

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Order of Conditional License and Order to Forfeit a Fine against the License of Penny VanLear and Danny Parden

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Steve M. Mihalchick at 1:00 p.m. on Tuesday, January 26, 2010, at the Norman County Courthouse, 16 Third Avenue, Ada, Minnesota. Thomas A. Opheim, Norman County Attorney, appeared on behalf of Clay County Social Services (County) and the Minnesota Department of Human Services (Department). The Licensee, Penny VanLear, appeared on her own behalf.

The hearing record for proceedings before the ALJ closed at the conclusion of the hearing on January 26, 2010.

STATEMENT OF ISSUES

1. Did the Licensees violate the requirement for Sudden Infant Death Syndrome or Shaken Baby Syndrome training when the only infants in the day care residence were their own children; if so, should a fine of \$200 be imposed on the Licensees for this noncompliance?

The Administrative Law Judge concludes that the Licensees did not violate the requirement for Sudden Infant Death Syndrome or Shaken Baby Syndrome training because that requirement applies only to infants in day care. Under the definitions in the applicable rules, a child in that child's own residence is not a child in day care. No fine is appropriate.

2. Should the Licensees' family child care license be made conditional?

The Administrative Law Judge concludes that the license should be made conditional because of the Licensees' demonstrated failures to comply with the standards imposed by day care laws and rules that are related to the health and safety of children in care.

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

FINDINGS OF FACT

1. Penny VanLear and Danny Parden (collectively, the Licensees) applied for a family child care license in October 2007. They have provided family child care in their home in Halstad, Minnesota since obtaining that license in 2008.¹ That license was renewed in 2009. The maximum capacity of children age 10 and younger in the Licensees' day care is 14.²

2. From December 2007 through July 2008, Mr. Parden had no role in caring for children in care. He worked outside the home, and his hours kept him out of the day care during all hours when children were in care.³

3. In July, 2008, Penny VanLear gave birth to twins. The twins were premature, and a condition of their release from the hospital was that the infants not be enrolled in a day care. Mr. Parden resigned from his full time job to care for their infant children and assist in the day care. Ms. VanLear considered Mr. Parden a substitute caregiver, even though he was on the day care license as a provider.⁴

4. On September 18, 2008, Cynthia Hansen, the County Licensing Worker, made an unannounced drop-in visit to the Licensees' day care. Mr. Parden was present, caring for two infants. The two infants were the children of Mr. Parden and Ms. VanLear.⁵

5. On December 5, 2008, the County received a complaint that a pit bull dog had been kept on the Licensees' porch. That dog pushed into the residence and killed the Licensees' dog, a Chihuahua. The pit bull dog was later euthanized. There were no day care children in the residence during any of these events.⁶

6. On December 8, 2008, Ms. Hansen conducted an unannounced drop-in visit to the Licensees' day care to investigate the complaint. In the enclosed porch of the day care residence there were thirteen school age children, with their backpacks, waiting for the school bus. Three of these children were Ms. VanLear's own children. Three of the children on the porch were over age ten. Three of the children were enrolled in the day care. Four of the ten were neighborhood children waiting on the enclosed porch because that morning was exceptionally cold.⁷ There were four children inside the day care, two enrolled toddlers and the Licensees' two infants. There was no interaction between the day care children inside and the school age children who were on the porch waiting for the school bus. Several children who were present were older siblings of those children not enrolled in the Licensees' day care. These older siblings

¹ Exhibits 3 and 5; Testimony of Cynthia Hanson

² Exhibits 4 and 6; Testimony of Cynthia Hanson.

³ Testimony of Danny Parden.

⁴ Testimony of Penny VanLear; Testimony of Danny Parden.

⁵ Testimony of Cynthia Hanson; Testimony of Danny Parden.

⁶ Exhibit 1.

⁷ Testimony of Penny VanLear; Testimony of Cynthia Hanson.

were present to watch over their younger school-age siblings.⁸ Ms. Hansen made no count of day care children present in the home that morning.⁹

7. Ms. Hansen discussed the dog situation with the Licensees. Mr. Parden acknowledged that he had not completed the required eight hours of training required of caregivers. Mr. Parden had not completed the Sudden Infant Death prevention training and Shaken Baby prevention training (SIDS/Shaken Baby training) required before caring for infants in day care. While examining the immunization records of the children enrolled in the day care, the binding came open and the paperwork spilled over the floor. At the time, the Licensees had not shown Ms. Hansen the required information for two children (collectively, KJ's children) enrolled in the day care. Due to the mishap, Ms. Hansen gave the Licensees additional time to produce those records.¹⁰

8. Ms. Hansen issued a correction order as a result of that visit, identifying as violations the presence of a dog lacking required vaccination records and a dog of a breed known to be dangerous. Also included in the correction order was Mr. Parden's failure to complete training and a citation for having unenrolled children waiting for the school bus in the entrance or drive way. The Licensees were given until April 1, 2009, to obtain the required training.¹¹

9. The County correction order was submitted to the Department for approval. The Licensees provided the vaccination records for their dog. The Department accepted that the pit bull had been in the house only outside of day care hours. The Department approved only the cited violations regarding caregiver training and having too many children in the day care.¹²

10. In response to the correction order, the Licensees no longer allow children who are not enrolled in the day care to wait for the school bus on the porch, no matter what the weather.¹³

11. Ms. Hansen did not receive the immunization records regarding KJ's children.¹⁴ On December 24, 2008, Ms. Hansen issued a correction order to the Licensees for their failure to provide those records. This correction order was approved by the Department.¹⁵

⁸ Testimony of Penny VanLear; Testimony of Cynthia Hanson.

⁹ Testimony of Cynthia Hanson.

¹⁰ Testimony of Cynthia Hanson.

¹¹ Exhibit 10; Testimony of Cynthia Hanson.

¹² Exhibit 11; Testimony of Cynthia Hanson.

¹³ Testimony of Penny VanLear.

¹⁴ While Ms. VanLear indicated that she faxed the records in January of 2009, she was unable to provide any supporting documentation of having done so. Ms. VanLear did acknowledge that she did not have those records prior to January of 2009. Testimony of Penny VanLear.

¹⁵ Exhibit 9; Testimony of Cynthia Hanson.

12. In February 2009, there was an incident which led Ms. Hansen to issue a correction order regarding prompt reporting of potential physical abuse.¹⁶ That incident and the subsequent correction order are not at issue in this proceeding.

13. On April 18, 2009, Mr. Parden completed six hours of professional development caregiver training.¹⁷

14. On April 25, 2009, Mr. Parden completed another six hours of professional development caregiver training.¹⁸

15. On November 12, 2009, the Department issued an Order to Forfeit a Fine and Order of Conditional License imposing a \$200 fine on the Licensees and making their license conditional. In the Order to Forfeit a Fine, the Department assessed a \$200 fine under Minn. Stat. § 245A.07, subd. 4. The violation was described as having Danny Parden providing care to infants prior to receiving training on reducing the risk of Sudden Infant Death Syndrome and Shaken Baby Syndrome, in violation of Minn. Stat. § 245A.50, subd. 5. These actions were the subject of the December 8, 2008 Correction Order.¹⁹

16. The Order of Conditional License relied upon Minn. Stat. § 245A.06, subd. 1(a), which allows the Commissioner of Human Services to issue a correction order and an order of conditional license if a license holder has failed to comply with applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program. The Order of Conditional License cited Minn. Stat. § 245A.50, subds. 5 and 7, as the basis for the sanction.

17. In addition to the statutory violations, the Order of Conditional License cited Minn. R. 9502.0325, 9502.0365 (regarding capacity), and 9502.0405, subp. 4 (records required for children admitted to day care). The violation was described as:

During the investigation [regarding the pit bull incident], it was also determined that the co-license holder, Danny Parden had failed to complete eight hours of required annual training. In addition, you failed to have admission and arrangement forms and immunization records for all children present in your child care home. You were issued a correction order for these violations.

On January 7, 2009, you requested reconsideration of the correction order. In a letter dated July 31, 2009, the Department of Human Services (DHS) notified you that the above referenced citations were affirmed. In addition, based on information provided in your request for reconsideration, the following violations were determined:

¹⁶ Exhibit 22; Testimony of Penny VanLear.

¹⁷ Exhibit 7.

¹⁸ Exhibits 8 and 18; Testimony of Penny VanLear.

¹⁹ Exhibit 1.

- Failure of the co-license holder, Danny Parden, to complete the required SIDS/SBS training prior to caring for infants.
- Failure to operate within your capacity limits by allowing up to ten additional children to wait in your home for the bus in the morning

Due to the serious nature of the above violations including, failure of the co-license holder to complete SIDS/SBS training prior to caring for infants; failure to operate within your capacity limits; failure of the colicense holder to complete the annual training requirements; and, in order to protect the health, safety, and rights and well-being of children receiving services in DHS-licensed programs, your family child care license is placed on conditional status for one year.²⁰

18. The Order of Conditional License allowed the Licensee to continue to operate with a conditional license with the following conditions:

1. You follow and comply with all applicable Minnesota Rules and Laws.
2. No variances to age distribution or capacity will be granted during the conditional period.
3. You must submit Admission and Arrangements forms and Immunization Records to Norman County prior to attendance of all new children enrolled in your child care home.
4. You must each complete 4 hours of additional training by February 28, 2010. The training is in addition to the annual training requirements as listed in Minnesota Statutes, section 245A.50. The training must be in the area of child safety. Prior to attending training, you must obtain approval from Norman County that the training is appropriate. You must submit documentation of your attendance to Norman County.
5. You must either provide a copy of the Order of Conditional License to parents of children in care or document that all parents have been given an opportunity to review the Order of Conditional License. You must obtain parent signatures for each currently enrolled child, verifying they have either received a copy of the conditional order or had an opportunity to review the conditional order. You must provide this documentation to Norman County by **November 27, 2009**. For new families, you must submit documentation of compliance with this term to Norman County **within 5 days of any child's admission** to your child care program.²¹

²⁰ Exhibit 1.

²¹ Exhibit 1 (emphasis in original).

19. The Licensees appealed the Order to Forfeit Fine and Order of Conditional License.²² On November 24, 2009, the Department issued the Notice of and Order for Hearing, setting this matter on before the Administrative Law Judge for hearing.²³

20. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

21. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

22. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

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

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction to consider this matter.²⁴

2. The Department gave proper and timely notice of the hearing and has complied with all procedural requirements of law and rule.

3. The Commissioner may impose a fine of \$200 on a license holder for each occurrence of a violation of law or rule governing matters of health, safety, or supervision, \$1,000 for each determination of maltreatment, and \$100 for each occurrence of a violation that is not subject to a \$200 or \$1,000 fine.²⁵

4. When the Commissioner has ordered a license holder to pay a fine, the license holder may, upon timely proper notice, appeal the fine by requesting a contested case proceeding. The Licensee in this matter made a timely and proper request for a contested case proceeding to appeal the fine imposed by the Commissioner.

5. If the Commissioner finds that the applicant or license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program, the Commissioner may also issue an order of conditional license to a licensee. When issuing a conditional license, the Commissioner must 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

²² The Department did not provide the appeal request among the procedural exhibits offered into the record..

²³ Notice of and Order for Hearing.

²⁴ Minn. Stat. §§ 245A.07, subds. 1 and 3; 14.50.

²⁵ Minn. Stat. § 245A.07, subd. 3.

persons served by the program.²⁶ When the Commissioner issues a dual order of both a fine and a conditional license, the scope of an ensuing contested case hearing includes both the fine and the conditional license.²⁷

6. Minn. Stat. § 245A.50, subd. 5(a), provides:

Subd. 5. Sudden infant death syndrome and shaken baby syndrome training. (a) License holders must document that before staff persons, caregivers, and helpers assist in the care of infants, they are instructed on the standards in section 245A.1435 and receive training on reducing the risk of sudden infant death syndrome and shaken baby syndrome. The training in this subdivision may be provided as initial training under subdivision 1 or ongoing training under subdivision 7.

7. The Order to Forfeit a Fine alleged that the Licensee failed to submit documentation on the completion of Sudden Infant Death Syndrome and Shaken Baby Syndrome training for Danny Parden before he began caring for an infant in the Licensees' day care. There is no dispute that Mr. Parden had not completed either training.

8. The infants being cared for were not enrolled in the day care of the Licensees. Mr. Parden was a parent of the infants who were in their own home. The Department has not shown that there was a violation of Minn. Stat. § 245A.50, subd. 5, by the Licensees in having a parent caring for his own children in their own home without obtaining the training required for such care to be provided to day care children.

9. Since no rule violation occurred as a result of the conduct cited in the Order to Forfeit a Fine, the fine must be rescinded.

10. The imposition of a Conditional License is based upon the violations of the Sudden Infant Death Syndrome and Shaken Baby Syndrome training requirement, the overall training requirements, and capacity violation.

11. As concluded above, there was no violation of the Sudden Infant Death Syndrome and Shaken Baby Syndrome training requirement when the co-licensee was caring for his own infant children in their own home.

12. The Licensees have affirmatively shown that there were fourteen children who were ten years of age or younger at the day care on December 8, 2008. There was no violation of the capacity limits as alleged by the Department. There was no basis for citing the Licensees for violating the recordkeeping requirements of Minn. Rule 9502.0405, subp. 2, on December 8, 2008, since those children were not enrolled in the Licensees' day care. However, there was a demonstrated violation of Minn. Rule

²⁶ Minn. Stat. § 245A.06, subd. 1.

²⁷ Minn. Stat. § 245A.06, subd. 4.

9502.0405, subp. 2, through the failure of the Licensees to provide the required immunization records for KJ's children.²⁸

13. The Department has shown that Danny Parden, as co-licensee, failed to complete the required training in the time allotted both by rule and by the County's correction order. The Licensees have shown that Mr. Parden completed that training not long after the deadline set in the County's correction order.

14. In determining appropriate sanctions, the Commissioner must 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.²⁹ The violations were not severe and the Licensees have attempted to comply with each of the requirements. Considering these criteria, imposition of a Conditional License is an appropriate sanction for the Licensees' violations.

15. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

16. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

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

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Department's Order to Forfeit a Fine be **RESCINDED** and that its Order of Conditional License be **AFFIRMED**.

Dated: April 13, 2010

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Digital Recording, No Transcript Prepared.

²⁸ While the failure to submit the required records for KJ's children was not described in the narrative portion for violations in the Order of Conditional License, the Licensees acknowledged being in violation of that rule during the hearing.

²⁹ Minn. Stat. § 245A.07, subd. 1.

NOTICES

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 the office of Cal Ludeman, Commissioner, Department of Human Services, PO Box 64998, St. Paul, MN 55164-0998, 651-296-2701, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within 10 working days to allow the Judge to determine the negative licensing action, if any, to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Pursuant to 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.

MEMORANDUM

This matter has been difficult to address due to the disparity between the conduct described and the statutory and rule provisions alleged to have been violated. There is reference to the pit bull incident in the narrative description of violations, but no statutory or rule citation to any violation relating to the incident. Under these circumstances, there is no basis for imposing discipline for anything relating to the pit bull incident.

The critical contention in this matter is the appropriate classification of the two infants of the Licensees. The Department contends that their presence in the day care residence triggers the application of the statutory requirement for SIDS/Shaken Baby training. The Licensees contend that the infants, being cared for by a parent in their own home, are not appropriately considered as being in “day care” so as to trigger the training requirement.

The term “day care” is defined in Minn. Rule 9502.0315 for the purposes of these rules as follows:

Subp. 9. Day care. "Day care" means the care of a child in a residence outside the child's own home for gain or otherwise, on a regular basis, for any part of a 24 hour day.

Applying the rule definition to the facts in this matter, the infants were in their own home and therefore not in day care. The Department asserted that the requirements for counting capacity of the day care compels a different conclusion. The definition for capacity states:

Subp. 18. Licensed capacity. "Licensed capacity" means the total number of children ten years of age or younger permitted at any one time in the residence. The licensed capacity includes all children of any caregiver when the children are present in the residence.³⁰

The Department is correct that the licensed capacity of the day care is measured including any children in their own homes. This provision is directed at ensuring that caregivers are able to provide adequate supervision for the children that they are actually caring for. The express statement in the capacity provision regarding a caregiver's own children shows that such children are not considered as being in the day care throughout the rest of Minn. Rule Part 9502. Interpreting the licensed capacity rule to apply all of the day care rules to children located in their own homes is contrary to the plain meaning of both the day care and licensed capacity definitions in Minn. Rule 9502.0315. Under the applicable rules, a child in that child's own home is never in day care. Day care rule requirements other than capacity limits do not apply to such a child.

The Department cited the transportation rule, Minn. R. 9502.0435, subp. 9, as an example of how the day care rules apply to provider's own child. That rule includes the following provision: "D. Written permission to transport children must be obtained from parents." The Department has not shown how the State has an interest in obtaining written permission from a parent to transport one's own child away from that child's own home. Treating the caregiver's own child as a day care child would require this result. The example supports the Licensees' contention that the only interaction between the day care rules and one's own children comes in measuring whether the capacity restrictions are met. The Licensees' position on this issue is supported by the plain language of the rules.³¹

The Department contends that the training process for inspectors informs them that the day care statutes and rules apply to children of licensees living in the day care residence.³² No statute or rule was cited to support this contention. Neither Minn. Stat. Chapter 245A nor Minn. Rule Chapter 9502 contains language generally applying the day care standards to children living in the day care residence. The definition of day

³⁰ Minn. Rule 9502.0315, subp. 18.

³¹ Additional support for this conclusion is found in Minn. Stat. § 245A.15, subd. 11(3), which requires that the licensee "enter into a written contract with a child's parent or legal guardian" A person cannot enter into a binding contract with oneself. The Legislature is presumed to not intend a result that is absurd, impossible of execution, or unreasonable. Minn. Stat. § 645.17(1).

³² Testimony of Cynthia Hanson.

care and the express treatment of children living in the day care residence for capacity purposes supports the conclusion that such children are not generally included in the restrictions governing day care. There is no basis for citing Mr. Parden for caring for infants without completing SIDS/Shaken Baby training, since the only infants in the Licensees' day care are his own children in their own home.³³

The Department contended that the two infants' participation in the subsidized meal program demonstrates that the children are in day care. The subsidized meal program itself treats children of providers differently than children enrolled in the day care.³⁴ Participation in the subsidized meal program does not support a conclusion that the day care rules apply to the Licensees' children.

While Ms. VanLear is correct in her contentions regarding the applicability of day care rules to her own children, she showed a clear misunderstanding of how the system of providers and substitutes works. Ms. VanLear maintained that Mr. Parden's obligation to obtain required training regarding day care was triggered only when he began caring for children. This is not correct. Mr. Parden was obligated to complete the training by his status as a co-licensee. Ms. VanLear referred to Mr. Parden as a substitute. This is also incorrect. While on the license, Mr. Parden could not act as a substitute at his own day care. The term "substitute" only applies to a person operating the day care when both the licensed providers (Ms. VanLear and Mr. Parden) are unavailable.³⁵

The failure of Mr. Parden to obtain required training and the failure of the Licensees to send copies of KJ's immunization records to the County are violations of the rules. Due to the lack of severity in the violations and the good faith efforts of the Licensees to correct these violations, imposition of a conditional license is appropriate to remedy the violations.

S.M.M.

³³ Relying on the Department's training as the basis for concluding that day care rules apply to children in their own home raises the possibility that the Department is following an unadopted rule in violation of Minn. Stat. § 14.381.

³⁴ *Where Your Money Goes: The 1994-95 Green Book*, at 580, footnote 12 (United States Congress, House Committee on Ways and Means).

³⁵ Minn. Rule 9502.0315, subp. 29; Minn. Rule 9502.0365, subp. 5; Exhibit 15.