

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS**

**FOR THE COMMISSIONER OF HUMAN SERVICES**

In the Matter of the Conditional License  
and Order to Forfeit a Fine Against the  
License of Rosemary Milton

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

A hearing was held in this matter before Administrative Law Judge Steve M. Mihalchick on October 21, 2005, at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The record was closed upon adjournment of the hearing that day.

Margaret L. Gustafson, Special Assistant Ramsey County Attorney, 50 W. Kellogg Blvd., Ste. 560, Saint Paul, MN 55102, appeared on behalf of the Department of Human Services ("DHS" or "Department") and Ramsey County Community Human Services Department ("County"). Rosemary Milton ("Licensee"), 2965 Edward Street, Maplewood, MN 55109-5505, appeared on her own behalf

**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 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. Was Licensee required to submit a background study form for a substitute caregiver Minn. Stat. §§ 245C.04, subd. 1, and 245C.03, subd. 1(d), and, if so, did she fail to do so?

2. If so, did the Department properly impose a fine of \$200 and order conditional licensure

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

## FINDINGS OF FACT

1. Licensee has been licensed by DHS to provide family child care for up to 10 children in her home since March 2001. Licensee typically provides care for about seven or eight children.<sup>1</sup>

2. Raberta Washington has been a social worker with the County's Family Child Care Licensing unit (FCC Licensing) since July 2003. Ms. Washington supervises 128 licensed daycare providers, including Licensee. In Ms. Washington's view, Licensee has provided exemplary child care.<sup>2</sup> Licensee has never been sanctioned.<sup>3</sup>

3. On May 13, 2004, Licensee was advised that she would need major surgery that would require six weeks of recuperation during which she could not work as a child care provider. Licensee was concerned that if she shut down for a six week period, her clients would find permanent child care elsewhere and she would be out of business. Licensee was so anxious about the issue that she discussed it with a psychologist.<sup>4</sup>

4. Under the Department's day care rules, children in a day care must be supervised by a "caregiver," and the licensed provider must be the primary caregiver. A "substitute" may provide care in place of the licensed provider (when the provider is not present), but not for more than a total of 30 days in any 12 month period.<sup>5</sup> Providers

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<sup>1</sup> Testimony of Milton.

<sup>2</sup> Testimony of Washington.

<sup>3</sup> Testimony of Milton.

<sup>4</sup> Testimony of Milton; Ex. 5 at 1.

<sup>5</sup> Minn. Rule 9502.0315 provides, in part:

Subp. 6. **Caregiver.** "Caregiver" means the provider, substitute, helper, or another adult giving care in the residence.

Subp. 14. **Helper.** "Helper" means a person at least 13 years of age and less than 18 years of age who assists the provider with the care of children.

Subp. 29. **Substitute.** "Substitute" means an adult at least 18 years of age who assumes the responsibility of the provider as specified in part 9502.0365, subpart 5.

are licensed to provide day care at a particular location. Other caregivers are not licensed, whether they assist the provider when the provider is present or whether they act as a substitute when the provider is temporarily absent. A licensed provider must submit documentation that all adult caregivers who assist with care on a regular basis have had a physical examination within the prior 12 months and are physically able to care for children.<sup>6</sup>

5. Under Minnesota statutes governing background studies, a licensed provider must submit completed background study forms for all persons living in the household and all employees or contractors who will have direct contact with the day care children.<sup>7</sup> A completed form must be submitted to the “commissioner,” which for this purpose is defined as follows:

"Commissioner" means the commissioner of human services or the commissioner's designated representative including county agencies and private agencies.<sup>8</sup>

6. In addition to licensed child care, there are certain situations that are excluded from the licensure requirement where the care is being provided by otherwise qualified organizations or where the amount of child care that is provided is so limited that a license is not required. The exclusions that apply to child care by individuals are listed in Minn. Stat. § 245A.03, subd. 2(a)(2004), as follows:

This chapter does not apply to:

(1) residential or nonresidential programs that are provided to a person by an individual who is related unless the residential program is a child

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Minn. Rule 9502.0365 provides, in part:

Subp. 4. **Helpers.** A helper may be used in place of a second adult caregiver when there is no more than one infant or toddler present.

Subp. 5. **Supervision and use of substitutes.** A licensed provider must be the primary provider of care in the residence. Children in care must be supervised by a caregiver. The use of a substitute caregiver must be limited to a cumulative total of not more than 30 days in any 12-month period.

<sup>6</sup> Minn. Rule 9502.0355, subp.2. A.

<sup>7</sup> Minn. Stat. §245C.04, subd. 1(d), provides:

Applicants for licensure, license holders, and other entities as provided in this chapter must submit completed background study forms to the commissioner before individuals specified in section 245C.03, subdivision 1, begin positions allowing direct contact in any licensed program.

The persons listed in Minn. Stat. § 245C.03, subd. 1, include:

(3) current or prospective employees or contractors of the applicant who will have direct contact with persons served by the facility, agency, or program;

<sup>8</sup> Minn. Stat. §§ 245A.02, subd. 5, and 245C.02, subd. 7.

foster care placement made by a local social services agency or a licensed child-placing agency, except as provided in subdivision 2a;

(2) nonresidential programs that are provided by an unrelated individual to persons from a single related family;

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(15) nonresidential programs for children provided for a cumulative total of less than 30 days in any 12-month period;<sup>9</sup>

7. Licensee was not familiar with the rules on the use of substitutes. She was unaware even that the word “substitute” had a particular meaning in day care licensure. She understood the word according to its common meaning to mean anybody that could replace her, including other licensed providers. Licensee had never used a substitute caregiver to relieve her, even for a few hours. She assumed that all substitutes had to be licensed providers. She recalls having heard of licensed providers who did only “substitute work.” Licensee was also unfamiliar with the statute allowing unlicensed child care in limited situations.<sup>10</sup>

8. On July 23, 2004, Licensee called her Licensor, Ms. Washington, and informed her that she would be having surgery in January 2005. She asked if Ms. Washington knew of any licensed providers who did substitute child care. Ms. Washington told her that she did not know of any that did “substitute work,” but suggested that Licensee contact the Adults and Children’s Alliance to obtain a list of providers who were willing to do “back-up” day care.<sup>11</sup>

9. Ms. Washington also told Licensee that any “helpers” would need a completed and cleared criminal background check form prior to starting work and that she would mail the necessary forms to Licensee that afternoon. Licensee did not receive any forms from Ms. Washington.<sup>12</sup>

10. Licensee called the Adults and Children's Alliance. She paid a one-year membership fee and requested a copy of the list of licensed providers available to do back-up care. She received that on July 29, 2004. Because she thought it would best to keep the four youngest children together if possible, she called the providers in the area to see if they could accommodate all four children. None would agree to do so, at

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<sup>9</sup> Effective August 1, 2005, clause (15) was amended to read:

programs for children such as scouting, boys clubs, girls clubs, and sports and art programs, and nonresidential programs for children provided for a cumulative total of less than 30 days in any 12-month period.

Laws of Minnesota, 2005 1st Spec. Sess., ch. 4, art. 1, § 4. That change merely added the listed groups to the exclusion and has no impact on this matter.

<sup>10</sup> Testimony of Milton; Ex. 5 at 1.

<sup>11</sup> Testimony of Milton; Ex. 5 at 1.

<sup>12</sup> Testimony of Milton and Washington; Exs. 3 and 5 at 27.

least not six months in advance. She then decided to look elsewhere. She checked the newspaper ads. She saw an ad for a person who worked strictly as a substitute. She called her, but found that she charged \$14 per hour, which was more than she was receiving from her clients already.<sup>13</sup>

11. On or about August 30, 2004, FCC Licensing mailed a brochure about adult caregiver and helper training to Licensee. The brochure described co-applicants, adult caregivers, and helpers. A co-applicant was described as a person whose name appeared on the license, completed the application and other requirements and signed a provider agreement and met the same training requirements as the primary licensed provider. A helper was described as a person 13 up to 18 years old, who had 18 would be considered an adult assistant. An adult caregiver was described as follows:

*ADULT CAREGIVER:*

Provides care 30 times a year or more but name is not on the license. The adult caregiver must provide a BCA, Fact Sheet, Physician's Report, and at least 6 hours of training each year which includes CPR and SIDS training. An Adult Substitute Caregiver can provide care in the absent [sic] of the provider up to 30 times in one calendar year. Six hours of training per year is required.<sup>14</sup>

12. Upon seeing this provision, Licensee realized for the first time that a substitute caregiver could be unlicensed. However, she did not realize that this was because the licensed provider remains responsible for the care of the children provided by a substitute caregiver because she still did not understand the concept of a substitute in licensing parlance. Instead, she focused on the concept that a caregiver could be unlicensed, which was new to her.<sup>15</sup>

13. Licensee reviewed her provider handbook to confirm her understanding that adult substitutes did not have to be licensed. She found a page describing changes to the Human Services Licensing Act -- Minnesota Statute 245A. It was on a form numbered RCW 3239 (8/00) cdr.<sup>16</sup> It listed the statutory exclusions from licensure. Licensee made particular note of the following statement paraphrasing clause (15):

A license is still not required in the following child care situations under Minnesota Statutes, section 245A.03, subdivision 2, . . . (15) child care provided to children for a cumulative total of less than 30 days in any 12 month period.

Licensee understood this provision to apply to substitutes, as she used the term, and now thought that she had another option available. Under this law, she could find

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<sup>13</sup> Testimony of Milton; Ex. 5 at 11.1.

<sup>14</sup> Testimony of Milton; Ex. 5 at 15.1.

<sup>15</sup> Testimony of Milton; Ex. 5 at 16.

<sup>16</sup> Ramsey County Welfare (RCW) is the former name of the Ramsey County Community Human Services Department.

someone to provide child care for her clients for less than a total of 30 days and that person would not have to be licensed.<sup>17</sup>

14. On September 3, 2004, Licensee contacted Tammy E. Wayne, the parent of a child who had formerly received child care from Licensee, and asked if she would be interested in providing substitute day care in Licensee's home. After Ms. Wayne expressed interest, Licensee contacted a tax attorney with some knowledge of day care laws. The attorney said that it was his understanding that Licensee could use an unlicensed substitute, but suggested that she contact the Licensor to see what was required. The attorney also advised Licensee to create an independent contractor relationship with the Ms. Wayne. He suggested a contract establishing independent contractor status between Ms. Wayne and Licensee and another set of contracts between Ms. Wayne and the parents of each of the children receiving child care. Licensee decided to proceed as her lawyer suggested.<sup>18</sup>

15. On September 7, 2005, the Licensee spoke to Ms. Washington and confirmed that she could use an unlicensed substitute caregiver. Ms. Washington told her that the only requirement was the need for a criminal background check. A few days later, Ms. Washington called to ask a few more questions and to make sure that Licensee was going to use Ms. Wayne for no more than 30 days.<sup>19</sup>

16. Licensee and Ms. Washington misunderstood each other during these discussions in September. Licensee was talking about Ms. Wayne temporarily providing unlicensed child care in Licensee's home, while Ms. Washington understood Licensee to be talking about using Ms. Wayne as a substitute under Licensee's license.

17. One child in Licensee's care receives daycare subsidy payments from the County. The County has contracted with Resources for Child Caring ("RCC") to provide some administrative services pertaining to the payment of day care subsidies, including the meals program. RCC also contracts with the County to operate a clearinghouse for parents seeking available licensed daycare in Ramsey County. Licensee called a social worker at RCC to see if payments for the one child could be sent directly to the substitute during her recovery period. The RCC worker informed Licensee that the substitute would need to be registered with the County to receive the payment. On about September 17, 2004, Licensee received a packet of forms for Ms. Wayne to complete, including a Release of Criminal Information form. It is County form number "RCW 2149A (Rev. 5/02) cdr." It states that the release of information is being requested by Ramsey County Community Human Services and authorizes the release of criminal information by law enforcement agencies to "Ramsey County Human Services payments." The Release of Criminal Information form was signed by Ms. Wayne on October 28, 2004, and returned to RCC. Licensee believed that the form

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<sup>17</sup> Testimony of Milton; Ex. 5 at 16.

<sup>18</sup> Testimony of Milton.

<sup>19</sup> Testimony of Milton. Ms. Washington had no record of these conversations.

was the Release of Criminal Information form that had been referred to by Ms. Washington and that submitting it to RCC complied with Ms. Washington's directions.<sup>20</sup>

18. On October 28, 2004, Ms. Wayne and Licensee signed a Substitute Childcare Provider Agreement that had been drafted by Licensee or her attorney. The agreement contained the following provisions, among others:

19. From February 7, 2005 to March 18, 2005, Ms. Wayne would be the "substitute childcare provider in place of" Licensee while Licensee recovered from surgery.

20. Ms. Wayne would provide the childcare at Licensee's residence.

21. Ms. Wayne would have her own contract with each of the clients so that they would understand that she was acting as a self-employed provider, not an employee of Licensee. Licensee would be on the premises recovering from surgery, but would not be providing care to the children and would not be supervising Ms. Wayne. She would, however, be available to answer questions from Ms. Wayne.

22. The clients would pay Ms. Wayne directly and Licensee would receive no income during the period.

23. Supplies would be provided by Licensee.

24. All curriculum, activities, cooking, etc. were the sole responsibility of Ms. Wayne.

25. Ms. Wayne would complete and pass a First Aid/CPR course prior to beginning work, because it was a state requirement.<sup>21</sup>

26. At various times during November 2004, Licensee's parents each signed an Enrollment Agreement for Child Care Services. Ms. Wayne signed the agreements on January 13, 2005. Each Enrollment Agreement stated that the parents understood that their children were enrolled in child care with Ms. Wayne for the period of February 7, 2005, through March 18, 2005. Each provided that day care would be provided Monday through Friday and identified the particular days and times each child would be attending, stated the rates to be paid, and provided for a termination notice of two weeks. Ms. Wayne signed the document in a space labeled, "Provider's signature."<sup>22</sup>

27. The period of February 7, 2005, through March 18, 2005, is almost six weeks long and has 30 weekdays.

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<sup>20</sup> Testimony of Milton and Washington; Ex . 5 at 20.1.

<sup>21</sup> Testimony of Milton; Exs. 4 and 5 at 18.1.

<sup>22</sup> Ex. 5 at 19.1-19.11.

28. On January 28, 2005, Licensee had surgery. She closed day care services for one week. On February 7, 2005, Ms. Wayne began caring for Licensee's day care children at Licensee's home. Licensee was present at her home, other than when she left for medical appointments. She saw Ms. Wayne interact with the children at various times during the day and did not observe any conduct that would cause concern. Licensee also had a monitor in her bedroom so she could hear the children in the event Ms. Wayne needed assistance. Licensee perceived no problems until March 2, 2005, when she observed Ms. Wayne was bleeding from her ear.<sup>23</sup>

29. On March 3, 2005, the County received a report from Regions Hospital that Ms. Wayne had been hospitalized for detoxification and had told the hospital that she had been caring for 10 children in Licensee's home for three weeks while Licensee recovered from surgery. The hospital also reported that Ms. Wayne stated she had been drinking only before and after doing the child care.<sup>24</sup>

30. Ms. Washington and another family child care licenser went to Licensee's home on March 3, 2005, to investigate the report. Licensee told the licensers that Ms. Wayne had contracted with each family to provide child care in Licensee's home beginning on February 7, 2005, and that Ms. Wayne was not working for Licensee. The licensers requested the Applicant Background Clearance Study and Physician's Report on Ms. Wayne. Licensee stated that she had submitted paperwork, including a release to the BCA, to RCC. The licensers informed Licensee that these were not the correct forms and that the licenser had previously told Licensee on two occasions in 2004 that the forms needed to be completed prior to any substitute caregiver being employed. Licensee stated that she had been told by the RCC that the forms were fine. Licensee said that except for follow-up medical appointments, she had been present in the house and did not note any behavior by Ms. Wayne that would indicate that she was ever intoxicated.<sup>25</sup>

31. The form used by FCC Licensing for authorizing background checks of criminal information is form number RCW 1909 (Rev.7/02) Page 1 [and 2] cdr. There is no title on the front page of the form, only instructions to, "PLEASE PROVIDE THE FOLLOWING INFORMATION (Please Print):." The back of the form has the title, "Applicant Background Study, Bureau of Criminal Apprehension Clearance Check." It contains a number of instructions and information that the information requested will be disclosed to the Department and the local agency responsible for licensing.<sup>26</sup>

32. Ms. Washington and the County believe that when day care is provided in a licensee's home, it is being provided under that licensee's day care license.<sup>27</sup> In this case, they did not believe that Ms. Wayne could provide legal unlicensed day care in Licensee's home.

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<sup>23</sup> Testimony of Milton.

<sup>24</sup> Testimony of Washington; Ex. 5 at 28.1.

<sup>25</sup> Testimony of Milton and Washington; Ex. 5 at 28.2.

<sup>26</sup> Testimony of Milton; Ex. 6.

<sup>27</sup> Testimony of Washington.

33. Licensee terminated her contract with Ms. Wayne on March 3, 2005. Ms. Wayne had no contact with the children in day care after March 2, 2005. Ms. Wayne provided day care in Licensee's home from February 7, 2005, to March 2, 2005, a total of 24 days.<sup>28</sup>

34. Ms. Washington contacted DHS to discuss how to handle the situation. Because Licensee had been such an excellent provider, Ms. Washington found the fact that she had not turned in the background check to her to be surprising and very out of character. She recommended to the Department that Licensee be fined, which he considered an appropriate minimal penalty. Ms. Washington was told to provide the Department with a written recommendation that Licensee be fined and placed on a one-year conditional license for failure to provide a criminal background check.<sup>29</sup>

35. On March 29, 2005, Ms. Washington sent a letter to the DHS on behalf of the County recommending a fine and a one-year conditional license. The letter cited the report that had been received from Regions Hospital and the March 3, 2005, conversations that the licensors had with Licensee and her description of the arrangements that have been made with Ms. Wayne. The letter went on to state:

FCC licensing informed Mrs. Milton that these were not the correct forms and that the licensor had previously stated to her (7/23/04 phone call, 1/20/05 relicensing visit) the forms that needed to be completed prior to any substitute caregiver being employed. In addition, all the forms were to be submitted and cleared by Ramsey County FCC Licensing as agent for DHS.

36. There was no relicensing visit on January 20, 2005. There had been a relicensing visit on January 20, 2004. It could not possibly have happened on that date. Ms. Washington did not explain why she had used the January 20, 2005, date other than to call it a mistake as to the year.<sup>30</sup> It appears that Ms. Washington recalled having a second conversation with Licensee, as she had on September 7, 2004, but could not accurately recall the date and just put something in that was not true. No contemporaneous notes support the statement in the letter that, "all the forms were to be submitted and cleared by Ramsey County FCC Licensing as agent for DHS." It does not sound like something a licensor would say. It most likely was not said to Licensee.

37. The March 29, 2005, letter stated the County's position on the arrangement with Ms. Wayne as follows:

The fact that day care services were being provided in the Milton FCC home meant that care was under the FCC license. As the license holder, Mrs. Milton was to follow the mandated licensing rules regarding documentation and qualification of caregivers, and was therefore, in violation.

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<sup>28</sup> Testimony of Milton; Ex. 2.

<sup>29</sup> Testimony of Washington.

<sup>30</sup> Testimony of Washington; Ex. 2.

38. Ms. Washington signed the letter as Licensing Social Worker from “RCC -- Family Childcare Licensing.”<sup>31</sup>

39. On August 19, 2005, the Department issued an Order to Forfeit a Fine – Order of Conditional License to Licensee. It stated that it was based upon a recommendation by the County. It ordered a \$200 fine stating the following reason:

On February 8, 2005, you were in violation of Minnesota Statutes, section 245C.04, subdivision 1, which requires license holders to submit a background study form to DHS before an individual working in the program has direct contact with children served by the program.

It described the violation as follows:

On March 3, 2005, Ramsey County received a complaint regarding your childcare home. On March 3, 2005, [sic] two Ramsey County licensing workers visited your home to investigate the complaint. During the complaint investigation, the licensing workers determined that from February 8, 2005, to March 3, 2005, a caregiver who was providing care for children did not have a background study submitted as required providing care for children [sic].

40. The Order also placed Licensee's license on conditional status for one year. The Order cited Minn. Stat. §§ 245A.06, subds. 1 and 3, and 245A.04, subd. 6, which provide the basis and authority for issuing conditional licenses and other sanctions, and Minn. Stat. §§ 245C.03, subd. 1, and 245C.04, subd. 1(d), as the statutes violated. It described the violation as follows:

During the complaint investigation, the licensing workers determined that from February 8, 2005, to March 3, 2005, a caregiver who was providing care for children did not have a background study submitted as required.

41. The Order imposed five terms on the conditional license. They included that she submit a written plan describing how she would ensure that substitute caregivers have the appropriate training and how she would comply with the background study requirements for all substitute caregivers, that she notify her licensor prior to use of any substitute caregiver, and that she provide a copy of the Order of Conditional License to the parents of her day care children.<sup>32</sup>

42. Licensee filed a timely appeal. The Notice of and Order for Hearing dated August 29, 2005, was served by the County by mail on September 20, 2005.

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

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<sup>31</sup> Testimony of Washington; Ex. 2.

<sup>32</sup> Ex. 1. The order stated it was based a recommendation of Ramsey County Human Services Department.

## CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services are authorized to consider the appeal of the fine and conditional child care license, pursuant to Minn. Stat. §§ 245A.08 and 14.50.

2. The Department may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable laws or rules. If the Department demonstrates reasonable cause, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the Department alleges were violated.<sup>33</sup>

3. Licensee has demonstrated by a preponderance of the evidence that Ms. Wayne was acting as a provider of legal unlicensed day care providing day care in Licensee's home from February 7, 2005, through March 2, 2005. Licensee was not the provider of day care during that period and Ms. Wayne was not her "substitute" as that term is defined in Minn. Rule 9502.0315, subp. 29.

4. Since Ms. Wayne was a legal unlicensed day care provider, Licensee was not required to submit a completed background study form for her under Minn. Stat. §§ 245C.03, subd. 1, and 245C.04, subd. 1. Therefore, Licensee did not violate those statutes.

5. Even if Ms. Wayne were considered to have been a "substitute" and Licensee were considered to have been the "provider," there was no violation of Minn. Stat. §§ 245C.03, subd. 1, and 245C.04, subd. 1, because a completed background check form for Ms. Wayne was submitted to RCC before she began providing care. RCC is a private agency authorized to request and receive the County's Release of Criminal Information form, RCW 2149A, which by its own terms provides for the release of information to Ramsey County Community Human Services. Thus, the completed background check form was provided to the County as required by the statutes.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

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<sup>33</sup> Minn. Stat. § 240A.08, subd. 3(a).

## RECOMMENDATION

**IT IS RESPECTFULLY RECOMMENDED** that the Order to Forfeit a Fine - Order of Conditional License be **REVERSED**.

Dated: December 9, 2005

/s/ Steve M. Mihalchick

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STEVE M. MIHALCHICK  
Administrative Law Judge

Tape recorded (two tapes) not transcribed

## MEMORANDUM

The purpose of a background study in the day care setting is to determine whether persons who will have direct contact with day care children have committed any acts that would disqualify them from having that direct contact. The Department maintains that Licensee violated the plain language of the statute when she failed to submit a background study form before her substitute caregiver began work. The Department seeks sanctions consisting of a \$200 fine and the imposition of a one-year conditional license.

Licensee has an exemplary record of providing quality child care. It is apparent that the County and Licensee have experienced significant miscommunications, some of which are not the fault of either Licensee or Ms. Washington, that have resulted in misunderstandings and hard feelings.

There are some conflicts in the testimony of Licensee and Ms. Washington and it is necessary to assess their credibility. Licensee was very precise, kept detailed and accurate records, and testified very credibly. She is an excellent day care provider. She sought information from the County and others as to how she could arrange to cover the care of her clients during her surgery and recovery. She looked at the statutes, rules, and other materials she had been provided and attempted to comply with them in every way. She suffered from a lack of knowledge of the jargon used by the County, and so did not ask the right questions and misunderstood the answers received.

Ms. Washington was less precise, kept less detailed and less accurate records, and testified slightly less credibly. She has many clients, and it appears that some of her testimony about what happened was not from actual memory of what happened or from contemporaneous notes. Rather they appear to be statements of what she most likely would have said in similar situations. Likewise, it appears that some of the records of her conversations with Licensee were reconstructed after the fact and

contained some content or keyboarding errors. Her letter to DHS recommending sanctions suffered from the same errors.

It is most clear that Ms. Washington never understood that Licensee was contemplating using Ms. Wayne to provide legal unlicensed day care in her home. That was probably because of confusion over the use of the term “substitute.” Ms. Washington failed to recognize that and failed to clear up the confusion.

The County has provided no support for its statement that day care provided Licensee’s home “meant that care was under the FCC license.” Nothing in the licensing statutes or rules says that. On the contrary, Ms. Wayne met every requirement set by Minn. Stat. § 245A.03, subd. 2, to be excluded from licensure. Thus, the statutes the Department alleges have been violated did not apply in this situation.

Licensee was not intentionally attempting to circumvent the rules governing substitute caregivers. Rather, Licensee made great efforts to comply with the law and honestly believed that submitting the completed background check form to RCC was what was required in these unique circumstances. She appears to have been correct, but if she was wrong, her mistake is understandable. The form was submitted and the County presumably completed the background check. The children were cared for without incident. It is not appropriate that Licensee be penalized in this situation.

S.M.M.