

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

In the Matter of the Denial of the
License of Elisabeth Malovrh

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Beverly Jones Heydinger on February 4, 2010, at the Scott County Government Center, 200 Fourth Avenue West, Shakopee, Minnesota, pursuant to a Notice of and Order for Hearing issued on November 18, 2009.

Appearances: Jeanne Anderson, Assistant Scott County Attorney, on behalf of the Department of Human Services (Department); Elisabeth Malovrh on her own behalf, without counsel (Respondent).

The hearing record closed at the conclusion of the hearing.

STATEMENT OF THE ISSUES

Did the Department properly deny Elisabeth Malovrh a family child care license?

The Administrative Law Judge concludes that the decision to deny Elisabeth Malovrh a family child care license should be reversed.

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

FINDINGS OF FACT

1. Elisabeth Malovrh (Respondent) was previously licensed to provide family child care in her home but, as set forth more fully below, that license was revoked in 2007. In 2009, she applied for a new license, which was denied. This appeal is from the Order of Denial issued October 27, 2009.

2. Sometime prior to December 14, 2006, Elisabeth Malovrh (Respondent) was granted a license by the Department to provide family child care in her home. As part of the process, a background check was completed for Eric Bugenhagen, who was

the father of the Respondent's two youngest children and frequently in her home. On December 14, 2006, the Respondent received notice from Scott County Community Services Department (County) that Mr. Bugenhagen was disqualified from "direct contact with, or access to, persons served by the program."¹

3. Mr. Bugenhagen requested reconsideration of the disqualification, pursuant to Minn. Stat. § 245C.21, which was received by the Department on January 24, 2007.²

4. On approximately March 20, 2007, while the request for reconsideration was pending, Mr. Bugenhagen assaulted the Respondent in her home.³ The Respondent's children were present during the assault. At that time, the Respondent was licensed to provide child care but no children had been enrolled. Respondent called the police, but did not report the incident to the County licensing staff because no children were in her care.⁴

5. On March 23, 2007, the Department issued a Temporary Immediate Suspension, preventing the Respondent from operating licensed child care. The Respondent appealed the Temporary Immediate Suspension. Following a hearing, by letter dated June 20, 2007, the Commissioner affirmed the Temporary Immediate suspension. On September 25, 2007, the Commissioner revoked the Respondent's license and also denied Mr. Bugenhagen's request for reconsideration.⁵

6. The Respondent did not appeal the Order of Revocation and her license was revoked.⁶

7. The Order of Revocation stated as its basis that the Respondent had been notified of Mr. Bugenhagen's disqualification and that he presented an imminent risk of harm, that she had been ordered to remove him "from having direct contact with, or access to, persons served by your program," and despite the order to remove Mr. Bugenhagen, the County had received a report of domestic violence involving Mr. Bugenhagen in her home "during daycare hours when children were present." It also stated that the Respondent had reported the assault to the police, "but [Respondent] refused to cooperate with the [police] investigation or provide any further statement regarding the incident." Also, the Respondent had reported to the County that Mr. Bugenhagen "was going to be a household member."⁷

8. On November 17, 2008, the Respondent notified the County that Mr. Bugenhagen had moved to Wisconsin, about six hours away, and that, although he occasionally visited his children, he did not visit with them at her home, nor did he stay

¹ Ex. 10.

² Ex. 1.

³ *Id.*

⁴ Testimony (Test.) of Respondent; Test. of Jacque Froemke.

⁵ Ex. 1.

⁶ Ex. 2.

⁷ *Id.*

in the home. Respondent asked about the possibility of reapplying for her child care license and was told by Nancy Berndt, the licensing worker assigned at that time, that she would check with the Department.⁸

9. On November 18, 2008, Ms. Berndt spoke with Molly Kelly at the Department, who referred Ms. Berndt to the language of Minnesota Statutes § 245A.08, and told Ms. Berndt that the Respondent could reapply for a license but would need to demonstrate that the disqualified person was no longer in the home. On November 19, 2008, Ms. Berndt conveyed this information to the Respondent and provided her with the schedule for upcoming orientation classes.⁹

10. The Respondent completed the orientation, the necessary application, and home inspection. Following completion of the home inspection, the Respondent's application was assigned to Jacque Froemke who conducted a licensing inspection at the home on May 22, 2009.¹⁰

11. On June 8, 2009, the Respondent submitted written notice to the County that she had separated from Mr. Bugenhagen in May 2008 and that he had moved to Menasha, Wisconsin.¹¹

12. On September 2, 2009, the County sent a letter to the Department recommending that the Respondent be granted a one-year conditional license, subject to the condition that Mr. Bugenhagen neither reside in nor be present in the child care home when children in care were present, and that he not have access to the children in care at any location. The proposed conditions also restated other requirements of the law, including notifying the County of any change in the household membership and granting the licensing staff access to the home at any time that the child care program was operating.¹² On September 9, 2009, the Respondent was notified of the County's recommendation.¹³

13. On September 18, 2009, Ms. Froemke received a call from Molly Kelly. Ms. Kelly told Ms. Froemke that the Order of Revocation was not based solely on the disqualification of Mr. Bugenhagen, but also because the Respondent did not remove him from her home, did not report the domestic assault to the County, and did not fully cooperate with the police. Ms. Kelly told Ms. Froemke that she would recommend denying the Respondent's application for a license.¹⁴

14. On October 27, 2009, the Order of Denial was issued. Its stated basis was that the Respondent had failed to prevent a disqualified person from having direct contact with or access to persons served by her child care program. It also stated that

⁸ Ex. 3.

⁹ *Id.*

¹⁰ Test. of J. Froemke; Ex. 4.

¹¹ Ex. 5, Attachment.

¹² Ex. 5.

¹³ Ex. 6.

¹⁴ Test. of J. Froemke; Ex. 7.

the incident of domestic violence occurred in her home during child care hours when children were present.¹⁵

15. On November 3, 2009, the Respondent appealed the Order of Denial.¹⁶

16. At the hearing, two of the Respondent's friends testified on her behalf. Kimberly Tschida has known the Respondent for five years and was aware of the domestic assault. She confirmed that the Respondent has taken steps to prevent Mr. Bugenhagen from returning and that Mr. Bugenhagen's contact with his children occurs in other supervised locations. Ms. Tschida previously provided child care in Washington County and believes that the Respondent handles children well, including children with special needs. Ms. Tschida's own children are comfortable with the Respondent and Ms. Tschida would have no concerns about placing her children in the Respondent's care.

17. Tammie Powers has known the Respondent for approximately 10 years. She speaks with the Respondent almost every day, knows about the domestic assault, and is quite certain that Mr. Bugenhagen has not been near the Respondent's home for over a year. She is aware that the Respondent arranges occasional visits for Mr. Bugenhagen with his children. Ms. Powers has been a mother for 21 years and described herself as "very picky" about who cares for her own children. She is confident that the Respondent would provide excellent care to children.

18. The Respondent also provided a letter of support from Wayne Tomei. Mr. Tomei has coached one of the Respondent's sons in youth football. He has five children, one of whom is a close friend of the Respondent's son. Both Mr. Tomei and his wife have become good friends with the Respondent and on one occasion the Tomei's children spent the night at the Respondent's home. He has confidence in the Respondent's ability to care for children.¹⁷

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 to consider this matter.¹⁸

2. The Department through Scott County Child Care Licensing gave proper and timely notice of the hearing and complied with all procedural requirements of law and rule.

¹⁵ Ex. 8.

¹⁶ Notice of and Order for Hearing, Ex. A.

¹⁷ Ex. 9; Test. of Respondent.

¹⁸ Minn. Stat. §§ 245A.07, subd. 3; 245A.08, subd. 2a (a); 14.50.

3. Pursuant to Minn. Stat. § 245A.08, subd. 3 (b), at a hearing on a denial of an application, the applicant bears the burden of proving by a preponderance of the evidence that she has complied fully with chapter 245A and other applicable law or rule.

4. The Commissioner shall not issue or reissue a license if the applicant has had a license revoked within the past five years, except that, notwithstanding the five-year restriction, if the basis for the revocation is the disqualification of a person who is not the license holder, and that person is no longer residing in the home and is prohibited from residing in or returning to it, the license holder may reapply.¹⁹

5. The Respondent has demonstrated by a preponderance of the evidence that the person who was disqualified is no longer residing in the home and has been prohibited from residing in or returning to it. Therefore, she is eligible to reapply for a license.

6. Before issuing a license, the Commissioner must evaluate information gathered about the applicant, including facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the applicant or license holder. The Commissioner shall also evaluate the results of the required background studies and apply the disqualification standards set forth in chapter 245C.²⁰

7. The Respondent failed to exercise good judgment when she allowed a person into her home who had been disqualified, resulting in a domestic assault in the presence of her children. The Respondent has demonstrated that she will not allow the disqualified person to have access to or contact with the children in her care and that those children are not at risk. There was no other evidence of facts, conditions, or circumstances that show that the Respondent is not qualified to hold a license, that she has not or will not comply with the applicable laws or rules, and there are no other alleged violations of the laws or rules that govern the licensure of family child care.

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

¹⁹ Minn. Stat. § 245A.04, subd. 7 (e); 245A.08, subd. 5a.

²⁰ Minn. Stat. § 245A.04, subd. 6.

RECOMMENDATION

The Administrative Law Judge recommends that:

The Order of Denial be REVERSED.

Dated: February 23, 2010

s/Beverly Jones Heydinger

Beverly Jones Heydinger
Administrative Law Judge

Reported: Digitally Recorded
A-BJH-02042010 (not transcribed)

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Commissioner Cal Ludeman, Department of Human Services, PO Box 64998, St. Paul, MN 55164-0998 or 540 Cedar Street, St. Paul, MN 55164, telephone number 651-431-2907, 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 discipline 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.

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

Although not clearly stated, the Department seems to have two separate bases for denying the application: first, Respondent allowed a disqualified person to have contact with, or access to, persons served by the child care program; and, second, Respondent showed poor judgment in allowing a disqualified person into her home where he committed a domestic assault in the presence of her children. Each of the two bases ties back to the Order of Revocation. The Order of Denial stated:

In an order dated September 25, 2007, your license to provide family child care was revoked because of the incident of domestic violence which occurred in your family child care home during normal child care hours when children were present, because an individual requiring a background study was disqualified from any position allowing direct contact with, or access to, persons served by DHS-licensed programs, and because you failed to remove a disqualified individual from direct contact with, or access to , persons served by your program.

It also stated:

As part of your application, you provided a notarized statement to Scott County that the disqualified individual is no longer residing in your home. However, this was not the sole basis for the revocation of your license. As described above, you failed to remove the disqualified individual from direct contact when ordered to by Scott County Community Services ..., and an incident of domestic violence occurred in your family child care home.

Thus, although the two bases are mixed together, one basis is the failure to exclude a disqualified person from access to or contact with children in care, and the other is that the Respondent showed poor judgment by allowing a disqualified person into her home, with a resulting domestic assault.

Failure to exclude a disqualified person from access to or contact with children in care

The Order of Revocation issued in 2007 stated that the domestic assault occurred “in [the Respondent’s] home during daycare hours when children were present.” Since the Respondent did not appeal the Order of Revocation, the apparent misstatement is not relevant to the revocation. The asserted fact was relied upon again in this proceeding. Yet, in this proceeding, the County concurred that there were no children in care at the time of the assault except the Respondent’s own children. The Respondent testified, and the County confirmed, that, at the time of the domestic assault, the Respondent was licensed to provide child care but no children had been enrolled.²¹ Thus, Mr. Bugenhagen had no contact with or access to children in care.

²¹ Test. of J. Froemke.

The applicable rule states that a license may be revoked if “the applicant, provider, or any other person living in the day care residence or present during the hours children are in care” has a disqualification.²²

Although the rule may have prohibited Mr. Bugenhagen’s presence in her home, the Respondent credibly testified that she was never informed that Mr. Bugenhagen could not be in her home, only that he could not have access to or contact with the children in care. The letter sent to her on December 14, 2006, notified her that Mr. Bugenhagen was disqualified and that he posed an imminent risk of harm to persons serviced by her program. She was ordered to “immediately remove this individual from having direct contact with, or access to, persons served by your program.”²³ It also stated: “Failure to immediately remove the subject from your program may result in a licensing action under Minnesota Statutes, section 245A.06 or 245A.07, or the denial of your license under 245A.05.” Nothing in the letter stated that Respondent was required to remove him from her home if no children were being served, nor was he prevented from having contact with his own children. The letter contained no reference to Minn. R. 9502.0335, subp. D. Moreover, the statute governing disqualification, Minnesota Statutes § 245C.14, prohibits direct contact with and access to children in care, but it does not prohibit a disqualified person from being present in the home.

The Respondent demonstrated that she did not allow Mr. Bugenhagen to have contact with or access to the children in care, and she will not permit any such access or care or allow him in her home in the future.

Poor Judgment That Placed Children At Risk

Although not clearly articulated, the second basis for denying the license seems to be that the Respondent knew that the disqualified person posed a risk but by allowing him to be in her home she demonstrated poor judgment that could endanger the children in care.

The Respondent did not dispute that she had used poor judgment when she allowed Mr. Bugenhagen into her home. However, she maintained that the risk was to her own family, not to others, and that she has taken steps to assure that there is no reoccurrence. Her testimony was supported by two friends who were familiar with the Respondent’s efforts to strictly limit contact with Mr. Bugenhagen. The Respondent asserts that one lapse in judgment should not be sufficient to deny her a license.

It is not clear whether the Department was also relying on the Respondent’s failure to cooperate with the police investigation as a separate basis for denying the license. As stated in the Order of Revocation, the Respondent called the police to report the domestic assault. It also states that she “refused to cooperate” with the police investigation, which is not entirely correct. Based on statements made to her by one of the police officers, the Respondent became fearful that her children might be

²² Minn. R. 9502.0335, subp. 6 D (emphasis added).

²³ Ex. 10.

removed from her home, and she was reluctant to make a statement. However, there is no reference to this in the Order of Denial, and it does not appear that failure to cooperate with the investigation served as a separate basis to deny the license application. However, for the record, the Respondent testified that the police officer with whom she initially had contact told her that, if the police found evidence of abuse, her children could be taken from her. This frightened the Respondent and she decided to say no more.

Thus, based on the record in this proceeding, the only substantiated basis to deny the Respondent a license was that she showed poor judgment when she allowed Mr. Bugenhagen into her home, that she knew that he presented a risk, and was not able to prevent a domestic assault in the presence of her own children.

The evidence supports the Respondent's position that children in her care will not be at risk. She has not allowed Mr. Bugenhagen into or near her home for more than a year, she will not allow him to be there in the future, and he is currently living in Wisconsin. The Respondent has contact with him once or twice a month in a public setting, typically in Wisconsin, for the limited purpose of allowing him to see his children. Mr. Bugenhagen has neither physical nor legal custody of the children and the visits are under the Respondent's control.

The Respondent made an effort to determine if she was likely to get a license before she started the application process in 2009. She asked the County to check with the Department, which it did, and she was given approval to go forward. Although that preliminary approval is not binding on the Department, it had the same information about the license revocation at the time it gave preliminary approval as it had when it denied the license.

This is an appropriate matter for the exercise of the Commissioner's discretion. With a more complete hearing record of the facts surrounding the domestic assault and the steps taken by the Respondent to eliminate the likelihood of such an event in the future, it is appropriate to grant the Respondent's license.

B. J. H.