

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

In the Matter of the Revocation of the License of  
Marlene Fastenau  
1201 8th Avenue North  
St. James, MN 56081  
to provide family child care under Minnesota  
Rules, parts 9502.0300 to 9502.0445

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

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 10:00 a.m. on January 5, 2005, at the offices of the Wantonwan County Human Services Department, 715 Second Avenue South, St. James, Minnesota. The OAH hearing record closed on January 28, 2005, when all of the parties' post-hearing submissions were received.

Lamar Piper, Wantonwan County Attorney, Courthouse, 710 Second Avenue South, P.O. Box 518, St. James, Minnesota 56081, appeared at the hearing as attorney for Wantonwan County (the County) and the Minnesota Department of Human Services (the Department). Bruce E. Sellers, Attorney at Law, 306 Main Street, P.O. Box 509, Mapleton, Minnesota 56065, appeared at the hearing as attorney for the Respondent, Marlene Fastenau.

**THESE FINDINGS OF FACT, CONCLUSIONS, AND  
RECOMMENDATIONS ARE PUBLIC, BUT THE HEARING RECORD ON  
WHICH THEY ARE BASED CONTAINS INFORMATION THAT IS NOT  
PUBLIC.**

**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 Commissioner Kevin Goodno, Commissioner of Human Services, 444 Lafayette Road North, 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 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 ISSUES**

(1) Whether Ms. Fastenau is currently disqualified from having direct contact with persons served by programs licensed by the Department; and

(2) Whether Ms. Fastenau's license to provide family day care should be revoked because of her disqualification.

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, Marlene Fastenau has lived at 1201 8th Avenue North, St. James, Minnesota, 56081. Prior to July 2002, Ms. Fastenau had been licensed to provide family child care at her home.<sup>[1]</sup>

2. Sometime prior to July 5, 2002, and in accordance with Minnesota Statutes, chapter 245C, the County conducted background studies for all persons in Ms. Fastenau's home over the age of 13 who would have direct contact with persons served by her child care program.<sup>[2]</sup>

3. As a result of the information obtained in the course of conducting those background studies, the County determined that a preponderance of the evidence established that on April 27, 1997, and on June 21, 2001, Ms. Fastenau engaged in conduct that constituted fifth degree assault (domestic assault) in violation of Minnesota Statutes, section 609.2242.

4. Based on its finding that Ms. Fastenau had engaged in conduct amounting to fifth degree domestic assault on two occasions, the County notified her by letter dated July 5, 2002, that she was disqualified from direct contact with

persons served by programs licensed by the Department.<sup>[3]</sup> The notice of disqualification informed Ms. Fastenau that she had the right to request reconsideration of the disqualification within 15 calendar days, and that any such request would be forwarded to the Commissioner for consideration. The notice further advised her that if she should submit a request for reconsideration, it was necessary for her to submit information showing either that the information relied upon in making the disqualification was incorrect or that she did not pose a risk of harm to persons served by her family child care program.<sup>[4]</sup>

5. Ms. Fastenau subsequently made a timely request for reconsideration of the County's disqualification decision, and by letter dated July 31, 2002, the County forwarded that request for reconsideration to the Commissioner for consideration.<sup>[5]</sup>

6. By letter dated August 15, 2002, the Commissioner acted on Ms. Fastenau's request for reconsideration. In that correspondence, the Commissioner specifically denied Ms. Fastenau's request to set aside the disqualification, indicating that the information she had submitted in support of her request failed to demonstrate that she did "not pose a risk of harm to any person served by family child care" under her license. However, by the same letter, the Commissioner did grant Ms. Fastenau the following variance to her disqualification:

Minnesota Statutes, section 245A.04, subdivision 3e, allows the Commissioner to grant a time-limited variance to a license holder for a person whose disqualification has not been set aside, provided there are conditions which minimize the risk of harm to people receiving services. **The Commissioner has granted a variance to your disqualification with the following stipulations:**

- 1) That there are no other disqualifying factors; and**
- 2) That there are no recurrences of the same or similar incidents.**

Please note that this is a time-limited variance, and that you must comply with the conditions stated above for the variance to be effective. **This variance is in effect for a period of one year from the date of the letter, or until the license expires, whichever comes first.** Watonwan County has been informed of this decision.<sup>[6]</sup> [Emphasis in original.]

7. The letter notice to Ms. Fastenau of August 15, 2002, also notified her of her right to request a hearing on the decision not to set her disqualification aside. It specifically provided that the request for a hearing "must be submitted within 30 days of receiving this notice, or within 90 days if you can show good cause why the request was not submitted within the 30-day period."<sup>[7][8]</sup>

8. Ms. Fastenau did not make a timely request for a hearing on the decision not to set aside her disqualification.<sup>[9]</sup>

9. By its terms, the variance that was granted to Ms. Fastenau expired on August 15, 2003. Before the variance expired, the County did not give Ms. Fastenau prior notice of its imminent expiration, or of any right to request an extension or renewal of the variance. After the variance expired, the County did not seek revocation of license to provide family child care until July 29, 2004.

10. By letter dated July 29, 2004, the County requested the Department to rescind Ms. Fastenau's variance for noncompliance with its conditions, and it further requested that the Department revoke her license to provide family child care.<sup>[10]</sup> By letter dated July 30, 2004, the County notified Ms. Fastenau of the request that had been submitted to the Department.<sup>[11]</sup>

11. On October 8, 2004, the Department issued an Order of Revocation revoking Ms. Fastenau's license to provide family child care. The Department considered evidence submitted by the County that Ms. Fastenau had failed to comply with the conditions of the variance she had been given. But the Department ultimately concluded that:

[w]hile the Commissioner has cause to terminate the variance to your disqualification, the variance has expired of its own terms on August 15, 2003. Therefore, you are disqualified from any position involving contact with persons receiving services in DHS-licensed programs.<sup>[12]</sup>

12. Ms. Fastenau made a timely appeal of the Order of Revocation, and this contested case proceeding ensued.<sup>[13]</sup>

13. The parents of children under Ms. Fastenau's care consider her to be an excellent provider of services. They also believe that because of the limited child care service available in Wantonwan County, revoking her license would cause them inconvenience and, in some cases, actual hardship.<sup>[14]</sup>

14. 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.

15. 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.

16. 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 of Human Services authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations or a final order, as the case may be.<sup>[15]</sup>

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. This is “a consolidated contested case hearing for sanctions based on . . . disqualifications” within the meaning of Minn. Stat. § 245A.08, subd. 2a. The scope of this contested case proceeding therefore includes appeals from Ms. Fastenau’s disqualification and from the Department’s revocation of her family child care license. However, the scope of this proceeding does not include issues relating to whether or not she has or should receive a variance.<sup>[16]</sup>

4. Minn. Stat. § 245C.14, subd. 1(a)(2), and § 245C.15, subdivision 3, provide that a person whom a preponderance of the evidence establishes as having engaged in conduct amounting to misdemeanor domestic assault<sup>[17]</sup> must be disqualified from having access to a person receiving services from a license holder if the person so convicted is a person “age 13 or older living in the household where the licensed program will be provided.”<sup>[18]</sup>

5. On July 5, 2002, the County determined by a preponderance of the evidence that that Ms. Fastenau had engaged in conduct amounting to fifth degree domestic assault on two occasions and was therefore disqualified from direct contact with persons served by programs licensed by the Department.<sup>[19]</sup>

6. Although Ms. Fastenau made a timely request to the Department for reconsideration of that disqualification, reconsideration was denied, and her disqualification has never been set aside.

7. Although Ms. Fastenau’s disqualification has never been set aside, the Commissioner did exercise discretion to give her a time-limited, one-year variance of her disqualification beginning on August 15, 2002.

8. Ms. Fastenau did not seek an extension or renewal of her variance before it expired by its own terms on August 15, 2003.

9. In the absence of an effective variance, Ms. Fastenau has been disqualified from direct contact with persons served by programs licensed by the Department beginning on August 16, 2003, and continuing until the present.

10. Since Ms. Fastenau is currently disqualified without an effective variance, the law requires the Commissioner to revoke her family child care license.

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

12. 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 AFFIRM the Department's Order of Revocation dated October 8, 2004, and REVOKE the license of Marlene Fastenau to provide family child care.

Dated this 9th day of February 2005.

S/ Bruce H. Johnson  
BRUCE H. JOHNSON  
Administrative Law Judge

Reported: Tape Recorded (one tape); No Transcript Prepared.

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**NOTICE**

Under Minnesota law,<sup>[20]</sup> 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

The facts in this contested case proceeding are not in dispute: On July 5, 2002, the County notified Ms. Fastenau that she was disqualified from having direct contact with persons served by programs licensed by the Department. The basis for the disqualification was a finding that she had engaged in conduct that constituted fifth degree domestic assault. Minnesota law specifies that an individual who engages in such conduct is disqualified for a period of ten years.<sup>[21]</sup> Ms. Fastenau requested reconsideration of the disqualification. Upon reconsideration, the Commissioner did not set aside the disqualification but rather granted Ms. Fastenau a variance that allowed her to continue to provide family child care services subject to compliance with certain conditions. That variance was expressly time limited and was in effect for a period of one year from August 15, 2002, or until August 15, 2003. The parties both agree that the variance did expire on August 15, 2003. But they disagree about the legal consequences of that expiration.

### I.

#### **Ms. Fastenau's Underlying Disqualification Was Not Extinguished by Operation of Law.**

Ms. Fastenau first argues that the legal effect of what happened was that her underlying disqualification expired when her variance expired, and that she is therefore now legally eligible to hold a license. Minn. Stat. Ch. 245C deals with disqualifications and variances. Minn. Stat. § 245C.15, subd.3, creates a ten-year disqualification for persons engaging in conduct constituting domestic assault. Chapter 245C provides for only three ways in which a disqualification can lose its full force and legal effect—in effect, become “extinguished.” The first is expiration of the statutory period of disqualification, in this case ten years. But Ms. Fastenau's disqualification will not expire in that way until 2011. The second way in which a disqualification can become extinguished is by action of the Commissioner, acting on a timely request for reconsideration.<sup>[22]</sup> Upon reconsideration of a disqualification, the Commissioner can do either one of two things that would effectively extinguish the disqualification. First, the Commissioner *must* rescind the disqualification upon a finding that the information on which it is based is incorrect.<sup>[23]</sup> Second, even if the evidence supporting the disqualification is correct, the Commissioner *may* set it aside upon a finding that the disqualified individual “does not pose a risk of harm to any person served by the ... license holder.”<sup>[24]</sup> In her request for reconsideration, Ms. Fastenau did not challenge the accuracy of the information on which it was based. So, there has never been a basis for extinguishing her disqualification by rescission. Moreover, in his August 15, 2002, decision on Ms. Fastenau's request for reconsideration of her disqualification, the Commissioner specifically found that she had failed to demonstrate that she did not pose a risk of harm to persons served by her program and expressly indicated that her disqualification was not being extinguished by being set aside.<sup>[25]</sup> In short, nothing has occurred

in this case that by operation of law would cause her disqualification to become extinguished. She still remains disqualified.

## II.

### **Ms. Fastenau's Underlying Disqualification Was Not Extinguished When Her Variance Expired.**

But Ms. Fastenau argues that expiration of her variance had the effect of causing her underlying disqualification to expire. Minn. Stat. § 245C.30, subd. 1, gives the Commissioner discretion to grant a variance enabling a disqualified person to continue to provide direct contact services, even though legally disqualified, if that person complies with conditions “that minimize the risk of harm to people receiving services.” There is nothing in that statute suggesting that the variance affects the underlying disqualification in any way. Rather, it establishes a mechanism under which a disqualified person can continue to provide services for a limited period of time and under controlled conditions. When a time-limited variance expires at the end of its express duration, the provider, who continued to be disqualified while the variance was in effect, simply no longer has the Commissioner's permission to continue providing services. In other words, expiration of a variance ends a disqualified person's authorization to continue providing services; it does not extinguish the underlying disqualification.

## III.

### **The ALJ Lacks Jurisdiction to Consider Substantive Issues Relating to Ms. Fastenau's Variance.**

Ms. Fastenau's second argument is essentially that the Department's and County's failure to notify her of the need to seek renewal of her variance before it expired deprived her of procedural due process of law. The ALJ notes that the variance in this case expressly stated that it was time-limited for a period of one year, which implies that a licensee would have to do something in order to continue providing services after the variance expired by its own terms. But there appears to be nothing in statute or rule that addresses the subject of reapplication for or renewal of variances. The County indicated that its normal practice was to notify licensees providing services under a variance of an impending expiration of a variance. But because of staffing changes within its Human Services Department, there had been a failure to give Ms. Fastenau that notification.

Normally, appeals from determinations made by the Commissioner on reconsideration of disqualifications are governed by an internal fair hearing process and not as contested cases of Chapter 14, such as this proceeding.<sup>[26]</sup> However, Minn. Stat. § 245A.08, subd. 2a, does allow consolidation of an appeal from an adverse disqualification reconsideration decision with a Chapter 14 contested case proceeding involving an appeal from the resultant revocation of

the license to provide services. That is how this contested case arose. But the law appears to commit all issues relating to variances permitting continuation of services by disqualified persons to the sole discretion of the Commissioner:

When the commissioner has not set aside a background study subject's disqualification, and there are conditions under which the disqualified individual may provide direct contact services or have access to people receiving services that minimize the risk of harm to people receiving services, the commissioner *may grant* a time-limited variance to a license holder. [Emphasis supplied.]<sup>[27]</sup>

\* \* \*

The commissioner's decision to grant or deny a variance is final and not subject to appeal under the provisions of chapter 14.<sup>[28]</sup>

In short, the ALJ has jurisdiction to determine whether a disqualification exists but lacks jurisdiction to make findings, conclusions, and recommendations to the Commissioner in this Chapter 14 contested case proceeding that relate to the granting, denial, or renewal of a variance. So, such issues as whether there was an improper failure to give Ms. Fastenau notice of a need to request a renewal of her variance and whether that variance should be renewed or reconsidered must be addressed directly to the Commissioner.

B. H. J.

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<sup>[1]</sup> Exhibit 1.

<sup>[2]</sup> *Id.*

<sup>[3]</sup> *Id.*

<sup>[4]</sup> Exhibit 1.

<sup>[5]</sup> *Id.*

<sup>[6]</sup> Exhibit 2.

<sup>[7]</sup> *Id.*

<sup>[8]</sup> Exhibit 2.

<sup>[9]</sup> Pursuant to stipulation of the parties.

<sup>[10]</sup> Exhibits 3, 5, 6 and 7.

<sup>[11]</sup> Exhibit 4.

<sup>[12]</sup> Exhibit 8.

<sup>[13]</sup> Exhibit 9.

<sup>[14]</sup> Exhibits C, D, E, and F.

<sup>[15]</sup> Minn. Stat. §§ 14.50, 14.57, 14.69, and 245A.01 through 245A.16.

<sup>[16]</sup> Minn. Stat. § 245C.30, subd. 5.

<sup>[17]</sup> Minn. Stat. § 609.2242.

<sup>[18]</sup> Minn. Stat. § 245A.04, subd. 3 (c) (2).

[\[19\]](#) Minn. Stat. § 245C.14, subd. 1(a)(2), and § 245C.15, subd. 3

[\[20\]](#) Minn. Stat. § 14.62, subd. 1.

[\[21\]](#) Minn. Stat. § 245C.15, subd. 3.

[\[22\]](#) Minn. Stat. § 245C.22.

[\[23\]](#) Minn. Stat. § 245C.22, subd. 2.

[\[24\]](#) Minn. Stat. § 245C.22, subd. 4.

[\[25\]](#) See Exhibit 2.

[\[26\]](#) Minn. Stat. 245C.27.

[\[27\]](#) Minn. Stat. § 245C.30, subd. 1(a).

[\[28\]](#) Minn. Stat. § 245C.30, subd. 5.