

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

In the Matter of the Temporary Immediate Suspension of the License of Tina Kurkosky to Provide Family Child Care	<b>FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION</b>
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This matter was heard by Administrative Law Judge Steve M. Mihalchick on February 19, 2010, in the Conference Room of Swift County Human Services in Benson, Minnesota. The Office of Administrative Hearings (OAH) record closed at the end of the hearing on February 19, 2010.

Danielle H. Olson, Assistant Swift County Attorney, appeared on behalf of Swift County Human Services (the County) and the Minnesota Department of Human Services (the Department or DHS).

Tina Kurkosky (the Licensee) appeared on her own behalf.

### STATEMENT OF THE ISSUES

Whether reasonable cause exists to believe that the Licensee was still under the influence of alcohol from the previous night when she provided care the next morning to a daycare child for at least an one hour and then allowed a substitute caregiver without a current background investigation to provide care for the child for up to an hour and, if so, whether the Licensee actions pose an imminent risk of harm to the health, safety, or rights of children in her care.

The Administrative Law Judge finds that reasonable cause to believe that the Licensee poses such a risk existed at the time of the incidents and continues to exist.

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

### FINDINGS OF FACT

1. The Licensee has been licensed since about 2005 to provide family child care in her home in Benson, Minnesota, where she lives with her husband and three children.<sup>1</sup>

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<sup>1</sup> Testimony of Becky Brown; Exhibit 2.

2. On January 14, 2010, the Licensee and her husband got a babysitter about 7:00 p.m. and went out for the evening. The Licensee drove her SUV. She and her husband spent at least part of the evening playing darts and having some drinks.<sup>2</sup>

3. Before they went out for the evening, the Licensee called Dawn Fox, a long-time friend, and asked her to provide substitute care for her at 7:30 a.m. the next morning. Fox had occasionally substituted for the Licensee, but had not had a background check completed and on record with the County since 2007. She was also a long-time friend of the mother of the daycare child that was to be at the Licensee's the next morning and had known and babysat for the child since her birth. Fox agreed to come in the morning, but informed the Licensee that she had to work until 8:30 a.m. and could not get there until a few minutes later.<sup>3</sup>

4. The Licensee and her husband went home about 1:00 a.m. on January 15, 2010. The Licensee dropped her husband off and then drove the babysitter home, about a half-mile away. The Licensee "drove okay," but was "talking really loud, louder than usual."<sup>4</sup>

5. On the way back home, the Licensee's SUV went into a snow bank and got stuck partly in the street and partly in the yard of the house at the end of her block. The Licensee spun her wheels, but was unable to get the vehicle out.<sup>5</sup> She left the vehicle and, apparently, walked to her nearby home.

6. The Licensee's SUV was discovered by a State Trooper who reported it to Benson Police Officer Dusty Burton at 4:40 a.m. on January 15, 2010. Officer Burton, who was on duty that morning, immediately went to the scene to investigate. He checked the license number and learned the SUV was registered to the Licensee. He was acquainted with the Licensee and her husband. He went to their home, knocked on the door, and received no response. He returned to the SUV, inventoried it, and had it towed. The SUV contained nothing of interest to him, but he noted darts and child seats.<sup>6</sup>

7. At approximately 5:45 a.m., Officer Burton went back to the Kurkoskys' home. He first spoke with the Licensee's husband outside the home, where he may have been leaving for work. They went inside. The Licensee's husband told the Officer that the Licensee had been driving when they went out the night before and had dropped him off. Officer Burton observed that the Licensee's husband had a strong odor of alcohol and bloodshot, watery eyes. The Licensee's husband submitted to a preliminary breath test (PBT), which indicated a .104 blood alcohol content (BAC). Officer Burton told him not to drive to work.<sup>7</sup>

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<sup>2</sup> Ex. 2.

<sup>3</sup> Test. of B. Brown, V. Stelfox, and Dawn Fox.

<sup>4</sup> Ex. 2, report of babysitter interview.

<sup>5</sup> Ex. 2.

<sup>6</sup> Ex. 2.

<sup>7</sup> Ex. 2.

8. Officer Burton asked to talk with the Licensee. She then came into the kitchen. Officer Burton noted a very strong odor of alcohol from her. He had her do a PBT that resulted in a .168 BAC. Both the Licensee and her husband then declined to answer further questions. Officer Burton left the home.<sup>8</sup>

9. Officer Burton promptly spoke with an Assistant County Attorney who advised him to return to the residence, read the implied consent advisory to the Licensee, and offer her a test for the presence of alcohol in her system. He did so at 6:54 a.m. After asking several times what a refusal meant, the Licensee refused to go for a blood or urine test, telling Officer Burton that she had to get her kids ready for school and had a daycare child coming at 7:30 a.m., and could not get anyone to come in temporarily to watch her children while she went to be tested.<sup>9</sup>

10. At some point, the Licensee's husband left for work. The Licensee's only daycare child for the day arrived about 7:30 a.m. She is three years old. The child's mother smelled alcohol on the Licensee and thought that the Licensee did not seem to be herself, but she left the child in the Licensee's care. The Licensee's two school-aged children left to get on the school bus by 7:45 a.m. Licensee provided care to the daycare child and her own youngest child by herself until Fox arrived at least an hour later.<sup>10</sup>

11. At 7:40 a.m. the Benson Police Department informed the County of the incident and that the Licensee was expecting daycare children. Becky Brown, Licensor, and Victoria Stelfox, Child Protection Social Worker, were informed of the report when they arrived at work and began a Child Protection and Licensing facility investigation. They arranged to meet the police officer at the Licensee's home about 8:20 a.m. About 8:25 a.m. they went to the door and knocked. The Licensee did not respond. They continued to knock for up to twenty minutes without response. Brown and Stelfox then asked the officer to remain and they went back to the office and began calling all the parents on the Licensee's daycare roster. They reached all of them except the parent whose child was with the Licensee that day. Stelfox called the Licensee's husband at work. He told her that his wife was home, but afraid to open the door because a police officer was there, too. Stelfox told him to have the Licensee call her.<sup>11</sup>

12. Brown and Stelfox returned to Licensee's home about 9:05 a.m. They and the officer knocked at the door, but there was no response. They left.<sup>12</sup>

13. At some point, Dawn Fox arrived. She and the Licensee testified that it was about 8:35 a.m., but it more likely was just after 9:05 a.m. because she also testified that she saw the police car leaving as she arrived. The later time was supported by testimony that the officer had remained outside the home while Brown and

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<sup>8</sup> Ex. 2.

<sup>9</sup> Test. of the Licensee; Ex. 2.

<sup>10</sup> Test. of the Licensee, B. Brown, and V. Stelfox; Ex. 3.

<sup>11</sup> Test. of B. Brown and V. Stelfox; Ex. 3.

<sup>12</sup> Test. of B. Brown and V. Stelfox; Ex. 3.

Stelfox went to the office. Moreover, Brown and Stelfox had not left the first time until as late as 8:45 a.m.<sup>13</sup>

14. Fox watched the children in the playroom for several minutes, perhaps until about 10:00 a.m. Then she, the Licensee, and the children went to the Whistle Stop Diner because Fox was hungry. Fox drove her vehicle because the Licensee had been told by the police officer that she was intoxicated and because Fox could not drive the Licensee's husband's truck.<sup>14</sup>

15. The Licensee heard from her husband and called Stelfox from the cafe about 10:40 a.m. Stelfox told the Licensee that they were conducting a Child Protection facility investigation because of the report that she was intoxicated while providing childcare. The Licensee informed Stelfox that she had one daycare child with her, that Fox was also with her, and that they were at the diner. Stelfox told the Licensee the daycare child's parent must be contacted to pick up the child immediately. The Licensee did so and the parent promptly picked up the child. Stelfox later spoke to the parent and verified that the parent had picked up the child.<sup>15</sup>

16. The Department issued an Order of Temporary Immediate Suspension that was served upon the Licensee later on January 15, 2010. The Order informed the Licensee of her right to appeal the Department's decision within five calendar days of receipt of the Order.

17. The Licensee properly appealed the Order of Temporary Immediate Suspension. The Notice of and Order for Hearing was issued by the Department on January 20, 2010, and served by the County on February 4, 2010.<sup>16</sup>

18. On February 3, 2010, the County determined that maltreatment by neglect occurred. The Licensee has requested reconsideration of the determination.

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

### **CONCLUSIONS**

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50 and 245A.07, subs. 2 and 2a.

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

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<sup>13</sup> Test. of B. Brown, V. Stelfox, and D. Fox; Ex. 3.

<sup>14</sup> Test. of D. Fox.

<sup>15</sup> Test. of V. Stelfox.

<sup>16</sup> Ex. 1.

3. Minn. R. 9502.0335, subp. 6, requires, among other things, the license of a provider to be revoked or suspended if the provider uses alcohol to the extent that the use may have a negative effect upon the ability of the provider to give care or is apparent during the hours children are in care.

4. The Licensee's use of alcohol on January 14 and 15, 2010, negatively affected her ability to give care and was apparent to others on January 15, 2010, during hours when a child was in care, in violation of Minn. R. 9502.0335, subp. 6.

5. Minn. Stat. §§ 245C.03 and 245C.04 requires that background studies be conducted of caregivers and other persons with direct access to daycare children. The Licensee's failure to require that Dawn Fox provide a background study form before providing substitute care violated those statutes. While Fox may have a current background study in connection with her employment with another state agency, that does not satisfy the requirements of Minn. Stat. §§ 245C.03 and 245C.04 for background studies by the Department.

6. Under Minn. Stat. § 245A.07, subd. 2, if a license holder's actions or violations, or the actions of others, pose an imminent risk of harm to the health, safety, or rights of persons served by the license holder's program, the Commissioner must act immediately to temporarily suspend the license and inform the licensee by personal service.

7. If a license holder appeals an order immediately suspending a license, the scope of the resulting expedited hearing is limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the Commissioner's final order under Minn. Stat. § 245A.07, subd. 3. In temporary immediate suspension hearings, the burden of proof is on the Commissioner to demonstrate 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.

8. The Administrative Law Judge shall recommend "whether the immediate suspension should remain in effect pending the Commissioner's final order regarding a final licensing sanction."<sup>17</sup>

9. The Department demonstrated that reasonable cause existed on January 15, 2010, to believe that the Licensee posed an imminent risk of harm to the health, safety, or rights of children in her care. The Licensee caused an imminent and serious risk to the health and safety of a child in her care when she, while still under the influence of alcohol from the previous night, provided care to a daycare child for at least an hour and allowed a substitute caregiver who did not have a current background investigation to provide care for the child for about the next hour.

10. There is no reason to believe that the risk of imminent harm has yet been eliminated. The Licensee claims that if she had known that her blood alcohol content

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<sup>17</sup> Minn. Stat. § 245A.07, subd. 2a(a).

was so high, she would not have provided care to the daycare child and suggests that her blood alcohol content was actually lower an hour later when the child's mother dropped him off. But clearly she knew that she had been drinking a few hours before providing daycare and should have recognized that she was still under the influence of the alcohol. There has been no dependency examination done to determine the extent of her dependency and whether treatment would be recommended. There is no evidence at this time that the risk of imminent harm no longer exists.

11. The Order of Temporary Immediate Suspension should remain in effect pending the Commissioner's final order regarding a final licensing sanction.

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

### **RECOMMENDATION**

IT IS RECOMMENDED that the Order of the Commissioner of Human Services temporarily immediately suspending the family child care license of Tina Kurkosky be **AFFIRMED**.

Dated: February 25, 2010

s/Steve M. Mihalchick

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STEVE M. MIHALCHICK  
Administrative Law Judge

Reported: Digitally Recorded

### **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. 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 Cal Ludeman, Commissioner of Human Services, P.O. Box 64998, St. Paul, MN 55164-0998, 651-296-2701, 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.