

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

In the Matter of the Temporary Immediate
Suspension of the Family Child Care
License of Anita Momsen.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge Richard C. Luis (ALJ) at the Minnesota Office of Administrative Hearings on December 8, 2004. The record closed at the conclusion of the hearing that day.

Rebecca S. Morrisette, Assistant Hennepin County Attorney, 525 Portland Avenue, Suite 1210, Minneapolis, MN 55415 appeared on behalf of Hennepin County Human Services Department ("Local Agency") and the Minnesota Department of Human Services ("Department"). Lori A. McLaughlin, Esq., Wagner, Falconer & Judd, Ltd., 3500 I.D.S. Center, 80 South Eighth Street, Minneapolis, MN 55402-2113 appeared on behalf of Anita Momsen ("Appellant", "Licensee", "Respondent").

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, Minnesota 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.

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.

ISSUES

Whether it was appropriate to issue a temporary immediate suspension of the License of Anita Momsen to provide family child care for providing care to a number of

infants and toddlers exceeding her licensed capacity, and for not taking corrective action to be within her licensed capacity of infants and toddlers immediately?

The Administrative Law Judge recommends that the Commissioner of Human Services rescind the temporary immediate suspension of the family child care license of Anita Momsen.

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

FINDINGS OF FACT

1. Since December of 2002, Anita Momsen has had a Group 3 (C-3) License for child care. Under that license, she is allowed to care for up to 14 children, if two adult caregivers are present. If two adults are present, four of the day care children can be under two years old, three of which can be younger than 12 months of age.^[1]

2. If only one caretaker is present, the licensed capacity limit for Ms. Momsen is ten children, of whom up to three may be infants and toddlers.^[2]

3. On October 28, 2004, Hennepin County Child Care Licensur Judy Ames came to the Licensee's premises at 8450 Winnetka Drive in Golden Valley. It was a scheduled visit made in connection with the application made by the Appellant to renew her license. At that time, the Licensee was the only adult caregiver present. She was caring for eight children under two years old, five infants and three toddlers. Also present were two preschoolers and one school-aged child. Ames advised Ms. Momsen that she was over the capacity limits, and would have been out of compliance even if another adult were present. Ames specified to Momsen that she had to reduce the number of infants and toddlers in her care immediately to a total of three infants and toddlers, of which no more than two could be infants.

4. Before leaving Momsen's premises, Ames issued a Correction Order to the Licensee and advised her that she would return soon (by Monday, November 1) to verify compliance with licensing rules regarding capacity and ratio.

5. Ms. Ames, accompanied by County Licensing Worker Mary Gabe, returned to Ms. Momsen's premises on November 1, 2004. Ms. Momsen had a helper to assist her in caring for the children, but was still caring for five toddlers and three infants. The Licensee had not submitted the required background study application for her helper. Later that day, Momsen advised Ames that she would call the families of four of the infants and toddlers to inform them they would have to take their children elsewhere, effective November 2, 2004. Momsen then called the appropriate number of parents to drop the numbers of infants and toddlers within the appropriate limits.

6. Ames returned to Momsen's day care, unannounced, on November 3, 2004. At the time of the visit, Momsen was alone in the house with six day care children, including three infants and a toddler. Momsen explained to Ames that a helper had been with her all day, but had to leave for a medical appointment and would be back in

15 minutes. The helper was gone a total of one hour, and Ames happened to come while the helper was gone and before the helper returned.

7. At the time of Ames's first visit to Momsen's premises on October 28, Momsen explained that her mother is her regular helper, but that her mother was out of town until November 22, 2004. When told that she would still be out of compliance if she was caring for eight children under two years old, even if she did have a second adult helper present, Ms. Momsen asked what would happen if she was not licensed. Ames told her – in such a case, she could care for the children of only one other family not related to her.

8. After Ms. Ames and Ms. Gabe explained to the Appellant that she was still out of compliance on November 1, Momsen got upset and declared that she was going to drop her license and do unlicensed child care. When Gabe reminded Momsen she could only care for the children of one unrelated family under those conditions, the Licensee, still upset, replied she did not care. She called Ames later to clarify that she would comply by dropping the families of half (four) of the toddlers/infants that were in her care November 1 (See Finding 5).

9. Some time after Ms. Gabe and Ms. Ames left on November 1, 2004, Momsen called the Hennepin County Department of Human Service's Licensing Office and inquired about getting a variance. Licensed Social Worker Gena Johnson took the call and replied to the Licensee that there was no license that authorized the care of eight infants/toddlers in a family day care licensing establishment and that variances from non-compliance generally were given only in advance of the period of non-compliance, not after-the-fact. The Licensee complained about the personalities of the social workers who had visited, calling them "unfeeling, heartless people", and said more than once that "people need to have a heart". She alleged to Johnson that she has had no problem caring for the number of infants and toddlers she had and claimed she was one of those people who could handle more children than normal. During the course of the conversation, the Licensee mentioned to Ms. Johnson that her establishment had likely been out of compliance for over a year.^[3]

Ms. Johnson also took a call from one of the parents whose child had been dropped by Ms. Momsen on November 1. The caller reported that Ms. Momsen had earlier mentioned that since she now had a helper, she was able to continue caring for all eight infants and toddlers.

10. Ms. Momsen believes that the social workers treated her in a patronizing, condescending manner during the November 1 visit because of her status as a woman of color (Ames and Gabe are Caucasian Americans, the Appellant is from India and has darker skin). In her letter of appeal, she accused Gabe of threatening her with calls to lawyers, the police and child protection services.^[4]

11. The Licensee's understanding from the conversation with Ms. Ames on October 28 was that, in order to comply, she needed to have a helper. This conclusion, while incorrect/incomplete, was how the Licensee understood the situation as of Tuesday, October 28, 2004. Ms. Momsen left a message to that effect on Ames's

voicemail, asking for a call back if Ames had any concerns. Ames did not call back before the return visit on Monday, November 1, 2004.

12. There is no evidence that any child in the Licensee's care has been harmed or endangered.

Based on the above Findings, 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. § 14.51 and Minn. Stat. Chapter 245A.

2. The Notice of Hearing was proper and the Department and Local Agency have complied with all relevant substantive and procedural requirements of law and rule.

3. The Local Agency and the Department of Human Services have not shown that reasonable cause exists to believe there is an imminent risk of harm to the health, safety or rights of persons served by Ms. Momsen's program because of the Licensee's failure to comply with applicable law or rule.

4. It is appropriate for the Commissioner to rescind immediately the temporary indefinite suspension of the family child care license of Anita Momsen.

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

RECOMMENDATION

IT IS RECOMMENDED that the Commissioner of Human Services **RESCIND** the temporary immediate suspension of the Family Child Care License of Anita Momsen.

Dated this 21st day of December, 2004.

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Reported: Taped

MEMORANDUM

The Administrative Law Judge is persuaded that no imminent danger exists to the health, safety or rights of Ms. Momsen's day care children if the temporary immediate suspension is lifted. It appears that the Local Agency Official did not believe so either, since they did not take steps immediately to close down the day care premises on the two occasions when over capacity of infants and toddlers "grossly" over the limits was discovered (eight children of those ages were in care each time, while the limits were three when only one adult was present and four when there were two adult caregivers).

The County Licensors continued to allow Ms. Momsen to make the changes necessary to come into compliance, and by the day of the third visit (six calendar days after the first), she had complied. On November 3, 2004, when three infants and one toddler were in care, Ms. Momsen had two adults (herself and an experienced former child care licensee) to provide care. The County's visit happened to occur during the "up to one hour" time period when Ms. Momsen's other adult caregiver absented herself to keep a prior medical appointment.

At the point in time when Licensors Ames visited on November 3, Ms. Momsen was one over her capacity, but there is no evidence to suggest a situation of "imminent danger" to an extent warranting a punishment so severe as a temporary indefinite suspension. Rather, the evidence is that the situation was remedied in a matter of minutes.

In arriving at the Recommendation to rescind the suspension, the Administrative Law Judge is influenced by the fact that the Licensee was credible in her testimony that she truly believed after the first visit (October 28) that she needed only to find an additional helper to come into compliance. This conclusion is corroborated by the evidence that one of the parents was told by Ms. Momsen prior to November 1 that she was still able to take in all eight infants and toddlers because she had hired a helper. The ALJ is persuaded that Momsen had no reason to lie about that assertion, and that she was simply mistaken, because she knew that Ms. Ames would soon make a return visit to check on her compliance. When she was reminded on November 1 that she needed to cut down to four children under age two in addition to having the second adult present, she took action to do so and removed four of the children by the next working day, November 2. On November 3, as fortune had it, her helper was gone for a short time, precisely when the County Licensors called again for the first time since November 1. Ms. Momsen's evidence on the timing of the helper's absence was corroborated by testimony from the helper, who also, impressed the Judge with her credibility.

Certainly any risk of harm for the day care children was closer to "imminent" within the meaning of the applicable statutes when the Licensee was over her licensed capacity by five and four infants and toddlers on October 28 and November 1, respectively. This as compared to when she was only one over on November 3. Given the demonstrated steady improvement, and the timing of the corrective measures taken by the Licensee to coincide with her growing knowledge of what she needed to do to be in compliance with the numerical/ratio requirements, it seems counterintuitive to conclude an imminent risk of harm still exists. It is appropriate to decide, given that the Licensee's business has been shut down now for nearly six weeks, that she has been punished severely enough for being over-capacity for the times when she was. As noted by Momsen's counsel, her former day care children have been cared for by others since late October/early November, and have had time to bond with new providers. If the Licensee is allowed to operate anew, she faces a situation of building a new clientele.

The Judge is persuaded that the Licensee's new day care children, if any, will encounter no imminent risk of harm to their health, safety or rights. Minn. Stat. § 245A.07, subds. 2 and 2a require that the imminent risk of harm be a present risk, and the ALJ finds no reasonable cause to believe such a situation exists. Shortly after Ms. Ames's visit and the November 1 follow-up, Ms. Momsen understood fully that she was out of compliance and what she had to do to correct the past violations. Once she fully was aware, her coming into compliance was swift. No evidence exists that a child in Momsen's care has suffered harm. The only suggestion that a risk of harm occurred appears in Ex. 3, Attachment A, Ms. Ames's note on October 28 describing the difficulty the Licensee seemed to have keeping up with all the children and the impression of Ames that "there was a lot of confusion" in the licensed premises. The Administrative Law Judge concludes that if Ames perceived an imminent risk of harm in the situation, she would have taken steps then to close down the day care establishment. This was not done. Momsen was given the opportunity first to come into compliance, and she made substantial progress to do that in relatively little time. Under that view of the situation, the ALJ is unable to conclude reasonable cause exists that the children at Ms. Momsen's day care are or would be in imminent risk of harm.

R.C.L.

^[1] Children ages six weeks to 12 months are "infants". Children between 12 and 24 months old are "toddlers".

^[2] Within the infant and toddler age group, no more two of the three may be infants.

^[3] Ex. 1A.

^[4] Ex. 8.