

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

In the Matter of the Revocation of the License of Shirell Smith to Provide Family Child Care.

**ORDER DENYING
DEPARTMENT'S MOTION FOR
SUMMARY DISPOSITION**

The above-entitled matter is pending before Administrative Law Judge Barbara L. Neilson pursuant to a Notice of and Order for Hearing dated October 19, 2005. The Department filed a motion for summary disposition on December 12, 2005. The Licensee filed her response in opposition to the Department's motion on December 23, 2005. The OAH motion record closed on December 30, 2005, when the last submission was received.

Rebecca S. Morrisette, Assistant County Attorney, 525 Portland Avenue South, 12th Floor, Minneapolis, MN 55415, appeared on behalf of Hennepin County and the Department of Human Services. Mark G. Ohnstad, Attorney at Law, Thomsen & Nybeck, P.A., 3300 Edinborough Way, Suite 600, Edina, MN 55435-5962, appeared on behalf of the Licensee, Shirell Smith.

NOW, THEREFORE, based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memoranda,

IT IS HEREBY ORDERED as follows:

1. The Department's motion for summary disposition is DENIED.
2. This case will proceed to hearing as scheduled on January 31, 2006.

Dated: January 24, 2006

s/Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Underlying Facts

Based upon the submissions of the parties, it appears that the underlying facts in this case are as follows. The Licensee, Shirell Smith, obtained a family child care license from the Department of Human Services ("DHS" or "the Department") on October 2, 1998, and a child foster care license from DHS in 2001.¹ On February 10, 2004, an altercation occurred between Ms. Smith and her roommate, Celestine Leonard.² Both Ms. Smith and Ms. Leonard were arrested and charged with domestic

¹ Smith Affidavit (attached as Ex. 2 to Memorandum in Opposition to Motion), ¶¶ 2, 3.

² *Id.* at ¶¶ 4-5.

assault in the fifth degree. Ms. Smith and the City of Bloomington reached an Agreement to Suspend Prosecution on May 20, 2004. The charges against Ms. Smith were continued for dismissal on condition that Ms. Smith not commit an offense similar to that involved in the February 2004 incident and pay \$75 in costs of prosecution. The matter was closed after one year, and Ms. Smith is seeking to have the criminal record expunged.³

By letter dated July 13, 2004, Ms. Smith was notified by Hennepin County (“the County”) that, based upon the results of a background study, she was disqualified from direct contact with persons served in her child care program. According to the letter, Ms. Smith was found to be disqualified because the County had determined that a preponderance of the evidence showed that she had committed misdemeanor assault in the fifth degree in violation of Minn. Stat. § 609.2242 in connection with the February 10, 2004, incident, and she thus posed an imminent risk of harm to persons served by the program.⁴ Ms. Smith thereafter requested reconsideration of the disqualification and asked that she be allowed to continue to operate her family child care.⁵ The DHS notified Ms. Smith by letter dated November 12, 2004, that the disqualification would not be set aside, but a variance would be granted to her family child care license for one year or until the license expired.⁶ The variance was contingent upon there being no other disqualifying factors and no recurrences of the same or similar incidents.⁷ The risk of harm assessment enclosed with the November 12, 2004, letter suggests that the individual who conducted the assessment actually recommended that the disqualification be set aside, since “SA” was circled at the bottom of the form.⁸

Shortly thereafter, by letter dated December 16, 2004, the Department issued an order revoking the license of Ms. Smith to provide child foster care. The letter indicated that the revocation of the foster care license was based upon a disqualification of which Ms. Smith had been notified on August 24, 2004, the disqualifications of two other individuals following background studies, and the failure of Ms. Smith and the other two individuals to submit requests for reconsideration of their disqualifications.⁹ Although the precise nature of these disqualifications is not clear from the motion record, it appears that Ms. Smith’s disqualification was again based on the February 10, 2004, altercation.¹⁰ The December 16, 2004, DHS order informed Ms. Smith that she had the right to appeal the foster care license revocation decision and the right to a contested case hearing, and notified her of the time limit for doing so.¹¹ On January 19, 2005, the DHS sent a letter to St. David’s Child Development and Family Services (who apparently employed Ms. Smith in some capacity in connection with her foster care

³ *Id.* at ¶ 6; see also Exhibits 6 and 7.

⁴ Ex. 8 attached to Memorandum in Opposition to Motion; Ex. 2 attached to Department’s Memorandum in Support of Motion, Smith Affidavit, ¶ 7.

⁵ Ex. 9 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶ 8.

⁶ Ex. 10 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶ 9.

⁷ Ex. 10 attached to Memorandum in Opposition to Motion.

⁸ *Id.*

⁹ Ex. 1, Att. A and Ex. 2 attached to Department’s Memorandum in Support of Motion; Ex. 11 attached to Memorandum in Opposition to Motion.

¹⁰ See Ex. 15. Ms. Smith’s affidavit indicates that the two other individuals who were disqualified were Ms. Smith’s son and daughter. She alleges that they each received variances of some type and that they no longer live with Ms. Smith and are no longer involved with child care. Smith Affidavit, ¶ 10.

¹¹ *Id.*

licensure¹²) in which DHS indicated that Ms. Smith had been disqualified and ordered St. David's to immediately remove Ms. Smith from any position allowing direct contact with persons receiving services from its program. The letter indicated that Ms. Smith had been provided a form that she could use to request reconsideration.¹³ Ms. Smith requested reconsideration of her disqualification in a form dated February 14, 2005,¹⁴ which the DHS apparently received on February 23, 2005.¹⁵ On March 24, 2005, the County sent Ms. Smith a request for fingerprinting in connection with her child care licensing background study. Ms. Smith complied with this request.¹⁶ By letter dated April 22, 2005, the DHS informed Ms. Smith that it had decided not to set aside her disqualification from positions allowing direct contact with persons receiving services from facilities licensed by the DHS and the Department of Health, from facilities serving children or youth licensed by the Department of Corrections, and from unlicensed Personal Care Provider Organizations.¹⁷ The letter informed Ms. Smith that the license holder (St. David's Child Development and Family Services) could request a variance if it was interested in allowing Ms. Smith direct contact with persons served by the licensed program.¹⁸ It is not clear whether such a variance was ever requested. On May 9, 2005, Ms. Smith faxed an appeal of the revocation of her "foster care/respite" license to DHS.¹⁹ By letter dated May 13, 2005, the DHS informed Ms. Smith that her appeal was not timely and notified her that the Order of Revocation issued on December 16, 2004, with respect to her foster care license remained in effect.²⁰

On May 12, 2005, the County sent a letter to DHS requesting that Ms. Smith's family child care license be revoked based upon the revocation of Ms. Smith's license to provide child foster care and the "conclusive disqualifications" precluding direct contact with those in the child care program. The letter did not mention that Ms. Smith had already been granted a variance for the February 10, 2004, incident.²¹ On October 5, 2005, the Department issued an order revoking Ms. Smith's family child care license.²² The Department's letter stated that, "[b]ecause you had your child foster care license revoked, your family child care license must also be revoked. You may not be granted another license from the Department of Human Services (DHS) for five years from the date of this revocation."²³ Ms. Smith filed a timely appeal of the order revoking her child

¹² See Ex. 24 attached to Memorandum in Opposition to the Motion.

¹³ Ex. 12 attached to Memorandum in Opposition to the Motion.

¹⁴ Ex. 13 attached to Memorandum in Opposition to the Motion; Smith Affidavit, ¶ 12.

¹⁵ Ex. 15 attached to Memorandum in Opposition to the Motion.

¹⁶ Ex. 14 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶ 13.

¹⁷ Ex. 15 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶ 14.

¹⁸ Ex. 15 attached to Memorandum in Opposition to Motion.

¹⁹ Ex. 16 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶ 15.

²⁰ Ex. 18 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶ 17; Exs. 1, 2 attached to Department's Memorandum in Support of Motion. Although this letter referred to Ms. Smith's family child care license, it is apparent that it actually was based upon the December 16, 2004, order revoking Ms. Smith's child foster care license.

²¹ Ex. 1 attached to Department's Memorandum in Support of Motion; Ex. 17 attached to Memorandum in Opposition to Motion.

²² Ex. 2 attached to Department's Memorandum in Support of Motion; Ex. 19 attached to Memorandum in Opposition to Motion.

²³ *Id.*

care license,²⁴ resulting in the initiation of the present contested case proceeding. She also filed letters supporting restoration of her licenses.²⁵

Scope and Standard of Review

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.²⁶ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.²⁷

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.²⁸ To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute that have a bearing on the outcome of the case.²⁹ A nonmoving party cannot rely on pleadings alone to defeat a summary judgment motion.³⁰ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.³¹

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party,³² and all doubts and factual inferences must be resolved against the moving party.³³ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.³⁴

Allegations and Contentions of the Parties

The Department argues that Ms. Smith is precluded from continuing to have a child care license under Minn. Stat. § 245A.04 due to the revocation of her foster care license. The Department asserts that, under Minn. Stat. § 245A.04, subd. 7(e)(3), the Commissioner of DHS cannot issue a child care license if the applicant, license holder, or controlling individual has had any type of DHS license revoked within the past five years. Because Ms. Smith did not file a timely appeal of the Department's order revoking her foster care license, the DHS points out that that order constitutes a final order and argues that Ms. Smith's child care license must also be revoked. The

²⁴ Ex. 20 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶ 19.

²⁵ Exs. 22-26 attached to Memorandum in Opposition to Motion; Smith Affidavit, ¶¶ 21-23.

²⁶ Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. Rules, 1400.5500K; Minn.R.Civ.P. 56.03.

²⁷ See Minn. Rules 1400.6600 (2002).

²⁸ Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

²⁹ Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

³⁰ White v. Minnesota Dept. of Natural Resources, 567 N.W.2d 724 (Minn. App. 1997).

³¹ *Id.*; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

³² Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

³³ See, e.g., Celotex, 477 U.S. at 325; Thompson v. Campbell, 845 F.Supp. 665, 672 (D.Minn. 1994); Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971).

³⁴ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251 (1986).

Department contends that there are no genuine issues of material fact and this matter is appropriate for summary disposition because it can be decided simply by applying the law to the undisputed facts.

In response, the Licensee asserts that the motion should be denied because Ms. Smith previously was granted a variance for the incident in question, there are genuine issues of material fact precluding summary disposition, and discovery is incomplete. The Licensee argues that it would be inappropriate to order summary disposition for DHS because there has been no showing by DHS that continued operation of the child care program is not in the best interest of the children served by the program and would pose an unacceptable risk of harm to those children. The Licensee asserts that the Department's motion for summary disposition overlooks the fact that the Commissioner previously granted Ms. Smith a variance for her child care license based on the February 2004 incident. The Licensee contends that her tardy appeal of the foster care license revocation should be excused due to the confusion over the appeal deadline and argues that revocation is too severe a penalty under the circumstances of this case. She also contends that the revocation was based on the erroneous assumption that a preponderance of the evidence shows Ms. Smith committed domestic assault. The Licensee points out that Minn. Stat. § 609.2242(1) defines misdemeanor domestic assault to encompass instances in which a person "intentionally inflicts or attempts to inflict bodily harm" upon a family or household member or acts "with intent to cause fear in another of immediate bodily harm or death," and argues that Ms. Smith did not act in a fashion that falls within the statute during the February 2004 incident. The Licensee provided with her Memorandum in Opposition to the Motion affidavits of Ms. Smith, Ms. Leonard, and Ms. Smith's daughter (who witnessed the February 2004 altercation) denying that Ms. Smith's actions that day constituted domestic assault.³⁵ Finally, the Licensee asserts that summary disposition is inappropriate because discovery remains incomplete.

Analysis

The DHS relies primarily upon Minn. Stat. § 245A.04, subd. 7(e)(3), to support its motion for summary disposition. That subdivision states that the Commissioner of Human Services "shall not issue a license if the applicant, license holder, or controlling individual has . . . had a license revoked within the past five years." The DHS contends that it is compelled to revoke Ms. Smith's child care license because her foster care license has been revoked, even though it previously granted Ms. Smith a variance to continue operating her family child care despite the February 2004 incident.

As a threshold matter, the Administrative Law Judge is not persuaded that the revocation of a foster care license necessarily compels the revocation of a family child care license under circumstances such as those presented here. The Department has not supplied any authority supporting such a strict construction of Minn. Stat. § 245A.04, subd. 7(e)(3), and the Administrative Law Judge has been unable to find any. Minn. Stat. § 245A.04, subd. 7(e)(3), upon which the Department relies, merely restricts the Commissioner's ability to issue "a license" if the individual has had "a license" revoked

³⁵ See Smith Affidavit ¶ 6 (attached as Exhibit 2 to the Memorandum in Opposition to Motion); Thomas Affidavit ¶ 2 (attached as Exhibit 3 to Memorandum in Opposition); and Leonard Affidavit ¶ 2 (attached as Exhibit 5 to the Memorandum in Opposition to Motion).

within the past five years; it does not expressly authorize revocation or suspension of the license of an existing license holder based upon revocation of a completely different type of DHS license. While the language of the statute is somewhat ambiguous, it is equally plausible that the statute merely means that the revocation of a particular type of license precludes the issuance of the same type of license to that individual during the next five years.³⁶

It is a well-established canon of statutory construction that, “[w]hen a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both”³⁷ and that “[e]very law shall be construed, if possible, to give effect to all its provisions.”³⁸ As discussed more fully below, if the general provision relating to licensure contained in Minn. Stat. § 245A.04, subd. 7(e)(3), is construed as urged by the Department, that provision would be at odds with several other detailed provisions of Minnesota Statutes Chapters 245A and 245C³⁹ that set forth standards and factors to be considered in making disqualification determinations and imposing licensing sanctions and allow for a consolidated contested case hearing where a licensee seeks to challenge a license revocation based upon a disqualification.

Chapters 245A and 245C make it clear that certain criteria must be applied in determining whether a disqualification should be found, whether a set aside should be issued, and whether a license should be revoked. For example, section 245A.04 specifies in subdivision 6 that, “[b]efore issuing, denying, suspending, revoking, or making conditional a license, the commissioner “shall evaluate information gathered under this section,” and “consider facts, conditions, or circumstances concerning the programs’ operations, the well-being or persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed.” Subdivision 6 also states that the Commissioner “shall evaluate the results of the [background] study” and “determine whether a risk of harm to the persons served by the program exists” by applying “the disqualification standards set forth in chapter 245C.” Moreover, the background study provisions cross-referenced in Minn. Stat. § 245A.04 make it clear that, if an individual is found to have a disqualifying characteristic, the Commissioner is required to “review the information immediately

³⁶ Such an interpretation of Minn. Stat. § 245A.04, subd. 7(e)(3), also would be consistent with the rules issued by the DHS governing the licensing of day care facilities which are set forth in Minnesota Rules part 9502. Minn. R. 9502.0341, subp. 11, states that “[a] provider whose license has been revoked because of noncompliance with applicable laws or rules, shall not be granted a new license for five years following revocation. When the commissioner initiates an action to revoke a license, the provider may not voluntarily withdraw his or her license without written assurance from the provider that he or she is voluntarily accepting revocation and will not reapply for five years. An applicant whose application was denied shall not be granted a new license for two years following a denial, unless the applicant’s subsequent application contains new information which constitutes a substantial change in the condition that caused the previous denial.” The May 12, 2005, letter to DHS from the County recommending revocation did not accurately quote the current version of this rule. See Ex. 1 attached to Memorandum in Support of Motion.

³⁷ Minn. Stat. § 645.26, subd. 1.

³⁸ Minn. Stat. § 645.16.

³⁹ Minn. Stat. § 245A.04 cross-references portions of Chapter 245C that govern required background studies, notification of the results of background studies, disqualifications, reconsideration of disqualifications, contested case hearing rights, variances, and conclusive determinations or dispositions. See Minn. Stat. § 245A.04, subds. 3, 3a, 3b, 3c, 3d, 3e, and 3f.

available and make a determination as to the subject's immediate risk of harm to persons served by the program where the individual studied will have direct contact" and list several specific factors to be considered in this regard.⁴⁰ Individuals are permitted to request reconsideration of a disqualification found by the Commissioner and the Commissioner is thereafter permitted to set aside the disqualification if the Commissioner "finds that the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm to any person served" The statute again sets forth detailed factors to guide the Commissioner in making this determination.⁴¹ If the disqualification is set aside, the individual remains disqualified but may hold a license and have direct contact with persons receiving services.⁴² Even when the disqualification is not set aside, the Commissioner may grant a time-limited variance if "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."⁴³

Chapter 245A of the Minnesota Statutes also sets forth other standards that must be applied in determining if a licensing sanction such as revocation is appropriate and provides rights to a consolidated hearing addressing both a disqualification and a resulting licensing sanction under appropriate circumstances. Minn. Stat. § 245A.07, subd. 1, states that, when applying a licensing sanction under Chapter 245A, the Commissioner "shall consider 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." Minn. Stat. § 245A.08, subd. 2a, makes it clear that, when a licensing sanction under Minn. Stat. § 245A.07, subd. 3, is based on a disqualification for which reconsideration was requested and which was not set aside under section 245C.22, "the scope of the contested case hearing shall include the disqualification and the licensing sanction" Ordinarily, a consolidated hearing is held in situations in which a license holder challenges both a disqualification and the licensing sanction, and the Administrative Law Judge ultimately renders Findings of Fact, Conclusions, and a Recommendation relating to whether or not a preponderance of the evidence showed that the license holder engaged in criminal conduct, whether or not the license holder posed a risk of harm to the children in the licensed program and should be disqualified, whether or not the disqualification should be set aside, and whether or not a licensing sanction should be imposed. The Report of the Administrative Law Judge in such cases is typically guided by application of the various statutory factors set forth above.

⁴⁰ Minn. Stat. § 245C.16, subd. 1(b). These factors include: "(1) the recency of the disqualifying characteristic; (2) the recency of discharge from probation from the crimes; (3) the number of disqualifying characteristics; (4) the intrusiveness or violence of the disqualifying characteristic; (5) the vulnerability of the victim involved in the disqualifying characteristic; (6) the similarity of the victim to the persons served by the program where the individual studies will have direct contact; and (7) whether the individual has a disqualification from a previous background study that has not been set aside."

⁴¹ Under Minn. Stat. § 245C.22, subd. 4, the Commissioner is required to consider "(1) the nature, severity, and consequences of the event or events that led to the disqualification; (2) whether there is more than one disqualifying event; (3) the age and vulnerability of the victim at the time of the event; (4) the harm suffered by the victim; (5) the similarity between the victim and persons served by the program; (6) the time elapsed without a repeat of the same or similar event; (7) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and (8) any other information relevant to reconsideration."

⁴² Minn. Stat. § 245C.22, subd. 5.

⁴³ Minn. Stat. § 245C.30.

Accordingly, in order to give effect both to Minn. Stat. § 245A.04, subd. 7(e)(3), and Chapters 245A and 245C, the Administrative Law Judge concludes that Minn. Stat. § 245A.04, subd. 7(e)(3), should not be interpreted to authorize revocation of a family child care license without permitting further inquiry into disputed facts simply because a different DHS license has been revoked, where the licensee has otherwise timely challenged a disqualification and resulting licensing sanction. Such a result is also consistent with due process principles.

In the present case, it appears that the Licensee made a timely request for reconsideration of the disqualification found by the DHS at least insofar as its impact on her child care license.⁴⁴ Upon reconsideration, the DHS found that the circumstances warranted the granting of a variance with respect to the day care license on the condition that there were no other disqualifying factors and no recurrences of the same or similar incidents. Despite the issuance of this variance, the DHS later issued an order revoking the Licensee's child care license, and the Licensee filed a timely appeal.⁴⁵

Based upon the materials submitted in conjunction with the motion, it is evident that there are issues of fact that require a hearing in this matter, and the Department's motion for summary disposition must be denied on this ground as well. The Licensee has provided information disputing the Department's conclusion that a preponderance of the evidence shows that she committed misdemeanor assault in the fifth degree in violation of Minn. Stat. § 609.2242 in connection with the February 10, 2004, incident, creating a genuine issue of fact regarding that issue. In addition, genuine issues of fact remain for hearing regarding whether Ms. Smith poses a risk of harm to the children in her day care; whether the disqualification should be set aside; what, if any, effect the November 2004 variance granted by the Department should have in this proceeding; and whether a licensing sanction is appropriate.

The Administrative Law Judge concludes that genuine issues of material fact remain for hearing in this case and the Department has not shown that it is entitled to judgment as a matter of law. Accordingly, the Department's motion for summary disposition is denied and the hearing in this matter will proceed as scheduled on January 31, 2006.

B.L.N.

⁴⁴ The Administrative Law Judge only has jurisdiction over the family child care license in this proceeding and cannot appropriately address arguments relating to the Licensee's foster care license.

⁴⁵ Because the Licensee apparently has taken appropriate steps to challenge the disqualification with respect to her day care license and appeal the revocation of that license, it does not appear that the disqualification should be found to be "conclusive" within the meaning of Minn. Stat. § 245C.29.