

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

In Re the Revocation of the License of
Tracy and Kevin Ogilvie

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDED DECISION

The above-matter came on for hearing before Administrative Law Judge George A. Beck on Friday, April 8, 2005, at 10:00 a.m. at the LeSueur County Courthouse in Le Center, Minnesota. The OAH record closed on the date of the hearing.

Michael A. Hanson, Assistant County Attorney, 65 South Park Avenue, P.O. Box 156, Le Center, MN 56057-0156, appeared on behalf of the Department of Human Services and the LeSueur County Human Services Department. Tracy Ogilvie, 112 South Fifth Street, LeSueur, Minnesota 56058-1922 appeared representing herself without the benefit of 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

This issue in this case is whether or not the childcare license of Tracy and Kevin Ogilvie should be revoked.

Based upon all of the proceedings in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Tracy and Kevin Ogilvie have been licensed as childcare providers since 1990. Tracy operates a childcare facility in their home at 212 North Second Street in LeSueur, Minnesota.

2. On April 14, 2003, a six year old child in Ms. Ogilvie's daycare allowed a younger child (a two year old) to go out the front door of the home while Ms. Ogilvie was preparing the children to go outside to play. Ms. Ogilvie was unaware that the two year old child had left the house.

3. Ms. Ogilvie and the other children proceeded to the back yard to play. A few minutes later, a neighbor returning home found the younger child walking in the middle of the street and returned the child to Ms. Ogilvie's care. The police were called and took a report, however no charges were filed. Ms. Ogilvie promptly reported the incident to her licensor with LeSueur County and told her daycare parents about the incident.

4. On March 15, 2004, eleven months later, Ms. Ogilvie's licensor recommended to the State Department of Human Services that a conditional license be issued to Ms. Ogilvie due to the April 14, 2003 incident. The recommendation cited a violation of the supervision rule.^[1]

5. On May 14, 2004 an Order of Conditional License was issued by the Department effective for a period of one year.^[2] The Order was amended on June 1, 2004.^[3] As amended the terms of the conditional license were as follows:

1. You follow and comply with all parts of Minnesota Rules, parts 9502.0300 to 9502.0445.
2. No variances to age distribution or capacity will be granted during the conditional period.
3. You obtain a minimum of six hours of additional training by August 20, 2004. The training is in addition to the annual training requirements as listed in Minnesota Rules part 9502.0385. Prior to attending training, you must obtain approval from your licensor that the training is appropriate. It is your responsibility to submit documentation of your attendance to your licensor.

4. You must submit a detailed plan outlining specific methods you will utilize to ensure the proper supervision of children in care at all times. The plan must address both indoor and outdoor supervision. The plan must be submitted to the licensing worker for approval by June 12, 2004.
5. You must either provide a copy of the Order of Conditional License to parents of children in care or document that all parents have been given an opportunity to review the Order of Conditional License. You must obtain parent signatures of each currently enrolled child, indicating they have either received a copy of the conditional order or had an opportunity to review the conditional order. You must provide this documentation to LeSueur County Department of Human Services by June 5, 2004. For new families, you must submit documentation of compliance with this term to LeSueur County Department of Human Services **within 5 days of any child's admission** to your childcare program.

6. In April of 2004 Ms. Ogilvie drafted a letter to the parents of her daycare children which was provided to the parents in May of 2004. In the letter she explained and apologized for the incident of April 14, 2003 and stated that she had become complacent in how she did daycare and was going to work on the problems.^[4] The letter was not sent to the LeSueur County Human Services Department. A copy of the letter was signed by a parent who enrolled in the childcare in August of 2004.^[5]

7. Ms. Ogilvie prepared an outline of a supervision plan which she gave to her licensor in May of 2004. The document does not appear in the LeSueur County file, however.

8. Ms. Ogilvie has not obtained six hours of additional training or submitted documentation of attendance to the licensor as of the date of the hearing. Ms. Ogilvie found that she was unable to obtain the training by the August 20, 2004 date in the Order of Conditional Licensure. She learned in the fall of 2004 that the training could be obtained through the use of videos and books. The licensor told her that she could do the additional training during the year of the conditional license ending June 1, 2005.

9. Although Ms. Ogilvie provided the letter of apology to the parents, she has not provided them with a copy of the Order of Conditional Licensure or obtained the parent's signatures indicating that they have received a copy of the order or had new enrollees sign the order. No orders signed by parents were forwarded to the LeSueur County Department. The licensor advised Ms. Ogilvie that as long as she had written the letter to the parents and that they all knew of the violation, that that was sufficient.

10. On November 5, 2004 a newly hired licensor with LeSueur County made an unannounced visit to Ms. Ogilvie's childcare facility. While the licensor was at the facility Ms. Ogilvie was on the phone in the kitchen on three occasions. The children

were watching a movie in the playroom.^[6] The licensor spent time playing with the children in the playroom. The licensor believed that Ms. Ogilvie was unable to see or hear the children while she was on the telephone.^[7] One of the telephone calls was from her insurance agent who asked her questions about her daycare. The other calls were brief. The licensor also observed that an outside lock on a cupboard was not locked and that there was some garbage on the back step, but not near the children since they were not outside that day. The cupboard also had an inside lock, however.

11. Five parents with children in Ms. Ogilvie's daycare provided letters stating that Ms. Ogilvie is a good daycare provider and in support of her retaining her childcare license.^[8]

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 LeSueur County have complied with all substantive and procedural requirements of law and rule.

4. Minn. Stat. § 245A.07, subd. 3 authorizes the Commissioner of Human Services to revoke a license where a license holder fails to comply fully with applicable law or rules.

5. That under Minn. Stat. § 245A.08, subd. 3, if the Department demonstrates that reasonable cause exists to take action, the burden of proof in a hearing involving the revocation of a childcare license shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with the laws and rules allegedly violated.

6. Minn. Rule pt. 9502.0315, subp. 29a. provides as follows:

Supervision. "Supervision" means a caregiver being within the sight or hearing of an infant, toddler, or preschooler at all times so that the caregiver is capable of intervening to protect the health and safety of the child. For the school age child, it means a caregiver being available for assistance and care so that the child's health and safety is protected.

7. The Order of Conditional Licensure issued to Ms. Ogilvie stated that a failure to comply with stipulations of the conditional license may result in the revocation of Ms. Ogilvie's license.

8. That the Department has demonstrated reasonable cause to believe that Ms. Ogilvie failed to provide adequate supervision for a child on April 14, 2003.

9. That the licensee has not demonstrated that she was in full compliance with the supervision rule on that date.

10. The Department has demonstrated reasonable cause to believe that Ms. Ogilvie violated the childcare rules related to locks on cabinets and garbage, and supervision on November 5, 2004, but that the licensee demonstrated that she was in compliance with those rules.

11. That the Department has demonstrated reasonable cause to believe that Ms. Ogilvie violated terms No. 3, 4 and 5 of the Order of Conditional Licensure issued to her on June 1, 2004.

12. That Ms. Ogilvie has not demonstrated that she was in full compliance with the Order of Conditional Licensure.

13. A decision to revoke a license must take into account “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 persons served by the program,” and “the facts, conditional or circumstances concerning the program’s operation, the well-being of persons served by the program, [and] available consumer evaluations of the program ... ,” as required by Minn. Stat. § § 245A.04, subd. 6 and 245A.07, subd. 1.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That disciplinary action be taken by the Commissioner of Human Services.

Dated this 28th day of April 2005.

/s/ George A. Beck
GEORGE A. BECK
Administrative Law Judge

Reported: Taped
(One Tape-No Transcript Prepared)

MEMORANDUM

In this case the Department seeks to revoke the childcare license of Tracy and Kevin Ogilvie on the grounds that Ms. Ogilvie has failed to comply with the terms of her conditional license which has been in effect since June 1, 2004. The event leading to the conditional license was a two year old child leaving the daycare home without Ms.

Ogilvie's knowledge. The child was found by a neighbor in the street in front of Ms. Ogilvie's house. This is clearly a serious violation of the supervision rule.

The conditional license required Ms. Ogilvie to comply with all parts of the daycare rules. The Department argued that she had failed to do so based upon observations made by the licensor during an unannounced November 2004 visit to the childcare home. The licensor observed an unlocked cabinet, but there was also an inside lock on the cabinet. The garbage observed was outside the daycare home at a time when the daycare children were not going outside. The licensor believed that Ms. Ogilvie could not see or hear the children watching a movie in the playroom when she was on the telephone during the licensor's visit. At this time the licensor was with the children in the playroom. Ms. Ogilvie testified that she was able to see the playroom while on the telephone. She may have justifiably believed that there was no problem while the licensor was playing with the children. The licensee had demonstrated that it is more likely than not that she was in compliance with daycare rules on the date of the unannounced visit.

The terms of the Order of Conditional Licensure required Ms. Ogilvie to obtain six hours of additional training by August 20, 2004. To the date of the hearing in this matter she had not yet obtained this training. The record indicates that the training was not available locally prior to the August 20, 2004 deadline. Ms. Ogilvie testified that the licensor told her that she could have until the end of the conditional license period, namely June 1, 2005, to complete that requirement. Ms. Ogilvie's testimony in this regard was uncontradicted. The licensee essentially argues that the Department is estopped from enforcing this requirement due to the statements of the prior licensor that Ms. Ogilvie states she relied upon.

The record does indicate that the prior licensor had some difficulties in completing her duties. She did not act on a recommendation to the State Department for conditional licensure until eleven months after the incident in question. Ms. Ogilvie testified that repeated requests to the licensor went unanswered. It also appears that the licensor had difficulty accomplishing license renewal visits resulting in the disqualification of some licensees for the USDA Childcare Food Program.^[9] If the prior licensor allowed Ms. Ogilvie through June 1, 2005 to complete this training this factor should be considered in imposing discipline, even though the licensee has not established all legal requirements for estoppel. She did have enough time to accomplish the training prior to the hearing in this matter, and has failed to do so.

The conditional license also required Ms. Ogilvie to submit a detailed plan outlining specific methods to insure proper supervision of children. It was to be submitted to the licensing worker for approval by June 12, 2004. Ms. Ogilvie testified that she drew up an outline of a plan but it was not given to the licensor until May of 2004. The document does not appear in the LeSueur County Human Services Department file. The licensee has not demonstrated that she was in compliance with the conditional license in this respect. It was an important requirement to have a plan in place immediately after the imposition of the conditional license in order to protect children in care. This was not accomplished.

The Order of Conditional Licensure also specifically required review of the Order by parents including the signature of the parents indicating they had either received a copy or reviewed the Order. This documentation was to be provided to LeSueur County by June 5, 2004. New families were also required to be notified. The record indicates that Ms. Ogilvie failed to comply with the terms of the conditional license in this respect. She did draft a letter of apology to parents, which was not provided to LeSueur County. The terms of the conditional order, however, would have specifically advised parents that Ms. Ogilvie had a conditional license and advised the parents of the specific terms that she was required to meet in the one year period that the order was effective. The parents were entitled to have this information in making their decision about whether to keep their children in Ms. Ogilvie's childcare. The licensee testified without contradiction that the licenser told her that the letter to parents was sufficient.

In arriving at discipline the Commissioner is obligated to take into account the nature, chronicity and severity of the violation on the health and safety of children served by the childcare. Some new facts were developed at the hearing which may justify a reconsideration of the level of discipline in this case. Specifically, the prior licenser appears to have had some difficulty in accomplishing her job duties and may well have advised Ms. Ogilvie that she could have more time to accomplish the training that was ordered and may have advised her that the letter of apology to the parents was sufficient. Additionally, there appears to be little in the way of violation demonstrated during the November 2004 visit. Finally, the letters submitted by the licensee do demonstrate positive consumer evaluations of the childcare program.

G.A.B.

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- [\[1\]](#) Ex. 1.
 - [\[2\]](#) Ex. 2.
 - [\[3\]](#) Ex. 3.
 - [\[4\]](#) Ex. G.
 - [\[5\]](#) Ex. H.
 - [\[6\]](#) Exs. E, F.
 - [\[7\]](#) Ex. D.
 - [\[8\]](#) Ex. I.
 - [\[9\]](#) Ex. I, p. 1.