

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

In the Matter of the Order to Forfeit a Fine and Order of Conditional License for Baringer Homes, Inc. and Dave and Michelle Baringer.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter was heard by Administrative Law Judge (ALJ) Richard C. Luis on November 23, 2010, at the Goodhue County Government Center in Red Wing. The OAH record closed at the completion of the hearing on November 23, 2010.

Carol K. Lee, Assistant Goodhue County Attorney, appeared for the Department of Human Services (Department or DHS) and Goodhue County Social Services (County). Michelle Baringer appeared on behalf of Baringer Homes, Inc. and Dave and Michelle Baringer (Licensees).

STATEMENT OF ISSUES

1. Did Baringer Homes, Inc. (License 219646 R203) fail to submit the required background study forms on two individuals who were providing direct care to residents of its adult foster care program in violation of Minn. Stat. §§ 245C.03, subd. 1, and 245C.04, subd. 1? If so, did the Department appropriately impose a fine of \$400 (\$200 per occurrence), pursuant to Minn. Stat. § 245A.07, subd. 3?

The Administrative Law Judge concludes that Baringer Homes, Inc. did violate Minn. Stat. § 245C.03, subd. 1 and Minn. Stat. § 245C.04, subd. 1, and the fine should be affirmed.

2. Did the Department demonstrate the propriety of placing conditions on Baringer Homes, Inc.'s license pursuant to Minn. Stat. § 245A.06?

The Administrative Law Judge concludes that a conditional license is warranted but that the term of the order requiring the Baringers to sign releases of information and written authorization to allow the County to obtain "updates" from their medical providers be deleted.

3. Did Dave and Michelle Baringer (License 1054879 R203) fail to submit the required background study form on an individual who was providing direct care to

residents of their adult foster care home in violation of Minn. Stat. § 245C.03, subd. 1, and Minn. Stat. § 245C.04, subd. 1? If so, did the Department appropriately impose a fine of \$200, pursuant to Minn. Stat. § 245A.07, subd. 3?

The Administrative Law Judge concludes that Dave and Michelle Baringer did violate Minn. Stat. § 245C.03, subd. 1, and Minn. Stat. § 245C.04, subd. 1, and the fine should be affirmed.

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

FINDINGS OF FACT

1. Dave and Michelle Baringer have been licensed to provide adult foster care out of their house located at 4222 Raymond Street in Red Wing since 1996. Between 1996 and 2008, the Baringers' home was a single family residence. The Baringers lived in the home and were licensed as individual adult foster care providers to care for up to six residents.¹

2. In 2008, the Baringers remodeled their house into a duplex, separating the upper and lower levels. The Baringers moved into the lower level and continued to provide adult foster care services under their individual license to two residents living on the lower level. The Baringers obtained a corporate adult foster care license under the name "Baringer Homes Inc." to provide adult foster care services to the four residents living on the upper level.²

3. An adjoining door at the top of an interior staircase in the Baringer's duplex separates the upper and lower levels. The door was typically kept shut to retain heat or air conditioning in the lower level. The Baringers installed a doorbell on the door so that staff or residents could notify them if they needed to come downstairs. The door had a lock but was not routinely locked.³

4. The interior door of the duplex was required to be locked to separate the corporate adult foster care home from the individual adult foster care home.⁴

5. Ms. Dayle Charnecki is the County licensing worker for the Baringers' individual and corporate adult foster care licenses.⁵

6. Prior to July 1, 2009, counties were responsible for conducting background studies for corporate and individual adult foster care licenses. Licensees were required to submit background study request forms for potential new employees or volunteers to their individual county licensing worker. After July 1, 2009, the

¹ Testimony of Dayle Charnecki and Michelle Baringer; Ex. A-5.

² Id.

³ Testimony of Baringer.

⁴ Testimony of Charnecki. See, Minn. Rule 9555.6125, subp. 2 (inspections by fire marshal under Minnesota Uniform Fire Code).

⁵ Testimony of Charnecki.

Department became responsible for conducting background studies and licensees were required to submit background study requests directly to the Department via a Web-based application known as the NETStudy program.⁶

7. On or about June 27, 2009, Michelle Baringer hired A.R. and M. M. to work for Baringer Homes, Inc. as caregivers for the residents living on the upper level of the home. The Baringers did not submit background study requests to either the County or the Department for A.R. or M.M. prior to hiring them.⁷

8. On July 8, 2009, Ms. Baringer sent an email to Ms. Charnecki in response to Ms. Charnecki's request to set up an annual license renewal visit. Ms. Baringer informed Ms. Charnecki that she had recently hired a "few additional people" and she stated that she had questions about the new background study request process. Ms. Baringer suggested that they schedule the licensing visit for July 16, 2009.⁸

9. On July 16, 2009, Ms. Charnecki met with Michelle Baringer at the duplex to conduct the annual licensing visit. Ms. Baringer told Ms. Charnecki that Baringer Homes, Inc. hired A.R. and M.M. in June without first requesting background studies. The employees had worked several shifts in the corporate adult foster care home (upper level) under Ms. Baringer's supervision. Ms. Charnecki reminded Ms. Baringer of the requirement that a background study be completed prior to an individual's hire.⁹

10. Ms. Baringer submitted background study requests on A.R. and M.M. on behalf of Baringer Home Inc. sometime shortly after July 16, 2009.¹⁰

11. During the licensing visit, Ms. Charnecki also learned from Ms. Baringer that she and her husband Dave Baringer were planning on taking the six residents on a vacation to Branson, Missouri in mid-August.¹¹ They had reserved a time-share condominium in Branson and planned on driving there, staying one night in a hotel on the way there and back.¹²

12. By memo dated July 23, 2009, Ms. Charnecki reminded all of the County Adult Foster Care providers and applicants that as of July 1, 2009, they were required to submit background study requests directly to the Department.¹³

13. On or about August 6, 2009, Mr. Baringer was hospitalized at St. Mary's hospital in Rochester for complications related to his kidneys.¹⁴

⁶ Testimony of Charnecki; Ex. A-8.

⁷ Testimony of Charnecki and Baringer.

⁸ Ex. 2.

⁹ Testimony of Charnecki; Ex. A-5.

¹⁰ Testimony of Baringer; Ex. A-3.

¹¹ Ex. A-7.

¹² Testimony of Baringer.

¹³ Ex. A-8.

¹⁴ Exs. A-1 and A-7.

14. On August 12, 2009, Michelle Baringer emailed Ms. Charnecki from Branson, Missouri and informed her that, due to a sudden illness, her husband Dave Baringer was unable to take the trip. Ms. Baringer stated that she flew in a former employee, M.B., to accompany her on the trip. Ms. Baringer did not submit a background study request for M.B. prior to leaving for the vacation. M.B. had direct contact with the residents during the trip.¹⁵

15. Ms. Baringer believed a background study was not needed for M.B. because M.B. was not an employee of Baringer Homes, Inc. M.B. owns her own company called "Horizons without Boundaries," and the residents paid her directly to accompany them to Branson. Ms. Baringer considered herself to be a volunteer for M.B.'s company on the Branson trip. Both Ms. Baringer and M.B. provided care and supervision to the residents while on the trip.¹⁶

16. Ms. Baringer, M.B., and the residents spent an evening in a hotel on their way to Branson and on their return trip back to Red Wing. Ms. Baringer, M.B., and the two female residents stayed in one room and the three male residents stayed in a room next door unsupervised.¹⁷

17. Ms. Baringer, M.B. and the residents returned to Red Wing on or about August 16, 2009.¹⁸ Sometime after the vacation, Ms. Baringer submitted a background study request for M.B.¹⁹

18. The Department issued Correction Orders to Baringer Homes, Inc. for its failure to submit background study requests for A.R., M.M. and M.B.²⁰

19. Sometime in the late evening of August 20, 2009, or early morning hours of August 21, 2009, a resident with significant mental illness (M.E.) left the upper level of the duplex and walked approximately three miles along Highway 61 to the County Social Services building located in downtown Red Wing. At some point during the night, the resident slept in the lobby of an apartment building. In the morning, he arrived at the Social Services building and met with his caseworker. The resident did not sustain any injuries in connection with wandering away from the adult foster care home.²¹

20. Michelle and Dave Baringer were sleeping in their bedroom on the lower level of the duplex during the late evening and early morning hours of August 20-21, 2009, and did not hear M.E. leave.²²

¹⁵ Testimony of Charnecki and Baringer; Ex. A-5.

¹⁶ Testimony of Charnecki and Baringer; Exs. 10 and 13.

¹⁷ Testimony of Baringer.

¹⁸ Ex. A-6.

¹⁹ Testimony of Charnecki.

²⁰ Exs. A-3 and A-4.

²¹ Testimony of Charnecki.

²² Testimony of Baringer.

21. Both Michelle and Dave Baringer use CPAP machines to assist with breathing while sleeping.²³ There is no evidence that the sound of the CPAP machines prevented the Baringers from hearing M.E. leave the duplex.

22. The upper level of the duplex has a front door and two sliding glass doors that lead to the outside. The sliding glass doors are located in the dining room and the kitchen. The sliding glass door in the dining room is usually locked. The sliding glass door in the kitchen is rarely locked and opens onto a large deck with stairs leading to the back yard.²⁴

23. On August 20-21, 2009, Baringer Homes, Inc. did not have an employee on the upper level of the duplex providing overnight supervision to the residents.²⁵

24. The Baringers realized M.E. was missing at approximately 6:30 a.m. on August 21, 2009. Michelle immediately notified M.E.'s case worker and Ms. Charnecki, and called law enforcement to start looking for him.²⁶ Eventually, M.E. was located at the Social Services Building.

25. Michelle Baringer filed a written incident report with Ms. Charnecki regarding M.E.'s absence.²⁷ Because the Baringers were unaware when M.E. left the home, the incident was classified as neglect and the report was sent to the Department for review.²⁸

26. Ms. Baringer submitted an incident report to Ms. Charnecki regarding M.E. leaving the foster care home in the middle of the night.²⁹

27. Since the incident with M.E., the Baringers have installed door alarms so that anytime a door is opened at night, an alarm sounds. There have been no further incidents with M.E. or any other resident wandering away from the duplex during the night.³⁰

28. Baringer Homes, Inc. now employs a staff person to stay overnight on the upper level of the duplex.³¹

29. In approximately June of 2010, the Baringers converted the lower level of the duplex from an adult foster care home to a "housing with services" program, which is certified through the Department of Health. The Baringers closed out their individual adult foster care license for the lower level of the duplex and they no longer reside

²³ Testimony of Baringer. (CPAP stands for continuous positive airway pressure. The machines deliver compressed air and are used primarily to treat sleep apnea.)

²⁴ Testimony of Baringer.

²⁵ Testimony of Charnecki.

²⁶ Testimony of Charnecki.

²⁷ Testimony of Charnecki; Ex. 7.

²⁸ Testimony of Charnecki.

²⁹ Testimony of Charnecki and Baringer; Ex. 7.

³⁰ Testimony of Baringer.

³¹ Testimony of Baringer.

there. The Baringers still maintain their corporate adult foster care license for the upper level of the duplex.³²

30. On August 16, 2010, the Department issued an Order to Forfeit a Fine of \$400 (\$200 per occurrence) to Baringer Homes, Inc. for its failure to submit the required background study on two individuals (A.R. and M.M.) who were providing direct care to residents of its adult foster care program.³³ The Department also placed Baringer Homes, Inc.'s license on conditional status for failing to document caregivers' training, failing to have a caregiver present in the residence during normal sleeping hours, failing to notify the County within 24 hours of the change in Mr. Baringer's health status, failing to report a suspected maltreatment incident when M.E.'s whereabouts were unknown, failing to report caregiver changes to the County within five days, and failing to keep the two adult foster care programs in the duplex separate by keeping the adjoining door closed.³⁴

31. Under the terms of the Conditional License Baringer Homes, Inc. was directed to verify training of newly hired caregivers, maintain current signed releases of information to allow the County to obtain "updates" from the Baringers' medical providers as needed to assess their ability to provide care to residents, verify that a caregiver is present in the residence during normal sleeping hours, maintain required staff-to-client ratios by submitting a staff schedule to the County on a monthly basis, and provide a copy of the Order of Conditional License to residents and/or their guardians.³⁵

32. On August 16, 2010, the Department issued an Order to Forfeit a Fine of \$200 to Dave and Michelle Baringer for their failure to submit the required background study on an individual (M.B.) who was providing direct care to residents of their adult foster care program.³⁶

33. On August 25, 2009, the Baringers and Baringer Homes, Inc. filed a timely appeal of the Orders to Forfeit Fine and Order for Conditional License.³⁷

Based on the 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.³⁸

³² Testimony of Baringer and Charnecki.

³³ Ex. A-1.

³⁴ Ex. A-1.

³⁵ Ex. A-1.

³⁶ Ex. A-2.

³⁷ Ex. 11.

³⁸ Minn. Stat. §§ 245 A.06, subd. 4; 245A.07, subd. 3; 245A.08, subd. 2a (a); 14.50.

2. The Department, through Goodhue County Social Services, 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. 3, the Department may demonstrate reasonable cause for the action taken by submitting evidence to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Department demonstrates that reasonable cause existed, the burden of proof shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the Department alleges the license holder violated, at the time that the Department alleges the violations of law or rules occurred.

4. Pursuant to Minn. Stat. § 245C.03, subd. 1, a background study must be conducted for current or prospective employees, volunteers, or contractors who have direct contact with persons served by programs licensed by the Department. The license holder must submit specified information about the individual who is the subject of the background study on forms or in a format prescribed by the commissioner.³⁹

5. License holders must submit completed background study forms to the Department before individuals specified in section 245C.03, subd. 1, begin positions allowing direct contact in any licensed program.⁴⁰

6. “Direct contact” is defined as “providing face-to-face care, training, supervision, counseling, consultation, or medication assistance to persons served by the program.”⁴¹

7. The Department established that Baringer Homes, Inc. allowed employees A.R. and M.M to have direct contact with persons served by its adult foster care program prior to submitting background study requests to the County or Department in violation of Minn. Stat. §§ 245C.03, subd. 1 and 245C.04, subd. 1.

8. The Department established that Dave and Michelle Baringer allowed M.B. to have direct contact with persons served by their adult foster care program prior to submitting a back ground study request to the Department in violation of Minn. Stat. §§ 245C.03, subd. 1. and 245C.04, subd. 1.

9. The Baringers and Baringer Homes, Inc. failed to demonstrate that they were in full compliance with the law governing background studies.

10. The Commissioner may issue a fine of \$200 for failure to submit a background study.⁴²

³⁹ Minn. Stat. § 245C.05, subs. 1 and 2.

⁴⁰ Minn. Stat. § 245C.04, subd. 1.

⁴¹ Minn. Stat. § 245C.02, subd. 11.

⁴² Minn. Stat. § 245A.07, subd. 3 (c)(4).

11. Because Dave and Michelle Baringer and Baringer Homes, Inc. violated Minn. Stat. § 245C.03, subd. 1 and Minn. Stat. § 245C.04, subd. 1, the fines assessed by the Department should be affirmed.

12. Under Minnesota Rules 9555.6175, subp. 2, caregivers shall immediately report any suspected maltreatment of a resident as required by Minn. Stat. § 626.557 and 626.5572 (reporting maltreatment of vulnerable adults).

13. Minn. Stat. § 626.557, subd. 3, requires that mandated reporters who have reason to believe a vulnerable adult is being or has been maltreated immediately report this information to the county “common entry point.”

14. For purposes of Minn. Stat. § 626.557, “maltreatment” means abuse or neglect, including the failure of a caregiver to provide supervision reasonable or necessary to maintain a vulnerable adult’s safety.⁴³

15. The Department failed to establish that Baringer Homes, Inc. violated Minnesota Rules 9555.6175, subp. 2, by failing to immediately report suspected maltreatment of M.E. to the County common entry point. The record shows that Michelle Baringer did immediately report M.E.’s disappearance to the appropriate authorities.

16. Under Minnesota Rule 9555.5015, subp. 37, “supervision” is defined to mean “the presence of a caregiver in the residence during normal sleeping hours.”

17. Each licensed adult foster care program is required to have a caregiver present during normal sleeping hours. The fact that Dave and Michelle Baringer were present on the lower level of the duplex during normal sleeping hours was insufficient to satisfy the supervision requirement for the corporate adult foster care program on the upper level of the duplex.

18. The Department established that Baringer Homes, Inc. violated Minnesota Rule 9555.5015, subp. 37, by failing to have a staff person on the upper level of the duplex during normal sleeping hours from approximately June 2008 through August 21, 2009, when M.E. wandered away during the middle of the night.

19. Under Minnesota Rules 9555.6175, subp. 3, licensees are required to report to the County within five calendar days any change in the regular membership of the household or caregiver’s employment status.

20. The Department established that Baringer Homes, Inc. violated Minnesota Rule 9555.6175, subp. 3, by failing to report to the County that it hired A.R. and M.M. as caregivers within five days of their hire.

⁴³ Minn. Stat. § 626.5572, subds. 15 and 17.

21. Under Minnesota Rule 9555.6175, subp.3D, licensees are required to report to the County within 24 hours a change in the health status of a caregiver that could affect the ability of the caregiver to care for a resident.

22. The Department established that Baringer Homes, Inc. violated Minnesota Rule 9555.6175, subp. 3D, by failing to report to the County Dave Baringer's illness and hospitalization within 24 hours of its occurrence.

23. If the Commissioner finds that a license holder has failed to comply with applicable law or rule and the failure does not imminently endanger the health, safety, or rights of the persons served by the program, the Commissioner may issue an order of conditional license. When issuing the license, the Commissioner "shall 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."⁴⁴

24. The Department demonstrated that Correction Orders were issued to the Licensees and that the identified violations have been supported by the facts or the cited provisions of law or rule.

25. The Department failed to demonstrate the need for or reasonableness of the proposed Conditional License term requiring the Baringers to provide releases of information and written authorizations to allow the County to obtain updates from their medical providers.

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

RECOMMENDATION

IT IS RECOMMENDED THAT:

1. The Order to Forfeit a Fine in the amount of \$400 issued to Baringer Homes, Inc. be **AFFIRMED**.
2. The Order to Forfeit a Fine in the amount of \$200 issued to Dave and Michelle Baringer be **AFFIRMED**.
3. The Order placing Baringer Homes, Inc. on conditional status for one year be **AFFIRMED** in all respects except for the requirement that the Baringers sign releases of information and written authorizations allowing Goodhue County Social Services to obtain updates from their medical providers.

Dated: December 23, 2010

/s/ Richard C. Luis

⁴⁴ Minn. Stat. § 245A.06, subd. 1.

Reported: Recorded Digitally

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 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. Parties should contact Cal Ludeman, 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.

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

Order to Forfeit Fine

There is a clear statutory requirement, repeated in rule, that current or prospective employees or volunteers of a licensed program must have a background check completed by the Department prior to having direct contact with persons served by the program.⁴⁵ The Department established that the Baringers allowed employees A.R. and M.M. and volunteer or prospective employee M.B. to have direct contact with residents of their adult foster care programs prior to submitting the required background study requests. Because the Baringers violated the background study requirements, the fines are justified and should be affirmed.

Order of Conditional License

⁴⁵ Minn. Stat. § 245C.03, subd. 1(3); Minn. R. 9555.6125, subp. 3A.

If the commissioner finds that a license holder has failed to comply with applicable law or rule and the failure does not imminently endanger the health, safety, or rights of the persons served by the program, the commissioner may issue an order of conditional license. In making the decision to issue a conditional license, the commissioner “shall 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.”⁴⁶

The Department has submitted sufficient evidence to support the cited violations and demonstrated the propriety of placing conditions on Baringer Homes, Inc.’s license, with one exception. The Department failed to support adequately the need for or reasonableness of the Conditional License’s term requiring Dave and Michelle Baringer to maintain current signed releases of information with written authorizations allowing the County to obtain information from their medical providers to assess their ongoing ability to provide care to residents. Although there was some testimony from both Ms. Charnecki and Ms. Baringer regarding Dave and Michelle Baringer’s use of a CPAP machine while sleeping, there was insufficient evidence that the use of this medical device prevented them from adequately supervising the residents during normal sleeping hours. Moreover, it is not clear from the record whether Dave or Michelle Baringer continue to provide overnight supervision of the residents of the corporate adult foster care program or whether other staff members provide that service. The Department failed to present sufficient evidence to support adequately the need or justification for such an intrusive condition on the Baringers’ license and the Administrative Law Judge recommends that this term be removed from the Order of Conditional License.

The Administrative Law Judge also notes that during the hearing Ms. Baringer testified that three adult male residents slept in a hotel room without supervision during a trip to and from Branson, Missouri in August 2009. While this incident may constitute an additional violation of the rules governing supervision, it was not identified and included in the Order of Conditional License and Notice of and Order for Hearing. It therefore cannot properly be considered as a violation in this proceeding.

In all other respects, the Department has shown that the nature, severity and chronicity of the violations warrant a Conditional License.

R.C.L.

⁴⁶ Minn. Stat. § 245A.06, subd. 1.