

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation of the
License of Rebecca Kluender

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Manuel J. Cervantes on May 12, 2010, at the Freeborn County Department of Human Services, 203 West Clark Street, Room 116, Albert Lea, Minnesota, pursuant to a Notice of and Order for Hearing, issued on February 19, 2010.

Erin O'Brien, Assistant Freeborn County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department) and Freeborn County Department of Human Services (County). Rebecca Kluender appeared on her own behalf, without counsel (Respondent or Licensee). The hearing record closed at the conclusion of the hearing.

STATEMENT OF THE ISSUES

Did the Department properly revoke Rebecca Kluender's family child care license, due to the disqualification of her son, J.K.? Should J.K.'s disqualification be set aside?

The Administrative Law Judge concludes that the decision to revoke Rebecca Kluender's family child care license should be reversed. The disqualification of J.K. should not be set aside.

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

FINDINGS OF FACT

1. Rebecca Kluender (Respondent) was licensed to provide family child care in her home in 1996. She has maintained her license since that time, with renewals occurring every two years.¹

¹ Notice of and Order for Hearing, Exhibit A.

2. On May 7, 2007, Respondent's adult son, J.K., pled guilty to felony drug possession² in the Third Degree. The plea was pursuant to an agreement that would, with J.K.'s adherence to the terms of probation, be discharged as a misdemeanor.³

3. Respondent informed all of her daycare families and the County license worker of J.K.'s conviction when it occurred. Respondent specifically asked the license worker if there would be any impact on her license and Respondent was assured that there was none.⁴

4. On August 24, 2007, Respondent submitted her application for renewal of her family child care license. At that time, J.K. was living in the daycare home. Background check forms were provided for all persons living in the residence, including J.K. The County did not indicate that anyone residing in the daycare home was disqualified from contact with persons in Respondent's daycare.

5. J.K.'s conviction was discharged as a misdemeanor at the conclusion of his probation on June 28, 2008.⁵

6. As part of her biennial renewal process in 2009, J.K. submitted an authorization for a background check, because he was living in the daycare home.⁶

7. On July 2, 2009, J.K. was notified that he was disqualified from direct contact with children in Respondent's daycare. The disqualification was based on J.K.'s 2007 conviction of Drug Possession in the Third Degree.⁷ On the same date, the Respondent was notified by the Freeborn County Department of Human Services (County) that J.K. was disqualified.⁸ Both notices described how reconsideration of the disqualification could be requested. The letter to Respondent included the following statement:

The subject's continued presence in your program is allowed if you:

- a) obtain from the individual a copy of his/her notice of disqualification that explains the reason for the disqualification;
- b) ensure that the individual requests reconsideration within 30 days of receiving his/her notice of disqualification; and

² The County pointed out that while some documents referenced Drug Possession in the Third Degree, J.K. was actually sentenced in a manner consistent with Drug Possession in the Fifth Degree, a less serious offense.

³ Exs. 10, 15.

⁴ Testimony of Respondent.

⁵ Exs. 10 and 18.

⁶ Ex. 2.

⁷ Ex. 3.

⁸ Ex. 4. Through a typographical error, J.K. was not actually identified as posing a risk of harm. The notice letter states, in pertinent part, "It has been determined that [redacted] poses a risk of harm to persons served by your program...." There was never any confusion regarding who was disqualified and the error is harmless.

c) ensure that the individual is continuously within sight or hearing of another adult caregiver whenever he/she is in a position allowing direct contact with, or access to, persons receiving services from your program pending reconsideration of the disqualification.⁹

8. J.K. did not immediately request reconsideration of the disqualification under the process set out in Minn. Stat. § 245C.21.

9. On August 17, 2009, the County recommended that the Respondent's license be revoked. The County relied on J.K.'s disqualification and lack of request for reconsideration as the basis for the recommended revocation.¹⁰ The Respondent was notified of this recommendation by letter dated that same day.¹¹

10. On August 20, 2009, Respondent wrote to the County requesting that her license not be revoked, since the disqualifying event for her son occurred almost three years prior to the background check, he was seeking to move from the premises, and he posed no risk of harm to the daycare children.¹² Accompanying the letter was J.K.'s request for reconsideration, dated August 18, 2009.¹³ The County noted that the reconsideration request was received over forty days after the notice of disqualification.¹⁴

11. On October 26, 2009, J.K. executed a lease to an apartment in Albert Lea.¹⁵ J.K. has not resided in the daycare home since November 1, 2009. After moving out, J.K. does not go to visit the daycare home while daycare children are there.¹⁶

12. On February 5, 2010, the Department denied J.K.'s request for reconsideration of the disqualification. The Department's notice of this denial included a reference to Respondent's right to appeal her license revocation and that such an appeal would include the Department's determination that J.K. poses a risk of harm to persons in Respondent's daycare.¹⁷

13. On February 5, 2010, the Department issued an Order of Revocation, revoking the Respondent's license due to J.K.'s disqualification not being set aside. The Order of Revocation cited Minn. R. 9502.0325 (licensing) and 9502.0335, subp. 6 (disqualification factors) as the basis for the revocation, stating:

Because an individual with direct contact with or access to persons served by your program is disqualified from any position allowing direct contact with or access to persons, served by DHS-licensed programs, and in

⁹ Ex. 4.

¹⁰ Ex. 7.

¹¹ Ex. 6.

¹² Ex. 8; Test. of Respondent.

¹³ Ex. 9.

¹⁴ Test. of Stacy Heusinkveld.

¹⁵ Ex. A.

¹⁶ Test. of J.K.

¹⁷ Ex. 10.

order to protect the health, safety, and rights of children receiving services in DHS-licensed programs, your license to provide family child care is revoked.¹⁸

14. The Respondent appealed the Order of Revocation, as well as asking that the Department reconsider the Order. In the appeal letter, the Respondent noted that the County was informed of J.K.'s situation at the time of his conviction and the County assured the Respondent that there would not be a problem regarding her licensure. The Respondent also noted that J.K. had his own apartment and he was not residing in the daycare premises.¹⁹

15. On February 19, 2010, the Department issued the Notice of and Order for Hearing that set this matter on for a contested case proceeding.²⁰

16. J.K. provided a letter of support from his current supervisor. J.K.'s supervisor noted that J.K. is hardworking, punctual, and gets along well with his coworkers.²¹ Other than the letter from J.K.'s supervisor, no substantive information was put into the record regarding the risk posed by J.K. to children in Respondent's daycare.

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.²²

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

3. Pursuant to Minn. Stat. § 245A.08, subd. 2 (a), contested case hearings are consolidated when, as in this matter, a licensing sanction under section 245A.07, subdivision 3, is based on a disqualification for which reconsideration was requested and which was not set aside under section 245C.22. In these circumstances, the scope of the contested case hearing shall include the disqualification and the licensing sanction or denial of a license, unless otherwise specified in the statute. No other statutory provision applies to this matter.

4. The disqualification at issue in this proceeding is that of J.K., not the Respondent. Sanctioning Respondent's license under Minn. R. 9502.0335, subp. 6, requires that a licensee have the

¹⁸ Ex. 11, at 4.

¹⁹ Ex. 12.

²⁰ Notice of and Order for Hearing.

²¹ Ex. C.

²² Minn. Stat. §§ 245A.07, subd. 3; 245A.08, subd. 2a (a); 14.50.

provider, or any other person living in the day care residence or present during the hours children are in care, or working with children: . . . [who] has a disqualification under Minnesota Statutes, section 245C.15, that is not set aside under Minnesota Statutes, section 245C.22, or for which a variance has not been granted under Minnesota Statutes, section 245C.30.²³

5. J.K. requested reconsideration of his disqualification. J.K. was not allowed unsupervised contact with the children in Respondent's daycare. The Respondent has demonstrated that the terms of the July 2, 2009 notice for allowing J.K. to continue residing in the household were met.

6. The Respondent has demonstrated by a preponderance of the evidence that the person who was disqualified is no longer residing in the home. There is no evidence in the record that J.K. will be able to return to the day care home when day care children are present. Therefore, there is no basis under Minnesota Rules Part 9502.0335, subpart 6, to impose any sanction on the Respondent's license.

7. There has been no demonstration in this matter that J.K. does not pose a risk of harm to persons served in the Respondent day care. Insufficient evidence has been supplied to support setting aside the disqualification of J.K.

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

RECOMMENDATION

The Administrative Law Judge recommends that the Order of Revocation be REVERSED, and the disqualification of J.K. not be set aside.

Dated: May 24, 2010

s/Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

Reported: Digitally Recorded, Not Transcribed

²³ Minn. Stat. §§ 245A.04, subd. 7 (e); 245A.08, subd. 5a.

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. 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

The Department relied on the presence of J.K. in the household as the reason for revoking Respondent's license. J.K. was not in contact with the daycare children from the time he was notified of this disqualification through November 1, 2009, when J.K. moved into his own apartment.

The July 2, 2009 notice provided to the Respondent set out the conditions by which J.K. could remain in the licensed premises. The only term that was arguably not met is the time limit for J.K. to have requested reconsideration. The Department accepted the request for reconsideration and the ALJ deems that to be a waiver of any assertion that the reconsideration request is untimely. Since the County was aware of J.K.'s conviction two years before the determination of a disqualification, and the County did not act to have J.K. removed from the daycare prior to 2009, there seems to be no reason to hold J.K. to a strict deadline on requesting reconsideration. There is even less reason to impose sanctions against the Respondent, who disclosed the situation regarding J.K. to the County at the time of his conviction in 2007. Revocation of the Respondent's license is not supported by the record in this proceeding.

Under the consolidated contested case process, the issue of whether to set aside J.K.'s disqualification is also before the ALJ. The Department declined to set aside his

disqualification upon the request for reconsideration.²⁴ There is little more on the subject in this proceeding than was put before the Department.²⁵ In assessing the weight to be given the evidence provided, it is not sufficient to support setting aside the disqualification issued to J.K. in 2009.

Summary

No disqualified person resides in the Respondent's daycare residence. There is no basis for revoking Respondent's license under Minn. R. 9502.0335, subp. 6. For this reason, the Order of Revocation should be reversed. J.K. has not offered evidence adequate to support setting aside his disqualification. For that reason, the disqualification remains. Since J.K. is not living at the daycare premises and has no contact with daycare children, there is no impact from J.K.'s continued disqualification on Respondent's license.²⁶

M. J. C.

²⁴ While the County recommended a "set aside," that recommendation is directed at Respondent, not J.K. Since Respondent was not disqualified, this proposal is properly described as a variance. See Ex. 20.

²⁵ In attempting to demonstrate that J.K. could pose a risk to daycare children, the County questioned J.K. regarding potential access by daycare children to illicit drugs that he had in his possession in 2007. That line of inquiry is not relevant to the situation in 2010, particularly since the County declined to act in 2007, despite knowledge of J.K.'s situation.

²⁶ At the hearing, the County expressed concern that J.K. could come back to the premises, while daycare children are present, while under the influence of illegal drugs. There was nothing more than speculation that this could happen. That speculation does not outweigh the years that J.K. has demonstrated compliance with his probation and absence of contact with the daycare children (even while J.K. was living on the premises).