

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

In the Matter of the Temporary Immediate Suspension of the License of Linda Johnson to Provide Family Child Care	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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This matter came on for hearing before Administrative Law Judge Raymond R. Krause commencing at 9:00 a.m. on July 18, 2007, at the Nobles County Prairie Justice Center, 1530 Airport Road, Worthington, Minnesota. The Office of Administrative Hearings record closed the same day.

Gordon L. Moore, Nobles County Attorney, 1530 Airport Road, Worthington, Minnesota 56187, appeared representing the Department of Human Services (the Department). Joel Wiltout, Attorney at Law, P.O. Box 475, Worthington, Minnesota 56187, appeared for Linda Johnson.

STATEMENT OF THE ISSUES

Whether there is reasonable cause to believe that there is an imminent risk of harm for the health, safety, or rights of children in the care of Respondent so as to require the immediate suspension of her family child care license.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Linda Johnson (Respondent) is a licensed family child care provider and provided care at her residence at 1415 Okabena St., Worthington Minnesota. The regular hours of her daycare services were from 7:00 a.m. to 5:00 p.m., Monday through Friday.¹

¹ Exs. 18 and 21, Testimony of Linda Johnson.

2. Respondent's son Kyle Johnson was arrested for and later convicted of Rape-Third Degree in South Dakota in 2004.²

3. On May 17, 2006, Kyle pled guilty to a misdemeanor charge of Interference with Privacy for peeking at an undressed woman through a space under a door at a tanning parlor in Nobles County Minnesota.³

4. On July 31, 2006, Kyle pled guilty to two counts of Felony Harassment, one count of Felony Solicitation of a child to engage in Sexual Conduct, and two counts of Misdemeanor Obscene Communications.⁴

5. Kyle was required to register as a predatory offender for a period of ten years. As a result of these convictions, Kyle was found to be a permanently disqualified individual by the Department. This designation meant that Kyle could not reside at his mother's home and could not be present while children were present.⁵

6. These conditions were explained to Respondent and neither Respondent nor her son Kyle requested reconsideration or a variance of this determination. Kyle's parents found him a one-room efficiency apartment at 750 Highway 59/60, Apartment 2, Worthington, Minnesota and moved him into it.⁶ The apartment complex has no clothes washer or dryer.⁷

7. On August 14, 2006, Blaine Radtke, a social worker for Nobles County Family Services took a complaint over the phone from an individual who was concerned because she saw Kyle at the Respondent's home and daycare facility while children were present.⁸ Mr. Radtke investigated the complaint and found, through a conversation with Respondent, that Kyle had indeed been on the premises during daycare hours. There were several instances when Kyle stopped by to pick up medicine he takes for Tourette's Syndrome. On these occasions, he did not enter the house but either came to the door or remained on the sidewalk until his mother brought his medicine. Respondent states that Kyle also suffers from depression and she did not feel it was safe to give him all the medicine at once. In addition, on August 7, 2006, Kyle stopped in to the house to have a final breakfast cooked by his mother before reporting to jail. Respondent told the parents who were dropping off children that he was there, and he remained only in the kitchen and left through a door not used by the children.⁹

8. As a result of this non-compliance with the rules, Mr. Radtke, after discussion with his supervisor, issued a correction order to Respondent.

² Ex. 1.

³ Ex. 2.

⁴ Ex. 3.

⁵ Testimony of Pam Verde and L. Johnson, Ex. 19.

⁶ Test. of L. Johnson.

⁷ Test. of L. Johnson, Exs. 7 and 8.

⁸ Ex. 17, Testimony of Blaine Radtke.

⁹ Test. of L. Johnson

Respondent stated in writing that “Kyle Johnson will not be present during day care hrs or reside here.” She then signed the correction order.¹⁰

9. Respondent set up a system whereby Kyle could only come to her house for visits or to pick up medicine when children were not present. If he was coming over for dinner after work, he would wait at a Perkins Restaurant drinking coffee with his father until they got a call from his mother stating that all the children were gone. If he chose to stay overnight, he was awakened and had to leave at least one-half hour before any children were scheduled to arrive for day care. When children were staying late or for an extended period of days, Kyle was not allowed to visit. Kyle would stay at Respondent’s home overnight no more than two or three nights a week, except for a period after a fire in the apartment complex.¹¹

10. Respondent went to Kyle’s apartment to clean at least once a week. She considers herself a “neat freak.” She takes Kyle’s clothes from the apartment or Kyle brings them to her for washing. She then washes the clothes in her home. Kyle does not know how to cook for himself and therefore eats his meals out at restaurants or at his parents’ home after daycare hours.¹²

11. One of Kyle’s conditions of probation was to report to Jenny Quade, an Enhanced Sex Offender Agent. He reported to her on a regular basis and she conducted regular and unscheduled home visits at his apartment. During these visits she noted that his apartment was clean and neat. She saw no evidence that he was not residing there or that he was residing at his mother’s home.¹³

12. On April 15, 2007, a fire broke out in the apartment next to Kyle’s. The fire department was called and responded to the fire. Kyle’s apartment was heavily damaged by smoke but was not burned.¹⁴ Volunteer Fireman (and Police Detective) Hoffman was one of the firemen at the scene. He was unaware that Kyle lived there at the time. He looked in Apartment 2 while fighting the fire. He observed smoke but no flame. The apartment was subsequently inspected by First Assistant Fire Chief Patrick Demuth. He observed smoke damage to clothing, personal articles and photos belonging to Kyle Johnson.¹⁵

13. Because all the contents of the apartment were smoke damaged, Respondent took all Kyle’s bedding and clothes home to be cleaned.¹⁶ Fans were set up to get smoke out of the apartment.¹⁷ Kyle moved into his parent’s house while the apartment was being cleaned, aired out and otherwise made

¹⁰ Ex. 17.

¹¹ Test. L. Johnson.

¹² Id.

¹³ Testimony of Jenny Quade.

¹⁴ Testimony of Detective Hoffman, Ex. 6.

¹⁵ Ex. D.

¹⁶ Test. of L. Johnson.

¹⁷ Test. of L. Johnson, J. Quade, D. Hoffman.

ready for occupation again. While he was temporarily living with his parents, he continued to observe the rules about being out of the house during daycare hours. He took his X-Box game to his mother's house to play.¹⁸

14. On April 19, 2007, Kyle indicated to Agent Quade that he would be moving back to the apartment. On May 3, 2007, he indicated to Agent Quade during therapy that he was living back at the apartment.¹⁹

15. Also during sex offender treatment, Kyle admitted to stealing a ladies undergarment from a house on which he was doing construction work. The police were notified on May 30, 2007, and a search warrant issued. Detective Hoffman and Agent Quade executed the search warrant on Kyle's apartment. They did not find an undergarment but noticed that the room had minimal food, minimal clothing and no bedding. They also observed that there was no X-Box game but there were empty X-box game cases and that the apartment was "very orderly." From these observations they drew the conclusion that Kyle was not residing at the apartment but must be residing at Respondent's home. The undergarment was eventually found in Kyle's car. During his interview upon his arrest for probation violation on May 31, 2007, Kyle stated that he was living at his parent's home either for three weeks or since November 2006.²⁰

16. Kyle's driver's license shows his apartment as his address.²¹ Several magazine subscriptions are addressed to Kyle at his apartment.²² All Kyle's mail is delivered to his apartment.²³ No witness at the hearing had ever seen Kyle at his parent's during daycare hours. Ten of eleven parents of children cared for by Respondent submitted letters stating affirmatively that they had never seen Kyle at his parent's home during daycare hours.²⁴ The eleventh parent had not responded as of the hearing date.²⁵

17. Brenda Hackbarth is the Regional Director of the Child Care & Nutrition Inc. program. Her role is to supervise daycare facilities to ensure compliance with state food program rules. Ms. Hackbarth has made five visits to Respondent's day care facility, four of them unannounced. On none of these visits did she observe Kyle in the home.²⁶

¹⁸ Test. L. Johnson.

¹⁹ Test. of J. Quade, Ex. 15.

²⁰ Test. of J. Quade, D. Hoffman, Ex. 15, Ex. 9. As Exhibit 9, the transcript of the interview indicates, Kyle's response to the question of how long he was living at his parents is largely inaudible on the recording, Exhibit 11, however, the words "three weeks" are audible.

²¹ Ex. A.

²² Exs. B and C.

²³ Test. of L. Johnson.

²⁴ Exs. E-N.

²⁵ Test. of L. Johnson.

²⁶ Ex. O.

18. Pam Verde, a social worker for Nobles County, was, for a period, the person responsible for Respondent's license. She visited the daycare on several occasions, both announced and unannounced, and never saw Kyle at the home when children were present.²⁷

19. Deb Clem is a social worker for Nobles County. She took over the responsibility of Respondent's license supervision from Pam Verde.²⁸ Pamela Fleming is the supervisor of Ms. Clem. Her understanding of the restriction imposed on Respondent because of the disqualification of Respondent's son is that it is not a problem if Kyle were to visit or spend the night or a weekend at the home as long as he is not present when children are there and he does not "reside" there. This understanding was communicated to her subordinate, Deb Clem.²⁹

20. Kyle has never been charged or convicted of sex offenses against children under the age of 15.³⁰ Kyle is now incarcerated in the Nobles County jail on probation violation charges.³¹

21. On June 1, 2007, Deb Clem sent a recommendation for Temporary Immediate Suspension of Respondent's license to the Department.³² On June 4, 2007, the Department issued the Temporary Immediate Suspension. Respondent timely appealed and a Notice of and Order for Hearing issued on June 7, 2007. A hearing date of July 18, 2007 was requested by the Nobles County Attorney. This date is beyond the statutory timeframe for a due process hearing in this type of case. The Nobles County Attorney requested an extension for good cause and the ALJ granted the extension on July 6, 2007.³³

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter under Minnesota law.³⁴

2. The Department of Human Services gave proper and timely notice of the hearing and has fulfilled all procedural requirements of law and rule.

²⁷ Testimony of Pam Verde.

²⁸ Testimony of Deb Clem.

²⁹ Testimony of Pamela Fleming.

³⁰ Test. of D. Hoffman.

³¹ Test. of D. Hoffman, J. Quade, and L. Johnson.

³² Ex. 22.

³³ See Hearing Record.

³⁴ Minn. Stat. §§ 245A.01-245A.16 and 14.50.

3. Under Minnesota law, if a “license holder’s action or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program, the Commissioner shall act immediately to temporarily suspend the license.”³⁵

4. At a hearing appealing an Order of Temporary Immediate Suspension, the burden of proof is on the Department to demonstrate that reasonable cause exists to believe that the license holder’s actions pose a risk of imminent harm to the children at the daycare.³⁶ The Department is authorized to demonstrate reasonable cause by submitting statements, reports or affidavits.³⁷

5. The Administrative Law Judge is directed by statute to determine “whether the immediate suspension should remain in effect pending the Commissioner’s final order . . . regarding a final licensing sanction.”³⁸

6. The Department has not shown reasonable cause to believe that violations of the child care licensing rules relating to permanently disqualified persons have occurred or that imminent risk of harm exists.

7. The Memorandum that follows explains the reasons for these Conclusions.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

Based upon these Conclusions, the Administrative Law Judge recommends that: the Temporary Immediate Suspension of the License to Provide Child Care Services of Linda Johnson be RESCINDED.

Dated: July 24, 2007
RRK/dsc

s/Raymond R. Krause

RAYMOND R. KRAUSE
Chief Administrative Law Judge

Reported digitally
No transcript prepared

³⁵ Minn. Stat. § 245A.07, subd.2.

³⁶ Minn. Stat. § 245A.07, subd. 2a(a).

³⁷ Minn. Stat. §245A.08, subd. 3.

³⁸ Minn. Stat. §245A.08, subd. 3.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Department) 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. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact the Commissioner of Human Services, c/o Licensing Division, Attention Mary Kelsey, Unit Manager, P.O. Box 6242, St. Paul, MN 55164-0242, to learn the procedure for filing exceptions or presenting argument.

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.

MEMORANDUM

Background

Respondent operates a daycare facility in her home in Worthington. Her son has been determined to be a permanently disqualified person by the Department. This means that he can not reside at her home and can not be present when daycare children are present. Respondent does not contest this designation. Instead, she moved her son from her home to a one-room efficiency apartment in town. The apartment is one unit in what used to be a small motel. The units are small and do not have many amenities.

Respondent's son has several medical conditions and needs medication daily. The medication is fairly strong and an overdose could be very dangerous. Because he also suffers from depression, Respondent does not trust him with large quantities of his medication and gives him dosages daily or in quantities of two or three days.

In August of 2006, he appeared outside Respondent's home during daycare hours to pick up his medication. Although he did not enter the house, he was present as the children were being dropped off. A concerned individual notified Nobles County authorities and ultimately a Correction Order was issued to Respondent by the Department. A condition of retaining her license was to acknowledge that her son could not be present at any time children were present and that he could not reside with her. She agreed to this condition in writing.

In April 2007, a fire destroyed the apartment next to the one occupied by Respondent's son, Kyle. Although not burned, Kyle's apartment was heavily damaged by smoke. The apartment was uninhabitable until the smoke damage could be mitigated.

Respondent cleans her son's apartment at least on a weekly basis. After the fire, she took most of his clothing and all of his bedding to her home to wash the smoke smell out of them. Kyle could not do this at the apartment since there were no washers and dryers there. During the time the apartment was being cleaned, her son stayed temporarily in the home of his father and Respondent. During this time, each day he would leave home at least one half hour before children arrived for daycare and would not return until Respondent called him on his cell phone to tell him all children had been picked up.

On May 30, 2007, the son was arrested on a probation violation charge. His apartment was searched by police and his probation agent. They observed only "minimal clothing," "minimal food," no Xbox game or cartridges even though Xbox game boxes were present. They also noted that the apartment was neat and orderly. They concluded, on that minimal information, that he must be living at Respondent's home rather than the apartment. Neither the police nor the probation agent asked Kyle or his mother where his clothes were or why. They

did not ask why there was minimal food there. They did not ask why his Xbox was not at the apartment.

They did ask him, during his arrest interview, where he was living. He stated “at Mom and Dad’s.” He was asked how long he had been staying there. He answered, “three weeks.” This answer is consistent with the testimony that he had stayed temporarily at Respondent’s home while the smoke damage was being remediated. Detective Hoffman, the arresting officer, however, suggests that the interview transcript is incorrect and remembers Kyle saying that he lived at home since October or November of the prior year.

Based on this alleged statement and the apartment having few clothes, little food, no bedding and no Xbox, the officer surmised that Kyle must be living with Respondent. The officer contacted the Nobles County Family Services office and a Temporary Immediate Suspension was issued.

Analysis

In order to sustain a Temporary Immediate Suspension, the Department has the burden of proof. In these cases that burden is relatively light.

The burden of proof in expedited hearings under this subdivision shall be limited to the Commissioner’s demonstration that reasonable cause exists to believe that the license holder’s actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by the program.³⁹

There must be reasonable cause to believe that two elements exist; first that there was a violation of the applicable law or rules and second that there is imminent risk to the children served by the program. In this case, the Department has not met its burden on either score.

Violation of Licensing Rules

With respect to the rules, Respondent was adamant that her son was not allowed to be anywhere around her home when day care children were there. The Department introduced no witness testimony or any other evidence, nor even an allegation that Kyle has ever been at the home when children were present after the Correction Order was issued. On the contrary, there is significant, independent testimony that he was never seen there at those times.

The other part of the restriction placed on Respondent’s license is that her son may not reside at home. The Department provides only two reasons for alleging that Kyle resided at home for more than an occasional overnight stay.

³⁹ Minn. Stat. §245A.07, subd. 2(a).

One reason is pure conjecture, based on one visit to the apartment after the fire. The police officer and probation agent saw few clothes, no bedding and only a little snack food at the apartment. In addition, the apartment was “neat and orderly” which is apparently not to be expected of a young single male living alone. No effort was made to find out why these conditions might have existed.

The testimony at hearing was very clear and convincing. Respondent is a “neat freak” who cleans regularly at her son’s apartment. Her objective is for him to have a “neat and orderly” apartment. The fact that she is successful in this is not evidence of where he lives. Kyle is no cook, so Respondent cooks for him or he eats out. He keeps only snack food in the apartment because that is all he eats there.

At the time of the search, he had no clothes or bedding at the apartment because his mother was washing the smoke out of it for him. Something he could not do himself since he had no washer and could not spend the day at Respondent’s home because children were there.

Finally, because he was temporarily staying at his parent’s house while the damage to the apartment was being repaired, he had taken his Xbox and game cartridges home to play, leaving the boxes at the apartment for his expected return. All of this testimony was uncontroverted.

The only other evidence that he resided with his parents is his statement to that effect upon his arrest. Here again, the evidence is insufficient to even get to probable cause. The official transcript shows his answer to the question of where he was living was “Mom and Dad’s.” The next question is “How long?” The transcript shows the answer to be “(inaudible) three weeks.” This answer is consistent with the testimony that he temporarily stayed at Mom and Dad’s during the time it took to rehabilitate the apartment after the fire.

Detective Hoffman remembers a different answer than that which the transcript shows. He remembers Kyle to have said that he lived at home since October or November of the prior year. In the actual recording of the interview, the exchange between the two is barely audible but the words “three weeks” are clear enough to discern. The officer’s memory is not consistent with the transcript or with the actual audio recording. His memory of the statement is also in direct contradiction of Respondent’s sworn testimony.

Consequently, since the recording, the transcript, and the testimony of Respondent are all consistent and credible and the only evidence to the contrary is the detective’s statement of what he remembered, there is insufficient evidence to meet the standard that reasonable cause exists to believe that he “resided” at home for more than occasional overnights or for the period during the fire rehab of his apartment. These temporary stays do not equate to residing at Respondent’s and hence, no violation of law or rule is demonstrated.

Imminent Risk

The second element necessary to sustain the immediate suspension of a license pending the Commissioner's final order is the presence of risk of imminent harm to the children in Respondent's care. There has been no allegation that Kyle was present when children were around since the Correction Order was issued. More importantly, the fact that he is now incarcerated on multiple probation violations makes it virtually impossible for him to present a risk to anyone much less children at his mother's day care.

The Commissioner has previously concluded that when the record establishes that the disqualified person is in custody and will remain in custody for some protracted period, the record does not reflect reasonable cause to believe that there is an "imminent risk of harm" to the children in care.⁴⁰

The Commissioner has not demonstrated that a reasonable cause exists to believe that Respondent has failed to comply with applicable law or rule or that there is imminent harm to those served by the program. The ALJ recommends that the suspension should be rescinded until the Commissioner issues a final order in this matter.

R. R. K.

⁴⁰ See, for example, Commissioner's Order dated December 7, 2004 in OAH Docket No. 1-18001116174-2.