

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

In the Matter of the  
Denial of the License of  
Barten and Linda Knudson

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

A hearing was held in this matter on September 6, 2011, at the Wadena County Courthouse by Administrative Law Judge Barbara L. Neilson, pursuant to a Notice of and Order for Hearing dated April 28, 2011. The OAH record closed upon completion of the hearing.

Appearances: Kyra Ladd, Wadena County Attorney, appeared on behalf of Wadena County Human Services (County) and the Department of Human Services (Department). Barten and Linda Knudson appeared without counsel on their own behalf.

**STATEMENT OF THE ISSUES**

1. Is Barten Knudson disqualified from having contact with or access to persons in a program licensed by the Department?
2. If Mr. Knudson is disqualified, should the disqualification be set aside or a variance granted?
3. Should the Knudsons' application for a license to provide foster care be denied?

The Administrative Law Judge concludes that Barten Knudson is permanently disqualified from having direct contact with or access to persons in a program licensed by the Department and that the Commissioner is prohibited from setting aside the disqualification or issuing a variance. The decision to deny Barten and Linda Knudson's application for a foster care license should be affirmed based on the disqualification.

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

**FINDINGS OF FACT**

1. In September or October of 2010, Barten and Linda Knudson talked with Diane Kangas, the County Licensing Specialist, about applying for a license to provide adult foster care in their home in Sebeka, Minnesota. Among her job duties, Ms.

Kangas oversees the foster care application process.<sup>1</sup> As part of the process, the Knudsons submitted information to the County to enable a criminal background check to be conducted for each of them.<sup>2</sup>

2. While the background check was pending, the County continued with other aspects of the licensing process, including inspection of the home, training for the applicants and other steps that are typically followed.<sup>3</sup> In August 2010, the Knudsons began construction of an addition to their home to better serve adults in foster care, and installed a new furnace, sewer and plumbing. The County encouraged the Knudsons to have the home inspected by the fire marshal.<sup>4</sup>

3. In November 2010, the Knudsons each received two letters from the Department notifying them that the background studies were still not complete. The second letter to Mr. Knudson, dated November 24, 2010, stated that Mr. Knudson could have direct contact with persons receiving service only under the continuous direct supervision of an approved person.<sup>5</sup>

4. After receiving the letters, Mr. Knudson spoke with Ms. Kangas about why the background studies were taking so long. She asked him whether there might be something in his background that might not be on the records, and Mr. Knudson told her that he had a past criminal conviction, but had been led to believe by the local police chief that it would not be a problem.<sup>6</sup>

5. Although Ms. Kangas recalled the conversation, she did not stop the licensing process at that time because she had no specific information about Mr. Knudson's criminal background and because the Department (not the County) was responsible for conducting the background studies.<sup>7</sup>

6. On December 3, 2010, the Knudsons signed the completed application for a license. On the application, Mr. Knudson did not indicate that he had a prior criminal conviction.<sup>8</sup>

7. On February 15, 2011, the Department notified Mr. Knudson that, based on the results of his background study, he was disqualified from contact with or access to persons receiving services from a foster care program licensed by the Department because of a prior conviction.<sup>9</sup>

8. The basis for the disqualification was that, on February 20, 1974, when Mr. Knudson was 21 years old, he pled guilty to a charge of aggravated rape, a violation

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<sup>1</sup> Test. of Kangas.

<sup>2</sup> Test. of Kangas; Test. of B. Knudson; Test. of L. Knudson.

<sup>3</sup> Test. of Kangas.

<sup>4</sup> Test. of Kangas.

<sup>5</sup> Exs. 4 and 5.

<sup>6</sup> Test. of Kangas; Test. of B. Knudson.

<sup>7</sup> Test. of Kangas.

<sup>8</sup> Notice of and Order for Hearing, Ex. A (clarifies that the date of application was 12/3/10).

<sup>9</sup> Ex. 2.

of Minn. Stat. § 609.21, subd. 1 and 2, which was in effect at that time and subsequently has been repealed.<sup>10</sup>

9. In 1974, Minnesota Statutes § 609.291, subd. 1, described the offense of aggravated rape as follows:

Whoever has sexual intercourse with a female person, not his wife, without that person's consent and under any of the following circumstances, commits aggravated rape and may be sentenced to imprisonment for not more than 30 years:

- (1) The victim's resistance is overcome by force; or
- (2) The victim's resistance is prevented by reasonable fear of immediate and great bodily harm to the victim or another; or
- (3) The victim is unconscious, physically powerless to resist, or incapable of giving consent through mental illness or defect and the condition is known or reasonably should have been known to the actor.

10. At the time that Mr. Knudson entered his plea, he admitted that he had used force to overcome the victim and have sexual intercourse with her without her consent.<sup>11</sup>

11. Minn. Stat. § 609.344, subd. 1(c) (2010), which is currently in effect, states that a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person under specified circumstances including, among others, where force or coercion is used to accomplish the penetration.

12. The Department determined that the elements of felony aggravated rape as set forth in 1974 under Minn. Stat. § 609.21, subds. 1 and 2, were the same as those of Minn. Stat. § 609.344, criminal sexual conduct in the third degree, which is currently in effect and is a disqualifying offense.<sup>12</sup>

13. Mr. Knudson was sentenced to up to ten years, the duration to be determined by the Minnesota Corrections Authority, with the expectation that Mr. Knudson would serve "considerably less than ten years."<sup>13</sup> Mr. Knudson was incarcerated at Stillwater Prison for three months and was placed on probation for one year.<sup>14</sup> His level of sentence was consistent with a felony-level offense.<sup>15</sup>

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<sup>10</sup> Exhibit (Ex.) 1. At that time, Mr. Knudson reported his name as Bart A. Knudson.

<sup>11</sup> Ex. 1 at 8.

<sup>12</sup> Except where noted, Minnesota Statutes are cited to the 2010 Edition.

<sup>13</sup> Ex. 1 at 16-17.

<sup>14</sup> Test. of B. Knudson

<sup>15</sup> See Minn. Stat. § 245C.15, subd. 1 (e), allowing reduction of the disqualification if the sentence was consistent with a lower-level offense. See also Minn. Stat. § 609.03 (where not otherwise specified, a sentence longer than five years is a felony.)

14. Ms. Kangas first learned that Mr. Knudson had a disqualifying criminal conviction when she received a copy of the Department's notification to the Knudsons on February 15, 2011.<sup>16</sup>

15. On March 21, 2011, the County recommended that the Department deny the Knudsons' application for a license, based on Mr. Knudson's disqualification. Disqualification was the sole basis for the County's recommendation.<sup>17</sup>

16. On April 18, 2011, the Department notified the Knudsons that the application had been denied.<sup>18</sup>

17. The Knudsons appealed the disqualification and denial of their application for a license, and the Notice of and Order for Hearing was issued by the Department on April 18, 2011.

18. Mr. Knudson has had no criminal charges of any kind against him, including traffic offenses, since 1974.<sup>19</sup>

19. Mr. Knudson had previously discussed his criminal background with the Sebeka Chief of Police, Eric Swenson, and asked whether anything was still on his record. The Police Chief had checked in September 2010 and told Mr. Knudson that, because the 1974 offense was more than 15 or 20 years old, it would not be a problem on the background check and that it was not a bar to Mr. Knudson obtaining a firearm. Mr. Knudson did not include the information about his offense on the background study application because he relied on Chief Swenson's assurance to him that the record had been expunged.<sup>20</sup>

20. The Knudsons are upset that the County encouraged them to complete the licensing process and incur the costs of training if their license application was going to be denied for a criminal offense that was over thirty years old.<sup>21</sup>

21. The Knudsons believe that they can be good caregivers and would like to provide foster care. It is difficult for them to accept that an offense in 1974 prevents them from going forward with their plans. Without a license, it will be difficult for them to find elderly people for whom they can provide care because public funding will not be available.<sup>22</sup>

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

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<sup>16</sup> Test. of Kangas.

<sup>17</sup> Test. of Kangas.

<sup>18</sup> Test. of Kangas.

<sup>19</sup> Test. of B. Knudson.

<sup>20</sup> Test. of B. Knudson.

<sup>21</sup> Test. of B. Knudson; Test. of L. Knudson.

<sup>22</sup> Test. of L. Knudson.

## CONCLUSIONS

1. The Department and the Administrative Law Judge have jurisdiction to consider this matter.<sup>23</sup>

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

3. Persons who operate a residential program generally must be licensed by the Commissioner of Human Services.<sup>24</sup> In situations where a license must be obtained, the Commissioner must conduct a background study on each person applying for a license and for the adults living in the applicant's household.<sup>25</sup>

4. The Commissioner shall disqualify an individual who is the subject of a background study from any position allowing direct contact with or access to persons receiving services from a license holder when the background study shows that the individual has a conviction of or admission to a criminal offense listed in Minn. Stat. § 245C.15.<sup>26</sup>

5. The Department correctly determined that the elements of felony aggravated rape as set forth in Minn. Stat. § 609.21, subds. 1 and 2, in 1974 were the same as those of Minn. Stat. § 609.344, criminal sexual conduct in the third degree, a disqualifying offense.<sup>27</sup>

6. Minn. Stat. § 245C.15 sets forth the period of disqualification for listed offenses. Admission of or conviction under Minn. Stat. § 609.344 is listed as a permanent disqualification.<sup>28</sup>

7. The Commissioner of Human Services is prohibited from setting aside disqualifications for crimes listed in Section 245C.15, subd. 1, except under limited circumstances not applicable here.<sup>29</sup> The listed crimes are considered permanent disqualifications, regardless of how much time has passed since the offense. Section 609.344 is among the listed offenses that is a permanent disqualification and may not be set aside.

8. The Commissioner is permitted to grant a time-limited variance if there are conditions under which a disqualified person may safely have direct contact with or

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<sup>23</sup> Minn. Stat. §§ 14.50 and 245A.08, subd. 2a(f) and (g).

<sup>24</sup> Minn. Stat. § 245A.03, subd. 1. Certain exceptions to the licensure requirement are set forth in the statute, such as where a residential program is provided to an adult by a related individual.

<sup>25</sup> Minn. Stat. § 245C.03, subd. 1.

<sup>26</sup> Minn. Stat. § 245C.14, subds. 1 and 2.

<sup>27</sup> Except where noted, Minnesota Statutes are cited to the 2010 Edition.

<sup>28</sup> Minn. Stat. § 245C.15, subd. 1.

<sup>29</sup> Minn. Stat. § 245C.24, subd. 2.

access to persons receiving services. However, the statute prohibits the Commissioner from granting a variance to persons with a permanent disqualification.<sup>30</sup>

9. Because Mr. Knudson was convicted of an offense that is a permanent disqualification pursuant to Minn. Stat. § 245C.15, subd. 1, the disqualification may not be set aside and no variance may be granted.

10. No license may be granted to a person who has a disqualification that has not been set aside nor for which a variance has been granted.<sup>31</sup> In addition, the Commissioner may deny a license if an applicant, or a person living in the household of an applicant, has a disqualification that has not been set aside or for which no variance has been granted.<sup>32</sup>

11. The Department has demonstrated by a preponderance of the evidence that Mr. Knudson has a disqualification which may not be set aside and for which no variance may be granted, and that Linda and Barten Knudson's application for a foster care license was properly denied.

12. The attached Memorandum is incorporated in these Conclusions.

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:

1. The Department's determination that Barten Knudsen be permanently disqualified from direct contact with or access to persons in programs licensed by the Department be AFFIRMED;

2. The Department's denial of Linda and Barten Knudsen's application for an adult foster care license be AFFIRMED.

Dated: November 1, 2011

s/Barbara L. Neilson

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BARBARA L. NEILSON  
Administrative Law Judge

Reported: Digitally Recorded; No Transcript Prepared.

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<sup>30</sup> Minn. Stat. § 245C.30, subd. 1.

<sup>31</sup> Minn. Stat. § 245A.04, subd. 7(e).

<sup>32</sup> Minn. Stat. § 245A.05 (a)(3) and (4).

## NOTICE

This report is a recommendation, not a final decision. The Commissioner 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 make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. The Commissioner then has 10 working days to issue his final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul, MN 55164-0998, (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 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

This case leaves little room for interpretation. Although Mr. Knudsen's only offense occurred many years ago and he has had no subsequent criminal law involvement, his past offense has been categorized by the Legislature as a permanent disqualification from providing services that require a license from the Department of Human Services. That statute specifically precludes the Commissioner of Human Services from exercising any discretion to either set aside the disqualification or grant a variance.

The Department correctly concluded that the elements of the crime committed by Mr. Knudson fit the current crime of third degree criminal sexual conduct set forth in Minn. Stat. § 609.344. That crime is identified as a disqualifying offense. In light of the similarity between the statute under which Mr. Knudson was convicted and the current statute, the repeal of the statute in effect when the crime was committed should not prevent the disqualification.<sup>33</sup>

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<sup>33</sup> The Department may also show that the elements of the crime were met by a preponderance of the evidence. Minn. Stat. § 245C.15, subd. 1 (a); *See also* Minn. Stat. § 245C.15, subd. 1 (c): "An individual's offense in any other state or country, where the elements of the offense are substantially similar to any of the offenses listed in paragraph (a), permanently disqualifies the individual under section 245C.14."

Other statutes specifically preclude the Commissioner from granting a license to a person who has a disqualification that has not been set aside or for which there is no variance. Absent the lack of discretion to weigh all of the circumstances applicable to Mr. Knudson, the decision to deny Linda and Bentsen Knudson's license must be affirmed.

The Knudsons were upset that the County encouraged them to incur the expenses tied to the licensing process if Mr. Knudsen's prior criminal conviction was an absolute bar to getting a license. However, there was no clear evidence that the County knew what crime Mr. Knudsen had committed until it received the results of the criminal background study in February 2011. Also, some of the expenses of the Knudsons were incurred prior to the date that they completed their application for a license.

It is unfortunate that persons who have the potential to provide adult foster care will not be permitted to complete the application process, but the statutes do not allow the exercise of any discretion under the circumstances presented here.

**B. L. N.**