

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Maltreatment
Determination and Disqualification of
Ramona Pekarek

**FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION**

A hearing in this matter was conducted by Administrative Law Judge Steve M. Mihalchick on March 21, 2006, in the Conference Room of the Alexandria City Hall, 704 Broadway Street, Alexandria, MN. The hearing record closed on March 21, 2006, with the conclusion of the hearing.

Douglas R. Hegg, Hegg Law Office, 2020 Fillmore Street, P.O. Box 37, Alexandria, MN 56308, appeared on behalf of Ramona Pekarek (Appellant). Amber Hawkins, Assistant Attorney General, 1400 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101, appeared for the Department of Human Services (the Department).

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 these 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 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 Commissioner is required to serve his final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUES

At issue in this matter is whether Appellant engaged in acts constituting abuse under Minn. Stat. § 626.5572, subd. 2, by making disparaging remarks to vulnerable adults, striking a vulnerable adult, or making remarks about a vulnerable adult's anatomy. Also at issue is whether such conduct, if proven, constitutes recurring maltreatment under Minn. Stat. §§ 245C.14, subd. 1(a)(3) and 245C.15, subd. 4. If that conduct constitutes maltreatment, the further issue arises as to whether the resulting disqualification should be set aside under Minn. Stat. § 245C.22 due to Appellant not posing a risk of harm to vulnerable persons.

The Administrative Law Judge finds that Appellant struck a vulnerable adult and that act constitutes abuse. The Appellant abused a vulnerable adult by repeatedly and directly calling the vulnerable adult by a derogatory name. The Appellant also engaged in conduct that constitutes abuse by forcibly removing a vulnerable adult from an activity and attempting to deprive him of a meal as a disciplinary measure. These acts constitute recurring maltreatment.

With the finding of recurring maltreatment, Appellant is disqualified from direct contact with persons in licensed programs. The next issue is whether Appellant poses a risk of harm to the vulnerable adults or daycare children who she wishes to serve. If so, then her disqualification for the recurring maltreatment should not be set aside under Minn. Stat. § 245A.04, subd. 3b.

The Administrative Law Judge finds that Appellant does pose a risk of harm to the persons to be served and concludes that her disqualification for the recurring maltreatment should not be set aside.

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

FINDINGS OF FACT

The Alexandria Minnesota State Operated Community Services Program

1. The Alexandria Minnesota State Operated Community Services Program (the Facility or Alex-MSOC) is a Department-operated group home in Alexandria, Minnesota. The Facility opened in June, 2000.^[1] The Alex-MSOC is part of a program, begun in the early 1990s, to move developmentally disabled persons out of large institutions and into small community-based group homes.^[2] At all times relevant here, the Alex-MSOC operated under supervision from managers at the Fergus Falls Regional Treatment Center.

2. Alex-MSOC is home to four developmentally disabled adult males. Each of the residents, also known as clients, is low functioning and non-verbal. The clients will be referred to individually as VA1, VA2, VA3, and VA4, the same identifiers that were used in the Investigative Memorandum referred to below.^[3]

The Facility

3. Alex-MSOC is situated in a duplex that was remodeled to accommodate the needs of the program. The front door opens in to a living area and adjacent kitchen, the communal dining area, and an alcove used as the Facility's office. A hallway runs the length of building off of the communal area, providing access to the clients' bedrooms. There are two bathrooms, one accessed through the kitchen and the other at the end of the hallway.^[4]

4. One staff person works from 10 p.m. to 8 a.m., joined by another staffer at 7:00 a.m. on weekdays who works until 9:30 a.m. One client leaves at 8:00 a.m. The other three leave by 9:30. The Facility is unoccupied by staff or clients through the middle of the day on weekdays. Two staffers come in to work at 2:00 p.m. (one shift ends at 8:00 p.m. and the other at 10:00 p.m.). The clients return to the Facility by 3:00 p.m.

Resident Care

5. The clients at Alex-MSOC function mentally at about the level of a normal eighteen-month old child. They cannot communicate verbally. They do not use words to communicate, either oral or written. They have some signs and behaviors to indicate some needs. With very few exceptions related to their daily routine, the clients do not understand words spoken to them.^[5] VA1 cannot dress himself and wears an incontinence brief. Only one client, VA4, can open a door. Due to their inability to provide self-care, the clients are assisted with most of their activities of daily living, including bathing, shaving, and meals.

Appellant's Background

6. Appellant worked in the Alex-MSOC from March 3, 2002, to December 2003.^[6] From August 2002 to December 2003, Appellant completed 49 hours of in-service training on client care.^[7]

7. On her first day of work at the Alex-MSOC, Appellant felt that Diane King, Mental Retardation Residential Program Lead, was hostile towards her. King was the person in charge at the Alex-MSOC. This perceived hostility continued throughout Appellant's time at Alex-MSOC. Appellant perceived that the situation rose to the level of harassment on the job.

8. Appellant understood that abuse of vulnerable adults was prohibited. Her understanding of what constituted abuse was striking a vulnerable adult hard enough to leave a bruise. Appellant understood that abuse needed to be reported and that she was to report any observed abuse to her

supervisor, Arlene Barber. Barber supervised several MSOCs. Appellant did report to Barber that other staff at the Alex-MSOC spoke to clients with epithets, such as “asshole.”^[8]

Hitting Incident

9. VA1 exhibited a behavior at Alex-MSOC where he would come up behind another person and strike that person with his open hand, thrusting forward sharply with his arm. The staff’s nickname for this behavior was “bopping.” On December 12, 2003, VA1 had done this several times to staff. Jennifer Searle, LPN, observed VA1 in the kitchen pacing (another behavior of VA1’s). He came up behind Appellant and struck her in the back of her head. Searle saw Appellant turn and strike VA1 in the forehead with her open hand, saying “How do you like it?”^[9] Appellant struck VA1 with enough force to move his head backward and make a sound. The blow left a red mark on VA1s’ forehead that lasted for about one hour. Searle spoke to Appellant later that day about the incident and Appellant said she had not hit VA1 that hard and that the sound resulted from VA1’s head being “hollow.”^[10]

Comments/Conduct Concerning Clients

10. In April 2002, King observed Appellant interacting with VA3. King saw Appellant ask VA3 for a kiss. King reported this behavior to her supervisor, but did not raise the issue with Appellant.

11. In December 2002, King asserted that she observed Appellant lean over VA3 as he sat in his chair in the living area. King indicated that Appellant’s breasts were near his face and King told Appellant to move away from VA3. King reported that behavior to Appellant’s supervisor.

12. King described occasions when she saw VA3 with his hand in his pants (which was one of VA3’s behaviors). King maintained that on three of these occasions, VA3 went from touching himself to immediately stroking Appellant’s face. King intervened on each occasion and told Appellant that allowing such conduct was inappropriate. Appellant described the behavior as VA3 just touching her face when he was happy (which was one of his behaviors). Appellant maintained that there was no sexual connotation in VA3’s conduct.^[11] On one occasion, VA3 came up behind Appellant and she “backed into” VA3. King described the conduct as “swooning” and she perceived the conduct to be intentional by Appellant.^[12] Appellant explained that candy was in the filing cabinet and she backed into VA3 to keep him out of the cabinet.^[13] King also objected to how Appellant would shave VA3 (maintaining that she did so before he put on clothes after his bath) and implied a sexual connotation in Appellant’s conduct.^[14]

13. On several occasions while talking with other staff, Appellant referred to VA2 as an “asshole.” Appellant did that directly to VA2, but with a

sweet tone of voice and smiling. VA2 responded to that comment by smiling. Other clients were in the room at that time.^[15]

14. Heather Danner, LSW (another staffer at Alex-MSOC), heard Appellant call VA2 as an “asshole” a number of times. Danner usually heard the reference in a sweet tone of voice, but occasionally Danner heard Appellant say it in an angrier tone. Danner perceived the conduct as verbal abuse “because there was a chance” that the other clients might understand what was being said.^[16]

15. VA3 refuses to eat rice dishes. Searle once heard Appellant respond to VA3’s refusal by saying that he doesn’t have to eat. Searle went to the kitchen to make VA3 a peanut butter sandwich (his preferred alternative meal). Appellant took the bread away from Searle. A little later, Appellant made VA3 a sandwich with meat and cheese, knowing that VA3 did not always eat the meat in such situations. VA3 ate the cheese from the sandwich and Appellant gave the bread to another client. Later, Searle made VA3 a peanut butter sandwich for his meal.^[17]

16. VA3 always ate peanut butter toast for breakfast. All the staff were aware that this was VA3’s choice for a morning meal and that he would refuse to eat anything else. On December 25, 2003, Appellant gave VA3 cereal. When he refused to eat the cereal, Appellant took the bowl of cereal, put it in the sink, and told VA3 that he wasn’t going to have breakfast. Heather Danner, LSW, was working that morning and began preparing toast for VA3. Appellant told Danner that she and another staffer (MK) were trying to see how long VA3 would go without eating what he was given.^[18]

17. Later that day, the clients opened their Christmas gifts. VA4 began tearing the discarded wrapping paper (tearing paper was one of VA4’s behaviors). Appellant told VA4 to “get his ass in his room” and said that he wasn’t eating lunch that day.^[19] VA4 went to his room, being pushed roughly by Appellant. Danner set out four places for lunch and Appellant told her that VA4 wouldn’t be eating lunch. Danner told Appellant that VA4 was diabetic, it was Christmas, and VA4 would be eating lunch.^[20] Appellant maintained that redirecting VA4 from tearing paper was in his disciplinary plan. Appellant described pushing VA4 as necessary to get him to move when he was unwilling to go. Appellant did not assert that denying VA4 food was part of that plan.^[21]

18. On one evening, Appellant took VA2 to a church for an outing. Upon returning, Appellant told Danner that VA2 had been acting out, and that VA2 would not be getting his bath that evening. Bathing before bedtime was part of VA2’s normal daily routine and he became agitated anytime he was not able to bathe before bed. VA2 tugged on his shirt, which was his usual signal that he wanted to bathe. Appellant refused to give VA2 his bath.^[22]

19. On a number of occasions, Rosemary Zins, a staffer at Alex-MSOC, heard Appellant make references to the size of VA3's penis. Appellant described it as a "pop can" and how it would be "a real hurter."^[23] None of these comments were made in the hearing of the clients.

20. On a Saturday in September, 2003, Zins came in to the Alex-MSOC. Appellant and MK were working at that time. Appellant held up a cucumber from the kitchen counter and told Zins that she and MK had measured up the cucumber against VA3's penis. Appellant said she had mentioned this in a telephone conversation to her mother and that her mother had laughed. Zins later asked MK if this was true. MK told Zins that it did not happen and that Appellant was "a liar."^[24] Appellant had not actually undressed VA3 and physically compared the cucumber to his penis.

21. At the hearing, Appellant described instances where a number of staff swore at the clients. She indicated that this was common practice and that clients were treated this way as part of the normal routine. Appellant indicated that supervisors at Alex-MSOC were aware of this conduct and they did not consider that conduct to be maltreatment.^[25]

The Department's Investigations and Findings

22. King testified that she received comments regarding Appellant's conduct. King perceived the comments to be directed toward Appellant's job performance and reported the information to Arlene Barber, Community Residential Supervisor for the Alex-MSOC. Barber initiated an investigation with Dick Hedin, another MSOC Supervisor.

23. The Department received complaints of possible maltreatment by Appellant of clients at the Alex-MSOC.^[26] The Department investigated suspected maltreatment of all four clients by Appellant arising from Appellant's use of inappropriate nicknames. The hitting incident was investigated as possible maltreatment. In the course of the investigation, the actions of another staffer (MK) were also examined as possible abuse.^[27]

24. Two investigations were initiated as a result of the information. One was an internal investigation by MSOC management directed toward Appellant's conduct as an employee. The other was a maltreatment and licensing investigation by the Department's Division of Licensing ("Licensing"). On December 31, 2003, Barber placed Appellant on investigatory leave, pending conclusion of the investigations into her conduct.^[28] Appellant has not worked at the Alex-MSOC since beginning that leave.

25. Barber and Hedin conducted site visits and interviews for the MSOC investigation. On March 1, 2004, Barber notified Appellant of her discharge from the Alex-MSOC. The stated reasons for the discharge were Appellants repeated interference with clients receiving meals, inappropriate

language directed at clients, referring to a client's genitalia in a degrading and derogatory manner, and striking a client.^[29]

26. Investigator Vicki Anderson began Licensing's investigation on February 3, 2004.^[30] Anderson conducted interviews and site visits between February 19 and May 18, 2004. The four clients were not interviewed. Information about the clients was drawn from their individual service plans (ISPs) and their risk management plans. Nine staffers and direct care providers were interviewed. Anderson also contacted Appellant's mother by telephone on July 27, 2004.^[31]

27. On December 23, 2004, Licensing issued an Investigative Memorandum (the Investigative Memorandum), written by Anderson, that reported the results of the investigation.^[32] The Investigative Memorandum noted Appellant's contentions regarding the allegations that she was engaging in inappropriate conduct. The investigator found by a preponderance of the evidence that Appellant had made statements constituting "malicious language" toward VA1, VA2, and VA4. The investigator found by a preponderance of the evidence that Appellant had "engaged in non-therapeutic, derogatory, and humiliating conduct" toward VA3. Regarding the impact of these incidents, the Investigative Memorandum reported that, "together, the conduct of SP1 toward VA1-4 could reasonably be expected to have produced emotional distress for VA1-4."^[33]

28. The investigation applied a "reasonable person" standard for determining maltreatment. As applied, the issue was whether the particular conduct could be reasonably expected to produce emotional distress.^[34] The investigation did not consider whether the vulnerable adults could understand what they were hearing. The investigation did not consider the tone of voice or the meaning intended in applying the reasonable person standard.

29. The Investigative Memorandum recounted Searle's statements about her observations of Appellant striking V1 on the forehead. The Appellant's statement to the investigator was that she did not remember the incident. The investigation concluded that maltreatment was committed by Appellant, but the absence of an injury compelled the conclusion that the maltreatment was not serious. The investigation concluded that maltreatment by Appellant was recurring.^[35]

30. By written notice of December 23, 2004, the Department notified Appellant that it had substantiated that Appellant had committed maltreatment of vulnerable adults involving emotional abuse by using derogatory language toward the four clients and physical abuse when she struck VA1 on the head. The Department concluded that these acts of maltreatment were recurring and therefore Appellant was disqualified from any position allowing direct contact with persons served by programs licensed by the Department or similar programs. The notice also indicated that it had been determined that Appellant posed an

imminent risk of harm to persons served by such programs and must be immediately removed from any position allowing direct contact. The notice set forth Appellant's rights to request reconsideration of the maltreatment, disqualification, and risk of harm determinations.^[36]

31. Appellant requested reconsideration of the maltreatment, disqualification, and risk of harm determinations.^[37]

32. Jennifer Park of the Department's Division of Licensing reviewed the information in the Investigation Memorandum and the request for reconsideration submitted by Appellant. She found that the facts support the maltreatment determination, that it was recurring, and that the disqualification was correct. She did a risk of harm assessment using a Department worksheet. She rated eight of the eleven listed factors as "high risk" and two as "medium risk," Park did not rate the length of employment factor because she had no information on it. Park also noted that Douglas County had substantiated an incident of maltreatment involving Appellant's discipline of her own child. She concluded that Appellant posed an imminent risk of harm and recommended that the disqualification not be set aside.^[38]

33. In concluding that "moderate harm" was suffered by the clients, Park relied on the fact that the verbal conduct was repeated. No specific harm was identified in making that conclusion. One of the factors to be considered is whether the subject has completed any related training or rehabilitation. In concluding that higher risk was posed by Appellant not completing appropriate training, Park relied on the absence of information provided to her. Park did not note that Appellant had completed substantial in-service training as part of her work at the Fergus Falls RTC.

34. Division of Licensing Supervisor Laura Plummer Zrust also reviewed the information in the Investigation Memorandum and the request for reconsideration submitted by Appellant. She reviewed the risk of harm worksheet completed by Park and approved the rating that Park had arrived at.^[39]

35. On May 3, 2005, the Department issued a Notice of Reconsideration of Maltreatment Determination and Notice of Reconsideration of Disqualification to Appellant. The Notice stated that the Commissioner of Human Services had determined that the maltreatment determination was appropriate. The Commissioner also determined that the information used to disqualify Appellant was correct and that the maltreatment was recurring, which is a disqualifying characteristic under Minn. Stat. § 245A.04, subd. 3d. Finally, the Commissioner determined that Appellant had failed to demonstrate that he did not pose a risk of harm to persons served by covered programs and denied Appellant's request to set aside the disqualification.^[40] The notice informed Appellant of her right to request a contested case hearing.

36. On May 17, 2005, Appellant submitted a request for a contested case appeal of the disqualification and maltreatment determination.^[41] The Department issued a Notice of and Order for Hearing and Pre-hearing Conference on January 4, 2006.

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Under Minn. Stat. § 626.5572, subd. 15, "maltreatment" means "abuse," "neglect," or "financial exploitation." Minn. Stat. § 626.5572, subd. 2(b), defines abuse, in relevant part, as:

Conduct which is not an accident or therapeutic conduct as defined in this section, which produces or could reasonably be expected to produce physical pain or injury or emotional distress including, but not limited to, the following:

(1) hitting, slapping, kicking, pinching, biting, or corporal punishment of a vulnerable adult;

(2) use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening;

(3) use of any aversive or deprivation procedure, unreasonable confinement, or involuntary seclusion, including the forced separation of the vulnerable adult from other persons against the will of the vulnerable adult or the legal representative of the vulnerable adult; and

(4) use of any aversive or deprivation procedures for persons with developmental disabilities or related conditions not authorized under section 245.825.

4. Minn. Stat. § 626.5572, subd. 20, defines "therapeutic conduct" as follows:

"Therapeutic conduct" means the provision of program services, health care, or other personal care services done in good faith in the interests of the vulnerable adult by: (1) an individual, facility, or employee or person providing services in a facility under the rights,

privileges and responsibilities conferred by state license, certification, or registration; or (2) a caregiver.

5. Appellant's striking of a vulnerable adult on the forehead, in response to his striking her on the head, is abuse under Minn. Stat. § 626.5572, subd. 2(b)(1), because it is hitting and corporal punishment and not an accident or therapeutic conduct.

6. Appellant's repeated instances of directly calling a vulnerable adult "asshole" is abuse under Minn. Stat. § 626.5572, subd. 2(b)(2), because it is repeated oral language toward a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, and humiliating.

7. Appellant's actions to redirect a vulnerable adult by pushing him to his room and stating that he would not be eating lunch constitutes abuse because Appellant was inappropriately physically intervening and she was denying a meal to a client suffering from diabetes (which constitutes an aversive or deprivation procedure prohibited under Minn. Stat. § 245.825, subd. 1(b)).

8. Any individual who has engaged in serious or recurring maltreatment of a vulnerable adult must be disqualified from direct contact with or access to persons receiving services from the facility.^[42] "Recurring maltreatment" means more than one incident of maltreatment.^[43]

9. Appellant has engaged in recurring maltreatment of vulnerable adults and must be disqualified.

10. The Commissioner may set aside a disqualification if the Commissioner finds that the individual does not pose a risk of harm to any person served by the facility.^[44] In determining that an individual does not pose a risk of harm, the commissioner shall consider the nature, severity, and consequences of the event or events leading to the disqualification, whether there is more than one disqualifying event, the age and vulnerability of the victim at the time of the event, the harm suffered by the victim, the similarity between the victim and persons served by the program, the time elapsed without a repeat of the same or similar event, documentation of successful completion by the individual of training and rehabilitation, and any other relevant information. In reviewing a disqualification, the Commissioner shall give "preeminent weight" to the safety of each person to be served by the facility.

11. At the time of the events found to constitute recurring maltreatment, Appellant posed a risk of harm to the residents of Alex-MSOC. The conduct she engaged in directly impacted on vulnerable adults. The consequences, particularly regarding the diabetic client who was being told that he would have no lunch, could have been severe. The testimony of Appellant at the hearing suggests a lack of recognition of that seriousness. Appellant still poses a risk of

harm to vulnerable adults. Her disqualification for recurring maltreatment should not be set aside.

12. The attached Memorandum is incorporated by reference.

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

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED: that the Commissioner **AFFIRM** the determination of recurring maltreatment, the determination of disqualification of Ramona Pekarek, and the determination that the disqualification not be set aside.

Dated: May 22, 2006

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Tape recorded, five tapes. No Transcript Prepared.

MEMORANDUM

The maltreatment cited against Appellant falls into two general categories, emotional abuse and physical abuse. One claim of emotional abuse rests on comments made regarding clients to other workers in the course of client care. There is no evidence in this record suggesting that any of the four clients actually heard and understood any such comment made in their presence. Similarly, there is no showing of any emotional harm experienced by any of the four clients coming from those comments. There was only evidence that it was inappropriate to do so because there was a slight possibility that the clients would understand. This is no doubt true as a job requirement, but it does not prove that there was abuse.

The "asshole" comments directly to the clients are different. The definition of abuse includes conduct "which produces or could reasonably be expected to produce physical pain or injury or emotional distress" There was no proven injury or emotional distress caused by the language cited by the Department. But, the definition of abuse includes "use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or the treatment of a vulnerable

adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening....”

The Department applied the “reasonable person” standard set out in the statute. As described by the Department, the issue was whether a reasonable person in that situation would find the comments to be emotionally harmful. The Department applied the standard by determining how a reasonable person who can hear and understand what is being said would react, without reference to the tone and intent of the language. Identical language can be derogatory when spoken in one tone of voice, or affectionate when spoken in another tone. This is true whether the language is epithets or ordinary speech. Petitioner asserts that the clients were not emotionally harmed and therefore there was no abuse.

Referring to clients at Alex-MSOC as “asshole” on a repeated basis is sufficient to trigger an abuse finding under the Vulnerable Adults Act. A “reasonable person” understands that this sort of language is demeaning and hurtful. Moreover, the reasonable person need not be the person subjected to the language, he or she may be a person observing or evaluating the language. The Vulnerable Adults Act requires that such persons be treated with dignity. As “abuse” is defined in the statute, the Appellant’s conduct rises to the level of disparaging and derogatory language that constitutes maltreatment.

The Department also maintains that references to VA3’s genitalia are the sort of conduct that be found by “a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening....” By the terms of the statute, the conduct must be addressed to the vulnerable adult. The conversations about VA3 were not addressed to the clients and were not understood by the clients. As discussed in the Findings, the cucumber incident consists of a comment made in the kitchen, not involving actual physical comparison of the vegetable with the genitalia of VA3.^[45] This conduct, while lewd and improper for the workplace, does not constitute the sort of conversation directed at a vulnerable adult that supports a finding of abuse under Minn. Stat. § 626.5572, subd. 2(b).

Another instance of emotional abuse apparent from the record is the Appellant’s conduct when VA4 was tearing wrapping paper after opening presents on Christmas Day. In response to that frequently exhibited behavior, Appellant pushed VA4 toward his bedroom and improperly attempted to deny him a meal. This conduct was explicitly cited in the Department’s employment investigation, but only obliquely addressed in the maltreatment determination. At the hearing, the issues regarding denial of food were fully aired. The conduct constitutes violations of the aversive or deprivation procedure set out in statute and meets the definition of abuse in Minn. Stat. § 626.5572, subd. 2(b).

The physical abuse cited by the Department includes the “bopping” incident of VA1. Appellant’s pushing of VA4 is another incident of physical abuse (particularly since it was coupled with an attempt to deny VA4 a meal).

Appellant disputed the statements and testimony of several witnesses. The ALJ finds that the testimony of Searles and Danner to be credible. The testimony of King is not credible regarding the perceived sexual intent behind Appellant's actions toward VA3. The Appellant's statements are credible regarding allegations of conduct with sexual overtones. The Appellant's testimony regarding depriving clients of food as a disciplinary measure is not credible. Appellant's description of the "bopping" incident is not credible.

The Department has demonstrated multiple instances of maltreatment, meeting the recurring standard for disqualification under Minn. Stat. § 245C.15, subd. 4(b)(2). Disqualification precludes Appellant from having direct contact with clients (or persons served in any other licensed setting, such as daycare) unless the disqualification is set aside. A disqualification can be set aside if the person demonstrates that no risk of harm is presented to persons in these programs.

A number of factors must be considered in assessing the risk of harm.^[46] The Department's assessment relied on the verbal communications as both constituting abuse and resulting in emotional harm. Those communications do constitute abuse, but the harm inflicted by those communications was minimal.

Nonetheless, the high number of incidents of maltreatment and of poor treatment of vulnerable adults that did not rise to the level of maltreatment is very significant here. Moreover, Appellant did not recognize that her conduct was harmful to vulnerable adults. In its determination, the Department appropriately considered a finding of maltreatment arising from Appellant disciplining her own child by striking him with a metal spoon. That behavior is further evidence of Appellant's use of negative physical consequences for discipline of those in her care. Appellant has not demonstrated that she does not pose a risk of harm to vulnerable persons. Appellant's disqualification should not be set aside at this time.

S.M.M.

^[1] Testimony of King, Tape 2, Side 1.

^[2] MSOC is the current name. Originally the program was known as the Community Services Program – State Operated Community Services (CSP-SOCS or CSP).

^[3] Ex. 2.

^[4] Ex. 15.

^[5] Testimony of Searle, Tape 1, Side 2; Testimony of Danner, Tape 2, Side 1; Testimony of Pekarek, Tape 3, Side 2.

^[6] Testimony of Pekarek, Tape 4, Side 1.

^[7] Ex. 11; Appellant's Exs. 3 and 4.

^[8] Testimony of Pekarek, Tape 4, Side 2.

^[9] Testimony of Searle, Tape 1, Side 1.

- [10] Testimony of Searle, Tape 1, Side 1.
- [11] Testimony of Pekarek, Tape 4, Side 2.
- [12] Testimony of King, Tape 2, Side 1.
- [13] Testimony of Pekarek, Tape 4, Side 2.
- [14] Testimony of King, Tape 2, Side 1.
- [15] Testimony of Searle, Tape 1, Side 1.
- [16] Testimony of Danner, Tape 2, Side 1.
- [17] Testimony of Searle, Tape 1, Side 1.
- [18] Testimony of Danner, Tape 2, Side 1.
- [19] Testimony of Danner, Tape 2, Side 1.
- [20] *Id.*
- [21] Testimony of Pekarek, Tape 4, Side 1.
- [22] Testimony of Danner, Tape 2, Side 1.
- [23] Ex. 12.
- [24] Ex. 12.
- [25] Testimony of Pekarek, Tape 4, Side 1.
- [26] Testimony of Janecek, Tape 3, Side 1.
- [27] Ex. 4.
- [28] Ex. 14.
- [29] Ex. 2.
- [30] Ex. 1.
- [31] Ex. 4.
- [32] Ex. 4.
- [33] Ex. 4, at 8.
- [34] Testimony of Janecek, Tape 3, Side 1.
- [35] Ex. 4, at 11.
- [36] Ex. 3.
- [37] Ex. 6. The request for reconsideration was not dated and no receipt stamp was applied to the letter. Exhibit 7 indicates that the request was received on January 13, 2005.
- [38] Ex. 8.
- [39] Ex. 8.
- [40] Ex. 45.
- [41] Ex. 46. The Department did not contest the timeliness of the request.
- [42] Minn. Stat. § 245C.14, subs. 1 and 2, and § 245C.15, subd. 4(b)(2) (2003)(formerly found in Minn. Stat. § 245A.04, subd. 3d(a)(4)).
- [43] Minn. Stat. § 245C.02, subd. 16 (2003)(formerly found in Minn. Stat. § 245A.04, subd. 3d(a)(4)).
- [44] Minn. Stat. § 245C.22, subd. 4 (2003)(formerly Minn. Stat. § 245A.04, subd 3b(b)).
- [45] Such physical conduct would constitute “treatment of a vulnerable adult” under Minn. Stat. § 626.5572, subd. 2(b)(2), and would compel a different conclusion.
- [46] Minn. Stat. § 245C.22, subd. 4(b).