

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

In the Matter of the Denial of the
Application of Tracy Nelson for a License
to Provide Child Care

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on October 13, 2004, at the Sherburne County Government Center, 13880 Highway 10, Elk River, Minnesota. The OAH record closed at the end of the hearing.

Victoria J. Powell, Assistant County Attorney, 13880 Highway 10, Elk River, MN 55330-4601, appeared on behalf of the Sherburne County Social Services Department and the Department of Human Services.

Tracy Nelson, 216 Santa Fe Street NE, Princeton, MN 55371, appeared for herself without counsel.

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

Did the Department properly conclude that Ms. Nelson should not be issued a license to provide adult foster care because both she and her husband are disqualified?

The Administrative Law Judge concludes that because Ms. Nelson and her husband are disqualified, the Department of Human Services properly denied her license application.

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

FINDINGS OF FACT

1. Tracy Nelson lives in Princeton, Minnesota, with her husband and his 80-year-old mother, who is in poor health and has difficulty walking. The family previously lived in Clay County, where both Tracy Nelson and her husband were certified to provide foster care to his mother.^[1]

2. On September 18, 2000, Tracy Nelson pleaded guilty in Crow Wing County to felony theft, in violation of Minn. Stat. § 609.52. She admitted taking funds from a cash register while employed as a cashier. After completing a three-year probationary term, her conviction was reduced to a misdemeanor pursuant to Minn. Stat. § 609.13.^[2]

3. On June 18, 2001, Tracy Nelson pleaded guilty in Cass County to attempted theft by swindle, in violation of Minn. Stat. § 609.52. While working as a paid home care worker for her mother-in-law, she had altered a prescription for home care service to increase the level of service to 24-hour care. The district court granted a stay of adjudication,^[3] and the charge was dismissed when she completed probation. Although Ms. Nelson has no conviction as a result of this plea, she admits the underlying conduct.^[4]

4. In September 2003 Nelson submitted an application to Sherburne County Social Services for a license to provide adult foster care for her mother-in-law.^[5] She also signed a consent form for a background study.^[6]

5. On January 28, 2004, the licensing social worker wrote to Nelson to advise her that she was disqualified from providing adult foster care based on the guilty pleas in the Crow Wing and Cass County matters described above.^[7]

6. Nelson requested reconsideration of the disqualifications.^[8]

7. On June 4, 2004, the licensing social worker recommended that the Department of Human Services deny Nelson's application based on the two disqualifications.^[9]

8. On July 16, 2004, the Department of Human Services issued an order declining to set aside the disqualifications, declining to grant a variance, and denying the application for licensure.^[10]

9. Nelson filed a timely request for appeal.^[11]

10. On August 5, 2004, the Department of Human Services issued an Amended Notice of Disqualification-Not Set Aside and Order of Denial for the additional reason that Nelson's husband was disqualified. He sought reconsideration of the disqualification, but the Department declined to set it aside or grant a variance.^[12] He did not appeal that decision and declined to testify about the factual basis for the disqualification at the hearing.

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

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. § § 14.50 and 245A.08.

2. The Department of Human Services gave proper and timely notice of the hearing in this matter.

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

4. At a hearing on denial of an application, the applicant bears the burden of proof to demonstrate by a preponderance of the evidence that the applicant has complied fully with this chapter and other applicable law or rule and that the application should be approved and a license granted.^[13]

6. The commissioner shall disqualify an individual from a position allowing direct contact with persons receiving services from the license holder when a background study shows conviction of or admission to one or more crimes listed in Minn. Stat. § 245C.15, or when a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the listed crimes.^[14]

7. An individual is disqualified if less than seven years has passed since the discharge of sentence for a misdemeanor conviction for violation of Minn. Stat. § 609.52.^[15] An individual is also disqualified if less than seven years has passed and a preponderance of the evidence indicates that the individual has attempted to commit theft by swindle in violation of Minn. Stat. § 609.52.^[16]

8. Based on her misdemeanor conviction for theft and her admission to attempted theft by swindle, Nelson is disqualified under Minn. Stat. § 245C.14.

9. In determining whether a disqualification should be set aside because the person no longer poses a risk of harm, the Commissioner is to consider the nature, severity, and consequences of the event or events that led to disqualification; whether there is more than one disqualifying event; the age and vulnerability of the victim at the time of the event; the harm suffered by the victim; the similarity between the victim and persons served by the program; the time elapsed without a repeat of the same or similar event; documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and any other information relevant to reconsideration.^[17]

10. The Department considered the appropriate factors in determining that Nelson's disqualifications should not be set aside.

11. Operators, caregivers, and household members in an adult foster home must not have a disqualification under Minn. Stat. § 245C.14.^[18]

12. The Department of Human Services properly denied the applicant's request for a license for the additional reason that Nelson's husband resides in her home and is disqualified.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the order denying Ms. Nelson a license to provide adult foster care on the basis that she and her husband are disqualified be affirmed.

Dated this 3rd day of November, 2004.

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY

Administrative Law Judge

Reported: Taped (two tapes)

MEMORANDUM

Nelson has presented persuasive evidence that she has accepted responsibility for the actions that led to the misdemeanor conviction for theft and the charge of theft by swindle. She acknowledges that these actions were very wrong and that her punishment was appropriate. In addition, she has presented evidence that she obtained counseling to help with family problems and frustrations and is now on the right track. The Administrative Law Judge does not doubt that Nelson has provided loving care for her mother-in-law under difficult circumstances.

The Department must be able to trust, however, that a licensed foster care provider will not financially exploit vulnerable adults in the provider's care. These offenses demonstrate that twice in the last four years Nelson violated the trust of an employer and a physician for the purpose of financial gain. Given the recency of these events, the evidence of rehabilitation does not outweigh the risk of harm.

K.D.S.

^[1] The Nelsons were not licensed to provide foster care in Clay County but were certified to provide foster care under a hardship condition outlined in Instructional Bulletin #91-67J. See Ex. 5.

^[2] Ex. 16.

^[3] Ex. 14.

^[4] Testimony of Tracy Nelson.

^[5] Ex. 3.

^[6] Ex. 2.

^[7] Ex. 4.

^[8] Ex. 6.

^[9] Ex. 7.

^[10] Ex. 9.

^[11] Ex. 10.

^[12] Ex. 11.

^[13] Minn. Stat. § 245A.08, subd. 3(b).

^[14] Minn. Stat. § 245C.14, subd. 1(a)(1), (2).

^[15] Minn. Stat. § 245C.15, subd. 4(a).

^[16] *Id.*, subd. 4(c).

^[17] Minn. Stat. § 245C.22, subd. 4.

^[18] Minn. R. 9555.6125.