

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

In the Matter of the Revocation of the
License to Provide Child Foster Care of
Antoinette Jenkins

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came before Administrative Law Judge Raymond R. Krause (ALJ) for hearing on October 25, 2011 at the Hennepin County Health Services Building, 525 Portland Avenue, Minneapolis, Minnesota. The hearing was scheduled pursuant to a Notice of and Order for Hearing dated June 20, 2011.

Michael Q. Lynch, Assistant Hennepin County Attorney appeared on behalf of the Department of Human Services (the Department) and Hennepin County Human Services and Public Health Department (HCHS). Respondent appeared on her own behalf, without benefit of counsel.

STATEMENT OF THE ISSUES

1. Did the Respondent fail to comply with Minn. R. 2960.300, subp. 2, by smoking near her foster child and/or allowing second hand smoke to come in contact with the child?
2. Did Respondent fail to meet the License Holder Qualifications of Minn. R. 2960.3060, subp. 3 C, by not being able to provide a statement that she has been free of chemical use problems for the past two years?
3. Has Respondent failed to respond to correction orders requiring her to obtain mandatory training in a timely fashion in violation of Minn. R. 2960.3070, subp. 2?
4. Was the Commissioner of the Department of Human Services (the Commissioner) justified in issuing an Order revoking Respondent's license?

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

FINDINGS OF FACT

1. Respondent obtained a restricted foster care license in 2003. She was granted a permanent license in 2009.¹ Respondent was previously known as Ms. Ross, prior to a divorce.²

2. Respondent operates a hairdressing shop from her home.³

3. Respondent has a child S.G. in her foster care. S.G. is approximately two years old. S.G. was placed in Respondent's care on July 17, 2009. Respondent also has a teenage girl, E.F., also in her foster care.⁴

4. Respondent's licensing worker at HCHS is currently Erica Lutgen. From 2003 to January of 2011, Respondent's licensing worker was Barbara Bonds. From the time of Respondent's original licensure until recently, Ms. Bonds was also a personal friend and a hairdressing customer of Respondent.⁵

5. On February 17, 2010, a letter was sent to Respondent from Ms. Bonds, advising Respondent that she was not to allow S.G. to be exposed to smoke because S.G. had asthma.⁶ She was informed in that letter that if the child was exposed to smoke, an incident form should be filled out and submitted to her license worker.

6. On September 20, 2010, HCHS received a complaint that Respondent and/or a teenage child under the care of Respondent, was smoking marijuana in the home. HCHS Child Protection workers investigated the complaint and found no probable cause to support the allegation. The file was closed with no further action.⁷

7. During November 2010, a second complaint was made to HCHS stating that Respondent was smoking marijuana in the home.⁸ Again, there was a finding of no probable cause by child protection services.⁹

8. During the investigation of the complaint, Respondent admitted to Ms. Bonds that she sometimes smoked cigars. She told investigators that she either smoked outside or smoked inside in the entrance vestibule or inside the home after S.G. was in bed. Respondent was warned that because S.G. has asthma, the child must not come in contact with smoke in the environment or second hand smoke on Respondent's clothing.¹⁰

¹ Testimony of Barbara Bonds.

² *Id.*

³ Testimony of Respondent.

⁴ Test. of B. Bonds and Ex. 6.

⁵ Test. of Respondent and B. Bonds.

⁶ Ex. 12.

⁷ Test. of B. Bonds and Ex. 1, Ex. 4, Ex. 5, Ex. 7.

⁸ Test. of B. Bonds and Ex. 2.

⁹ Ex. 2 and 11 and Test. of B. Bonds.

¹⁰ Test. of B. Bonds and Ex. 2.

9. During the course of the investigation, Respondent was asked to submit to urinalysis tests for marijuana. The first test showed presumptive positive but there was insufficient urine for confirmation. The second test was negative. The third test was confirmed positive.¹¹

10. Respondent denied smoking marijuana and attributed the positive tests to her consumption of lemon cupcakes and hamburger buns with onions and poppy seeds.¹²

11. On November 23, 2010, Ms. Bonds sent Respondent a Correction Order regarding Respondent's smoking. In response to the Correction Order, Respondent admitted smoking in the house at night or when S.G. was napping. She also stated that she was quitting smoking.¹³ Also on November 23, 2010, Ms. Bonds sent a letter to Respondent requiring her to provide an action plan with regard to her smoking and S.G.'s health.¹⁴ HCHS Child Protection investigator, Michael Sherman, acknowledged receipt of an asthma action plan and that Respondent said she had quit smoking.¹⁵

12. On December 1, 2010, S.G. was brought to the emergency room and diagnosed with clinical pneumonia.¹⁶

13. On December 10, 2010 Nurse Connie Smith at Children's Hospital followed up on the emergency room visit with a letter to HCHS reemphasizing the importance of avoiding all contact with smoke for a child in S.G.'s condition. The nurse also emphasized the concern that smoke may exacerbate the asthma and possibly lead to pneumonia.¹⁷

14. On April 28, 2011, Erica Lutgen sent Respondent a Correction Order to Respondent because she had not completed mandatory training for 2010 through 2011. The training was to have been completed by April 2011. Respondent agreed to take the required class on May 21, 2011.¹⁸

15. On May 25, 2011, Ms. Lutgen sent Respondent another Correction Order because the required training had still not been completed. Respondent explained that she was unable to do so because she went out of town and missed one class and another was cancelled.¹⁹

¹¹ Exs.2, 8, 9, 10, and Test. of B. Bonds.

¹² Test. of Respondent.

¹³ Ex. 13.

¹⁴ Ex. 14.

¹⁵ Exs. 15 and 18.

¹⁶ Ex. 6.

¹⁷ Ex. 16.

¹⁸ Ex. 22.

¹⁹ Ex. 23.

16. As of the date of hearing, Respondent had completed the training requirements for 2010 but not for 2011.²⁰

17. Catherine Bass is a friend of Respondent and who temporarily lived with Respondent. Ms. Bass believed that E.F. was smoking marijuana rather than Respondent. Ms. Bass witnessed Respondent smoking cigars in the backyard with the wind at her back to avoid getting smoke on her clothing.²¹

18. Respondent claimed to have quit smoking on October 19, 2010.²²

19. Respondent did not file any incident reports with regard to smoking because she felt that her informal conversations with Ms. Bonds when dressing her hair were sufficient.²³

20. Respondent believed the reasons for the problems with her license are due to Ms. Bonds not maintaining professional boundaries between herself and Respondent and because Ms. Bonds did not give her adequate reminders of the training and incident report requirements.²⁴

21. Respondent has recently adopted S.G.²⁵ E.F. is still in foster care with Respondent.

22. On March 22, 2011, HCHS recommended that the Commissioner revoke Respondent's license because of her smoking around S.G., her inability to sign a statement that she has been free from chemical use problems for the past two years, and because she had failed to complete the mandatory annual training as required by the Correction Order.²⁶

23. On June 7, 2011, the Commissioner issued an Order of Revocation as recommended by HCHS.²⁷

24. On June 16, 2011, Respondent timely appealed the decision of the Commissioner.²⁸

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

²⁰ Test. of E. Lutgen.

²¹ Test. of C. Bass.

²² Test. of Respondent.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Ex. 3.

²⁷ Ex. 20.

²⁸ Ex. 21.

CONCLUSIONS

1. The Commissioner of Human Services and the Office of Administrative Hearings have jurisdiction to consider this matter.²⁹

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

3. Pursuant to Minn. Stat. § 245A.07, subd. 3, a license may be revoked if a license holder fails to fully comply with applicable laws or rules, or if the license holder has a disqualification that has not been set aside.

4. The Department has the burden of proving by a preponderance of the evidence that the Licensee committed serious and chronic violations of the rules with regard to a child in her care.³⁰

5. At a hearing regarding a licensing sanction, the commissioner must demonstrate reasonable cause for the action taken. If the commissioner 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 the laws or rules that the commissioner alleges were violated.³¹

6. The Department has demonstrated that it had reasonable cause for its conclusion that Respondent was unable to sign a statement that she has been free from chemical use problems for the past two years, in violation of Minn. R. 2960.3000 subps. 1 and 2, and 2960.3060, subp. 3C. The Respondent failed to demonstrate by a preponderance of the evidence that she was in full compliance with the rules.

7. The Department has demonstrated that it had reasonable cause for its conclusion that Respondent failed to follow a child's case plan by smoking tobacco in the home while the child was present and exposed the child to second hand smoke, in violation of Minn. R. 2960.3000, subp. 1 and 2, and Minn. R. Minn. R. 2960.3060, subp.4 B, C, and J. The Respondent failed to demonstrate by a preponderance of the evidence that she was in full compliance with the rules.

8. The Department has demonstrated that it had reasonable cause for its conclusion that Respondent did not complete required hours of training, in violation of Minn. Stat. 245A.06, subd. 3 and Minn. R. 2960.3070, subp. 2. The Respondent failed to demonstrate by a preponderance of the evidence that she was in full compliance with the statutes and rules governing her license.

²⁹ Minn. Stat. §§ 245A.07, subd. 3; 245A.08, subd. 2a (a); 14.50.

³⁰ Minn. Stat. § 256.045, subd. 3b, and Minn. R. 1400.7300, subp. 5.

³¹ Minn. Stat. § 245A.08, subd. 3.

9. In determining the appropriate licensing sanction, 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.”³²

10. Grounds for revocation of a license include, but are not limited to:

(1) immediate suspension of a license;

(2) a disqualifying crime or conduct that has not been set aside or for which a variance has not been granted;

(3) a false statement knowingly made by the license holder on the application;

(4) failure or refusal to provide the commissioner access to the physical plan and grounds, documents, persons served, and staff;

(5) recurring failure to comply with discipline standards in rules governing the program;

(6) severe or recurring failure to comply with capacity limits; or

(7) licensing violations that occur while the license is probationary or suspended.³³

11. Before revoking a license, the commissioner “shall consider facts, conditions, or circumstances concerning the program’s operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the ... license holder.”³⁴

12. The Department has proven by a preponderance of the evidence that in light of the nature, chronicity or severity of the violations of law and rule, and in order to protect the safety and health of children receiving services in Department licensed programs, negative action should be taken against this license.

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

³² Minn. Stat. § 245A.07, subd. 1.

³³ Minn. R. 9543.0100, subp. 3.

³⁴ Minn. Stat. § 245A.04, subd. 6.

RECOMMENDATION

The Commissioner's Order of Revocation should be AFFIRMED.

Dated: November 8, 2011

s/Raymond R. Krause
RAYMOND R. KRAUSE
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 90 days to issue his final decision. Parties should contact Lucinda Jesson, Commissioner of Human Services Lucinda Jesson, 540 Cedar Street, 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.

MEMORANDUM

Respondent has been a foster parent for some time without major incident. Recently, however, she has been, by her own testimony, somewhat overwhelmed with running her business, caring for an infant and caring for a teenage girl. Respondent testified that at the end of the day she needed to collect herself with a cocktail and a cigar. She said that when she smoked outside, she sat in such a way that the smoke always blew away from her. She did so to avoid having smoke on her clothing. She also admitted to smoking in the house when the child was asleep in another room or smoking in the foyer or vestibule of her home. Respondent claimed that she was, through these means, being careful and responding positively to the child's care plan.

Respondent's excuses are unavailing. The child has asthma. Respondent was warned repeatedly about the need to avoid smoke anywhere near the child but continued to smoke in places where the second hand smoke could come into contact

with the child. This disregard for the health of the child is serious and quitting smoking now is too little too late.

Respondent is adamant that she does not smoke marijuana. Two urine samples proved positive and one negative. Even discounting the first sample because it could not be confirmed, it leaves one confirmed positive for marijuana. Respondent's explanation that it was her foster teenage daughter doing the marijuana does not explain the positive urine sample. Even less believable is the claim that eating lemon cupcakes or onion-poppy seed hamburger buns was the cause of the positive sample.

Respondent's claim that her failure to complete her training in a timely way is the fault of her licensing worker is also unavailing. Respondent has a responsibility to know and observe the requirements of licensed foster care. Licensing workers generally try to advise their licensees when something needs corrective action but it is not their fault if the licensee does not comply on her own.

Perhaps, as Respondent alleges, the relationship between Ms. Bonds and Respondent was too close. Perhaps it was unprofessional to have multiple roles in their dealings. Nevertheless, a licensee has the ultimate responsibility to comply with training and other regulations. Failure to do so is not excused by a license worker failing to remind a licensee of her responsibilities.

It may be, as Respondent claims, that she has quit smoking altogether. That does not, however, erase the question of her suitability as a future foster parent. She did smoke around her child against all advice and warnings from medical and licensing personnel. This demonstrates a callous disregard for the conditions imposed on her by the medical needs of her child.

Finally, Respondent argues that because she was allowed to adopt S.G. she must be, de facto or de jure, qualified to do foster care. Adoption is not before this ALJ. It is a different proceeding with different rules. Having adopted a child does not automatically qualify one for foster care.

R. R. K.