

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

In the Matter of the Denial of the
Application for a Child Foster Care
License of Michael and Tiffany Roberts

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Kathleen D. Sheehy on September 16, 2011, at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota. The OAH record closed on September 29, 2011, upon receipt of correspondence from counsel for the Applicants.

Bennett C. Rosene, Assistant Ramsey County Attorney, Suite 560, Ramsey County Government Center-West, 50 W. Kellogg Boulevard, St. Paul, MN 55102-1556, appeared on behalf of the Ramsey County Human Services Department (County) and the Department of Human Services (Department).

Wright S. Walling, Walling, Berg & Debele, PA, 121 South 8th Street, Suite 1100, Minneapolis, MN 55402-2823, appeared for Michael and Tiffany Roberts (Applicants).

STATEMENT OF THE ISSUES

Did the Department properly deny the application for foster care licensure based on the permanent disqualification of Michael Roberts?

The Administrative Law Judge concludes the Department had no choice but to deny the application based on the permanent disqualification of Mr. Roberts.

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

FINDINGS OF FACT

1. In May 2007, Michael and Tiffany Roberts agreed to take a three-year-old child named E.S. into their home. The police had previously removed E.S. and his siblings from the home of his birth mother, because of issues with chemical dependency and neglect. In a pending Child in Need of Protective

Services (CHIPS) proceeding, the birth mother had identified Michael and Tiffany Roberts as kin and asked that E.S. be placed with them.¹

2. E.S. is a bright, verbal, and imaginative child who also has extremely disordered behavior. He has special needs as a result of the neglect he experienced.²

3. At the time E.S. was placed in their home, Michael and Tiffany Roberts applied for a relative-only foster care license. In connection with the application, a background study was performed.

4. The background study disclosed that in 1992, at the age of 17, Mr. Roberts pled guilty in Kings County, New York, to second-degree manslaughter. He was sentenced to a term of imprisonment for 18 to 54 months.³

5. By letter dated December 10, 2007, the Department notified Mr. Roberts that the elements of this crime were substantially similar to the crime of second-degree manslaughter in Minnesota, which is a disqualifying crime under the Background Studies Act.⁴ The Department further advised that this disqualification was a permanent bar to licensure and that the Department could not set the disqualification aside or grant a variance to it, regardless of how much time had passed. The letter advised Mr. Roberts of his right to seek reconsideration within 30 days.⁵

6. Mr. Roberts did not seek reconsideration of the disqualification.

7. Despite the disqualification, E.S. continued to remain in the home by order of the Ramsey County Juvenile Court.⁶

8. E.S. adjusted well to the foster home. Mr. and Mrs. Roberts were able to respond to his needs and provide him with the services, love, and attention he needed in order to thrive. Both the child protection worker and the guardian ad litem assigned to E.S. supported his continued placement in the home. In periodic reviews of the placement, the Ramsey County Juvenile Court concluded it was in the best interests of E.S. to remain in the home.⁷

¹ Applicants' Ex. 6.

² Testimony of Sue Chiuminatto; Applicant's Ex. 6. E.S. had drugs in his system at the age of three and has been diagnosed with fetal chemical issues. Test. of S. Chiuminatto.

³ DHS Ex. 4; *see also* N.Y. Pen. Law § 125.15 (1) (a person is guilty of manslaughter in the second degree when he recklessly causes the death of another person).

⁴ DHS Ex. 3; *see also* Minn. Stat. § 609.205 (1) (2010) (a person who causes the death of another by the person's culpable negligence, whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another, is guilty of second-degree manslaughter). All citations to Minnesota Statutes are to the 2010 edition.

⁵ DHS Ex. 3.

⁶ Testimony of Sue Chiuminatto (child protection worker).

⁷ Applicants' Ex. 6; Testimony of Sue Chiuminatto; Testimony of Theresa Lippert (guardian ad litem).

9. Because Mr. and Mrs. Roberts were not licensed foster parents for E.S., they received no compensation for the care they gave to him. The Child Protection Unit provided them with approximately \$200 per month in gift cards to assist with some of the expenses incurred in caring for him.⁸

10. After approximately two years, it became clear that E.S. would not return to his mother's custody and that a permanent placement should be found for him. Mr. and Mrs. Roberts hoped to adopt E.S., but they worried they would not have the resources to care for his needs without financial assistance, either through foster care licensure or an adoption subsidy. The Juvenile Court continued to order placement with Mr. and Mrs. Roberts while child protection authorities attempted to find a way to keep him in their home.⁹

11. As of October 28, 2009, there was agreement between counsel for Mr. and Mrs. Roberts, the child protection worker, and the assistant county attorney for the Child Protection Unit that the County would proceed with a petition to terminate the birth mother's parental rights, and the County would apply for an adoption subsidy before an adoption was finalized. There was concern about whether the subsidy would be approved given the criminal conviction of Mr. Roberts; however, the consensus was that if an adoption subsidy were denied, the decision would be appealed in an effort to continue the placement and provide financial assistance to the family.¹⁰

12. On October 29, 2009, a meeting was held to discuss these same issues with others involved in permanency planning. Those present at the meeting included the guardian ad litem; the child protection worker; the child protection supervisor; the county foster care licensing supervisor and a licensing worker; and others involved in permanency planning. In addition, an assistant county attorney in the Child Protection Unit attended the meeting. Those associated with the Child Protection Unit supported continued placement with the Roberts family and supported the family's attempts to qualify for a subsidy.¹¹

13. During the meeting, a telephone conference was held with counsel for Mr. and Mrs. Roberts to discuss what further action was planned with regard to the disqualification. Counsel indicated that he planned to attempt to expunge the New York conviction. Based on concerns that this would not clear the way to eligibility for adoption subsidies, the decision was made to pursue an appeal of licensing issues first and then to pursue the adoption process if the licensing appeal was unsuccessful.¹² Based on this decision, the County agreed to keep

⁸ Test. of S. Chiuminatto.

⁹ Applicants' Ex. 6.

¹⁰ Applicants' Ex. 1.

¹¹ Applicants' Ex. 6.

¹² Applicants' Ex. 6; Applicants' Ex. 2.

the CHIPS proceeding pending, and the proposed termination of the birth mother's parental rights was postponed.¹³

14. In a letter dated November 12, 2009, counsel for Mr. and Mrs. Roberts wrote to the Juvenile Court judge as follows:

As the court may recall, at the time of the last hearing the county, in agreement with us, concluded that it would move forward with a termination of parental rights in order to look seriously at a subsidy. The subsidy might be denied by the State and would result in an appeal, but we were prepared to do that.

However, after significant discussion, and a group meeting of all of the parties at the county where I had an opportunity to be on a conference call with them, a new strategy has developed. I appreciate the significant effort from the county and all of the people from child protection to the county attorney to the permanency unit.

The conclusion is that we will be requesting that the matter be continued so that we might file an appeal on the disqualification in the original underlying application for foster care. I have indicated to the county that we would file that appeal, and they have sent the primar[y] documents over to me for review and for purposes of filing the internal administrative appeal.

The advantage of this is that if we are successful, that opens all doors automatically to the subsidy and the other conclusions which we wish to reach. *The county has indicated they would be supportive of that as a waiver of the permanent disqualification bar that is [cited] in the original disqualification for foster care.*¹⁴

15. On February 2, 2010, the County's Human Services Child Foster Care Department recommended that the Department deny the foster care application, based on the disqualification of Mr. Roberts.¹⁵

16. On May 10, 2010, the Department issued an order of denial of the foster care license application, based on the disqualification of Mr. Roberts.¹⁶ A timely request for hearing was made to appeal the denial.

17. On August 26, 2010, the Department issued the Notice and Order for Hearing in this matter, scheduling a hearing to take place on October 8, 2010.

¹³ Test. of S. Chiuminatto; Applicants' Ex. 2.

¹⁴ Applicants' Ex. 2 (emphasis added).

¹⁵ DHS Ex. 2.

¹⁶ DHS Ex. 1.

18. At the request of counsel for Mr. and Mrs. Roberts, the hearing was rescheduled to take place December 16, 2010.¹⁷

19. At the outset of the hearing on that day, counsel for Mr. and Mrs. Roberts requested that the hearing be continued for approximately six months so that he could seek to expunge the conviction in New York. Over the County's objection, the Administrative Law Judge granted the continuance.¹⁸

20. In April 2011, counsel for Mr. and Mrs. Roberts indicated that, after significant effort, he had determined that the state of New York has no process to expunge the conviction. The hearing was scheduled to take place in July 2011.¹⁹

21. Because of the shutdown in state services during that timeframe, the hearing was rescheduled to take place on September 16, 2011.²⁰

22. The CHIPS proceeding eventually was closed when the Juvenile Court granted custody of E.S. to Michael and Tiffany Roberts, although the birth mother's parental rights have not been terminated. As the legal custodians of E.S., it will be difficult for Mr. and Mrs. Roberts to obtain an adoption subsidy that is intended to encourage the movement of children with special needs out of foster care and into adoptive homes. They may have to return custody of E.S. to the county in order to pursue an adoption subsidy.²¹

23. Mr. and Mrs. Roberts have provided the only stability to E.S. that he has ever known. He is now seven years old and is doing better, but still has difficulties in school. The guardian ad litem for E.S. considers Mr. and Mrs. Roberts to be among the best providers of foster care in her extensive experience; and, in particular, she considers Mr. Roberts to be one of the best male foster parents she has ever met.²²

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

CONCLUSIONS

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50 and 245A.08, subd. 2a, and 245C.28, subd. 1(a).

2. The Department has complied with all relevant procedural requirements of statute and rule.

¹⁷ Letter from ALJ to counsel (Oct. 4, 2010).

¹⁸ Letter from ALJ to counsel (Dec. 17, 2010).

¹⁹ Second Prehearing Order (Apr. 12, 2011).

²⁰ Letter from ALJ to counsel (Aug. 23, 2011).

²¹ Test. of S. Chiuminatto.

²² Test. of T. Lippert.

3. The Applicant for a license has the burden of proving all facts at issue by a preponderance of the evidence.²³

4. Conviction in another state of any crime with elements that are substantially similar to Minn. Stat. § 609.25(1) is a permanent disqualification from licensure.²⁴ The Commissioner may not set the disqualification aside or grant a variance to it.²⁵

5. Based on the 1992 New York conviction, Mr. Roberts is permanently disqualified from licensure as a foster parent, and the Commissioner may not set the disqualification aside or grant a variance to it.

6. The commissioner shall not issue a license if the applicant has been disqualified and the disqualification was not set aside and no variance has been granted.²⁶

7. The Department properly denied the license application based on the permanent disqualification.

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 Commissioner AFFIRM the order denying the application for a child foster care license.

Dated: October 17, 2011

s/Kathleen D. Sheehy

KATHLEEN D. SHEEHY

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. Under Minn. Stat. § 14.61, the Commissioner shall not

²³ Minn. R. 1400.7300, subp. 5 (2009).

²⁴ Minn. Stat. § 245C.15, subd. 1(a); *id.*, subd. 1(c).

²⁵ Minn. Stat. §§ 245C.24, subd. 2(a); 245C.30, subd. 1(a).

²⁶ Minn. Stat. § 245A.04, subd. 7(e)(1).

issue a final decision 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. 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. Parties should contact Lucinda Jesson, Commissioner, Department of Human Services, P.O. Box 64998, St. Paul, MN 55164 (651) 431-2907 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. 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.

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 Applicants contend that on October 29, 2009, they reached a binding agreement with the County whereby they would forego the pursuit of an adoption subsidy from the state and instead would follow the County's suggestion to appeal the denial of their foster care application. The County contends that no contract was formed by the County and that, in any event, the County has no legal authority to bind the Department to approve the foster care application.

It is clear that the meeting of October 29, 2009, did not result in an enforceable contract. The Child Protection Unit supported the placement of E.S. with Mr. and Mrs. Roberts, and it further supported the efforts of the family to obtain a subsidy. The meeting was a brainstorming session in which people attempted to find a way through the difficult legal barrier created by the 1992 conviction. As reflected in the letter written by counsel to the Juvenile Court judge, there was agreement on a strategy. Even assuming the county agreed to support a "waiver of the permanent disqualification bar," which the County now disputes, this agreement cannot be construed as an offer, acceptance, and consideration sufficient to conclude an enforceable contract was formed.²⁷ Public policy simply would not support the resolution of issues concerning the custody and support of a child with special needs by way of contract between the persons at this meeting.

²⁷ Applicants' Ex. 2 (emphasis added); Applicants' Ex. 6.

Moreover, there is no evidence as to what the County was supposed to do in order to support the appeal. The County still supports placement of E.S. with Mr. and Mrs. Roberts, and it still supports their pursuit of a subsidy. Even if the County had forwarded a recommendation to set aside the permanent disqualification, as the Applicants argue should have happened, the Department would have no obligation to agree with such a recommendation. The Department, not the County, has authority to make decisions to set aside a disqualification or grant a variance to it.²⁸ It also has the obligation to comply with the statute that makes this particular disqualification a permanent bar to licensure.²⁹

It is unfortunate in this case, but there is no statutory exception that would permit the Department to set aside the disqualification when it would be in the child's best interest to do so. The Administrative Law Judge acknowledges that this result is harsh. Mr. Roberts was convicted of a serious crime at the age of 17. He is now 38, and is married with children and grandchildren of his own. He has paid his debt, and he has done something that benefits society in general and this child in particular by providing a calm and loving home to a boy who would clearly have difficulty adjusting to other foster parents. There is no doubt that the financial support provided by foster care licensure could make a huge difference to E.S. and that without it, Mr. and Mrs. Roberts may be forced to relinquish his custody. The law, however, provides no alternative to denial of the licensure application.

K.D.S.

²⁸ Minn. Stat. §§ 245C.22, subd. 4(a); 245C.30, subd. 1(a).

²⁹ Minn. Stat. §§ 245C.15, subd. 1(a); 245C.30, subd. 1(a).