, Ms. Sabaska and Ms. Rudich informed Licensee that because of the maltreatment determination and because C.E.'s injury was serious as defined by Minn. Stat. § 245C.18, Licensee was disqualified from providing licensed child care.^[17] The letter explained Licensee's right to request reconsideration of one or both of the maltreatment determination and the disqualification, as well as her right to request a fair hearing.

11. Licensee requested reconsideration of the maltreatment finding by letter dated March 2, 2004.^[18] Licensee argued that the results of the investigation were vague and misleading, and that she never left the table area where the soup was sitting and she immediately reacted when C.E. began screaming. She admitted responsibility for C.E.'s burns, but characterized the situation as an accident rather than neglect. The County responded to Licensee's letter on March 15, 2004, restating her right to request reconsideration of both determinations.^[19]

12. In a letter dated April 11, 2004, Licensee reiterated her request for reconsideration of the maltreatment determination and also requested reconsideration of the disqualification.^[20] She discussed the sound care she provided for her children in the past, as well as the quality care she provides for her grandchildren and day care children.

13. The County upheld both determinations and notified Licensee of the conclusion in a letter dated April 30, 2004.^[21] Licensee's disqualification was not set aside and a variance was not granted. The letter informed Licensee of her right to request a hearing.

14. By letter dated May 13, 2004, Ms. Rudich informed Licensee that the County recommended the revocation of Licensee's family child care license to the Department.^[22] Her recommendation was based upon Minn. Stat. §§ 626.556, 245C.14, and 245C.15, which requires disqualification for serious maltreatment.^[23]

15. The Department received a letter from Licensee, dated May 26, 2004, by which she requested a fair hearing on the maltreatment determination and disqualification.^[24]

16. On June 18, 2004, the Department issued Licensee an Order of Revocation based upon the County's recommendation, alleging the disqualification under Minn. Stat. § 245C.14, subd. 1, and failure to supervise under Minn. R. 9502.0365, subp. 5, failure to keep hazardous materials out of reach of children under Minn. R. 9502.0435, subp. 6, and failure to be prepared for emergencies under Minn. R.

9502.0435, subp. 8.^[25] The letter informed Licensee of her right to appeal the licensing sanction, which she did.^[26]

17. On June 23, 2004, the Department Appeals Referee who was to conduct Licensee's fair hearing on the maltreatment determination and disqualification recommended that the appeal under the fair hearing process be dismissed since Licensee also wished to appeal the revocation of her license. The Commissioner adopted the recommendation on June 24, 2004, so that all three appeals could be consolidated into one contested case hearing.^[27]

18. The Department issued a Notice of and Order for Hearing on June 24, 2004, setting the hearing to take place on October 27-29, 2004. On October 18, 2004, counsel for Licensee served a Notice of Motion and Motion for an Order requiring the Commissioner of Human Services to set aside the revocation of Licensee's license, citing a recent decision from the Minnesota Court of Appeals.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing 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. Pursuant to Minn. Stat. §§ 245A.08, subd. 2a, and 245C.28, this is a consolidated contested case hearing regarding revocation of a family child care license based upon a maltreatment determination and a disqualification that was not set aside.

4. Maltreatment under Minn. Stat. § 626.556, includes neglect, which is defined, in relevant part, as the "failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health when reasonably able to do so."^[28] "Serious" maltreatment is, in relevant part, serious injury that reasonably requires the care of a physician.^[29]

5. Minn. Stat. § 609.02, subd. 7a, defines substantial bodily harm as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ"

6. Children in care must be supervised at all times, meaning a child care provider must be within sight or hearing of an infant, toddler, or preschooler at all times so that the provider can intervene to protect the health and safety of a child.^[30]

7. Pursuant to Minn. R. 9502.0435, subp. 6, potentially hazardous material must be kept out of reach of infants, toddlers, and preschoolers, and the use of any

such materials must be supervised. Subpart 8 of the same rule part requires the provider to be prepared for emergencies.

8. Even accepting Licensee's version of the facts, it is clear that Licensee failed to supervise a child in care, which resulted in substantial bodily harm to the child.^[31] Serious maltreatment did occur.

9. Minn. Stat. § 245C.14, subd. 1 provides:

The commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with persons receiving services from the license holder . . . upon receipt of information showing, or when a background study completed under this chapter shows any of the following:

. . .

(3) an investigation results in an administrative determination listed under section 245C.15, subdivision 4, paragraph (b).

10. Minn. Stat. § 245C.15, subd. 4(b)(2), requires a seven-year disqualification for a licensee who has committed "substantiated serious or recurring maltreatment of a minor under section 626.556"

11. Licensee has committed serious maltreatment and, therefore, she must be disqualified.

12. Under certain circumstances, the Commissioner may set aside a license disqualification if the Commissioner finds that the individual does not pose a risk of harm to any person served by the provider.^[32] But Minn. Stat. § 245C.24, subd. 4(1) prohibits the Commissioner from setting aside a disqualification where the licensee "committed an act that constitutes maltreatment of a child under section 626.556, subdivision 10e, and the maltreatment resulted in substantial bodily harm as defined in section 609.02, subdivision 7a"

13. Licensee's disqualification may not be set aside because Licensee committed an act that constitutes maltreatment of a child under Minn. Stat. § 626.556, subd. 10e, that resulted in substantial bodily harm.

14. A family childcare license shall be revoked, not renewed, or suspended if the provider, or any other person residing in the daycare residence, has a disqualification under Minn. Stat. § 245C.14.^[33]

15. 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 in compliance with the rules at the time the violation allegedly occurred.^[34]

16. Under Minn. Stat. § 245A.07, subd. 1, when applying sanctions, 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 the persons served by the provider.

17. Licensee put hazardous material, in the form of hot soup, within reach of a child in care and then failed to adequately supervise the situation. She then failed to call for emergency care. This conduct constitutes severely inadequate care and supervision and gross violations of Minn. Stat. § 626.556, subd. 10e, and Minn. R. 9502.0315, 9502.0365, and 9502.0435. The lack of supervision resulted in second and third degree burns, a weekend hospital stay, and a long recovery period. Revocation of the license is appropriate.

18. The attached Memorandum is incorporated by reference.

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

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner affirm the maltreatment determination, the disqualification, the determination not to set aside the disqualification, and the revocation of Licensee's Family Child Care license.

Dated: December 7, 2004

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

Reported: Tape recorded (4 tapes). No transcript prepared.

MEMORANDUM

Licensee centers her argument on *Johnson vs. Commissioner of Health*,^[35] decided in December 2003, in which Ms. Johnson, a facility care provider, appealed the Commissioner of Health's final order not to set aside her disqualification that was based upon a guilty plea to second-degree assault. The court held that the Commissioner applied only three of the eight statutory factors under Minn. Stat. § 245C.22, subd. 4, and remanded the case for consideration of all eight factors.^[36]

Licensee argues that the Commissioner of Human Services failed to consider all eight statutory factors in reaching a result regarding the disqualification and, ultimately, the revocation of her license. But in this case, the Commissioner of Human Services has not yet issued a final order. The administrative appeal process is still in motion. Moreover, in this particular case, a set aside analysis is not required because C.E. suffered “substantial bodily harm,” and, by law, the disqualification cannot be set aside. Consequently, an analysis of the eight statutory factors is not necessary.

As a second point, Licensee argues that the term “maltreatment,” in its commonly understood meaning, implies an active or intentional behavior, while “neglect” commonly indicates a failure to perform a behavior. Licensee asserts that the definition of neglect cannot be reconciled with maltreatment and that the statutory definition under Minn. Stat. § 626.556 is ambiguous and overbroad. This is an argument best taken before the legislature. The Administrative Law Judge must apply the statutes as written, and Minn. Stat. § 626.556 clearly includes neglect as a form of maltreatment.

As another matter, Dr. Mohr testified in detail about the nature of C.E.’s burns and the probability of abuse. Licensee did not object to the testimony. But the maltreatment determination and the Order of Revocation made no reference to abuse, focusing instead on neglect. Accordingly, Dr. Mohr’s testimony as to abuse has not been evaluated, as it is irrelevant to the allegation of neglect set forth by the Department.

S.M.M.

^[1] Ex. 13, p. 15.

^[2] The facts adopted in this finding are based upon those provided by Licensee because the determination of maltreatment by neglect was based solely upon Licensee’s version of the events.

^[3] Ex. 14, p. 28. The children ranged in age from 17 months to four years old.

^[4] Licensee planned to serve lunch “family style” where the food is placed on the table and dished up from there. Licensee stated that this was a new concept suggested by the Food Program. Ex. 13, p. 15.

^[5] Ex. 14, p. 22-23.

^[6] The record contains conflicting accounts of whether Licensee actually saw the boys step down from the chairs. See Ex. 14, pp. 23, 29, and 36.

^[7] The record presents conflicting facts about whether Licensee took C.E. to the kitchen sink or bathroom sink. Ex. 14, pp. 23 and 29.

^[8] Testimony and statements of Licensee and James Brewer.

^[9] Ex. 20, p. 46.

^[10] Ex. 20, p. 49.

^[11] Ex. 14, p. 22.

^[12] Ex. 1, p. 72.

^[13] Ex. 13, p. 14.

^[14] Ex. 13, p. 15.

^[15] Ex. 13, p. 18. Ms. Sabaska also found the events of January 23, 2004, to be a violation of child care supervision rules under Minn. R. 9502.0315, subp. 29a, and criminal child endangerment under Minn. Stat. § 609.378, subd. 1(a). All of these involve a failure to provide adequate supervision of a child.

^[16] Ex. 4.

^[17] Ex. 5.

^[18] Ex. 6.

^[19] This letter is not part of the record.

[20] Ex. 8.

[21] Ex. 9.

[22] Ex. 10.

[23] Ex. 11.

[24] Ex. 12.

[25] Ex. 27.

[26] A written appeal by Licensee is not part of the hearing record but can be inferred from subsequent events.

[27] Ex. 26.

[28] Minn. Stat. §§ 626.556, subd. 10e(a)(2), and 626.556, subd. 2(c)(2).

[29] Minn. Stat. § 245C.02, subd. 18.

[30] Minn. R. parts 9502.0315, subp. 29a, and 9502.0365, subp. 5.

[31] At the hearing, Licensee stipulated that C.E. sustained “substantial bodily harm.”

[32] Minn. Stat. § 245C.22, subd. 4 (2003).

[33] Minn. R. 9502.0335, subp. 6.D.

[34] Minn. Stat. § 245A.08, subd. 3(a).

[35] 671 N.W.2d 921 (Minn. Ct. App. 2003).

[36] On remand, based upon all eight statutory factors, the Commissioner of Health concluded that Ms. Johnson posed a risk of harm to the clients she served and refused to set aside the disqualification. She appealed to the Minnesota Court of Appeals a second time, and in a decision dated November 23, 2004 (*Johnson II*), the court upheld the Commissioner of Health’s analysis.