

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Temporary
Immediate Suspension of the Family
Child Care License of Becky Wegscheid
To Provide Family Child Care

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on March 20, 2012, at the Otter Tail County Government Center, 530 Fir Avenue West, Fergus Falls, MN 56537. The OAH record closed at the end of the hearing on March 20, 2012.

Michelle Winkis Lawson, Special Assistant Otter Tail County Attorney, Clay County Courthouse, P.O. Box 280, Moorhead, Minnesota 56561-0280, appeared on behalf of the Department of Human Services ("Department"). Becky Wegscheid (Licensee) appeared on her own behalf without legal counsel.

STATEMENT OF THE ISSUE

Has the Department established that there is reasonable cause to believe that a failure by Licensee to comply with applicable law or rule, the actions of Licensee or other individuals, or conditions in the program, pose an imminent risk of harm to the health, safety or rights of children served by Licensee?

The Administrative Law Judge concludes that there is not reasonable cause to believe that children in Licensee's care are at imminent risk of harm.

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

FINDINGS OF FACT

1. Until February 10, 2012, Licensee operated a family child care program in her residential home in Bluffton, Minnesota.¹ Also living in the home at that time were Licensee's husband and their two teenage children, a 15-year-old son and a 13-year-old daughter.²

¹ Testimony of Becky Wegscheid and Carla Johnson-Rownd, Otter Tail County (the "County") unlicensed social worker; Ex. 1 – Order of Temporary Immediate Suspension ("TIS") of Licensee's license.

² Test. of B. Wegscheid.

Licensee's History and Program Conditions

2. Licensee has provided licensed family child care for 17 years. Licensee has had no incidents, complaints, or licensing sanctions of any kind in the years she has been a family child care provider, until the current temporary immediate suspension (TIS) of her license.³

3. Licensee's program hours are from 6:00 a.m. to 6:00 p.m. However, on typical days Licensee has children in care from 7:00 a.m. to 5:00 p.m.⁴

4. Licensee regularly cares for six children full time and another 11 children at various times under a C1 license. The ages of the children in care range from 13 months to six years old.⁵

5. The home rests on 21 acres, part of which is farmed by Licensee's husband, Mr. Joel Wegscheid.⁶ The property contains five principal structures including the home, a barn, a granary, a pole barn that is leased out to others, and a shop that contains tools and machinery. Licensee's husband is also a part-time wood worker and cabinet maker. He utilizes the shop for his woodworking activities.⁷

6. The shop is located across a circular driveway and is separated from the residence by approximately 100 feet.⁸

7. Between the shop and the residence, near the circular driveway, are a sandbox and a play shed that the day care children utilize in good weather. The shop is separated from the sandbox and play shed by approximately 40 feet.⁹

February 6, 2011 Incident Between Licensee and Her Husband

8. Licensee's husband, Joel Wegscheid, injured his back in February of 2011. He has worked only sporadically since that time. Mr. Wegscheid has been prescribed pain medication.¹⁰

9. Licensee works part time away from the day care home. On February 6, 2012, Licensee picked up her two children in Wadena and returned home in the evening. No day care children had been in care that day. Her son went out to the shop to work on snowmobiles with his father.¹¹

³ Test. of B. Wegscheid and C. Johnson-Rownd.

⁴ Test. of B. Wegscheid.

⁵ Exs. 4 – 8.

⁶ Test. of B. Wegscheid.

⁷ *Id.*; Exs. 9-1 – 9-6.

⁸ Ex. 10; Test. of B. Wegscheid.

⁹ Ex. 6; Test. of B. Wegscheid.

¹⁰ Exs. 1, 3.

¹¹ *Id.*

10. Licensee and her daughter commenced preparing supper, which happened to be chili.¹²

11. Joel Wegscheid came into the home and kitchen. He had been drinking alcohol and was intoxicated. His blood alcohol level was 0.158. Mr. Wegscheid was unhappy and complained that he didn't like what was being served for supper and that he was not going to eat it. Licensee told him that he was then on his own for making his dinner because chili was all she was making.¹³

12. When Licensee was facing the microwave her husband slapped her on the side of her head with his gloved hand. She turned slightly and was slapped again on the side of the head. Licensee turned to face him and he slapped her again. The last slap was painful and her nose hurt. Licensee then threatened to call the County Sheriff. By this time Licensee and her husband were yelling at each other and Mr. Wegscheid told Licensee that he would choke her until she was dead if she called the Sheriff.¹⁴

13. The two children heard the altercation and both entered the kitchen and chastised their father. Licensee told her husband to go back out to the shop because he was drunk. Mr. Wegscheid went back out to the shop and stayed there.¹⁵

14. Licensee called the County Sheriff and two County Deputies were dispatched at 10:08 p.m. to the home. The Deputies interviewed both Licensee and Joel Wegscheid. Mr. Wegscheid was placed in custody.¹⁶

15. Licensee had no visible injuries and declined offers of medical assistance from the Deputies.¹⁷

16. At 6:41 a.m. on February 7, 2012, Licensee e-mailed the County Licensor and reported the previous evening's assault by her husband.¹⁸

Law Enforcement, County and Department Investigations

17. After being placed in custody, Joel Wegscheid was transported to the County jail where he was processed, booked and issued a citation for misdemeanor domestic assault. Because of his level of intoxication combined with prescription medications, Mr. Wegscheid was transported to a detoxification center in Fergus Falls, Minnesota.¹⁹

¹² Ex. 1.

¹³ Ex. 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Ex. 5; Test. of Linda Hanstad, County Case Aide, unlicensed Social Worker.

¹⁹ Ex. 1.

18. Mr. Wegscheid was released from custody on February 8, 2012, upon the issuance of a Criminal Domestic Abuse No Contact Order (“DANCO” order) and additional orders that contained the following conditions:

- a. No contact directly, indirectly or through others, in person, by telephone, in writing, electronically or by any other means with the Licensee; and
- b. May not go to the home or anywhere the Licensee resides; and
- c. Restrained from harassing, stalking, or threatening Licensee; and
- d. Restrained from engaging in other conduct that would place the Licensee in reasonable fear of bodily injury; and
- e. Prohibited from the use, attempted use, or threatened use of physical force against the Licensee that would reasonably be expected to cause bodily injury; and
- f. Required to abstain from alcohol or any mood altering substances unless prescribed by a physician and
- g. Required to participate in random testing for those substances.²⁰

19. Exceptions to the DANCO order allow Mr. Wegscheid to:

- a. Recover prescription medications, personal clothing and toiletries from the home if accompanied by a police escort; and
- b. Utilize the shop on the property for his business as long as he does not enter the residence.²¹

20. Licensee has observed Mr. Wegscheid drive to and enter the shop during days when she has been present in the home. He has also driven to the shop to pick up their two children after they walk from the home to the shop to meet him. Rather than go to the home to recover his personal items, Mr. and Mrs. Wegscheid’s daughter retrieved his personal items from the home and delivered them to him at the shop.²²

21. Mr. Wegscheid has complied with all terms of the DANCO and other orders.²³

²⁰ Exs. 8, 9A.

²¹ Ex. 8.

²² Test. of B. Wegscheid.

²³ Test. of Heather Brandborg, Assistant Otter Tail County Attorney, and B. Wegscheid.

Opinion of Ottertail County Attorney

22. On February 10, 2012, the County Licensor's supervisor consulted with the County Attorney and the Department. At that time the County Attorney advised the Department that it did not support the issuance of a TIS of Licensee's family child care license, stating in an e-mail to the Department:

With the perpetrator removed from the home I do not believe it is necessary or appropriate for a license suspension. The situation should be monitored, and if there is any danger to the children, we could take action.²⁴

23. In conversations with the County and the Department and in a February 12, 2012 letter to the Department, the Assistant Ottertail County Attorney prosecuting Mr. Wegscheid offered to request modifications of Mr. Wegscheid's conditions of release "if there was some change or safety measure to ask for that was not in place." The Department did not respond to the offer to seek additional conditions from the District Court.²⁵

24. On February 15, 2012, the County Attorney sent the Department a letter declining to represent the Department in this proceeding.²⁶

Parent Confidence in Licensee's Program Conditions and the Safety of Their Children in Licensee's Care

25. Licensee has the confidence and unconditional support of at least two current day care parents, representing children in Licensee's care. They both believe that Licensee is a skilled and caring family child care provider. These parents, both knowing about the situation involving Joel Wegscheid, have no concerns for the safety of children while in Licensee's care. They are angry and upset that the TIS was issued. The parents are anxious to return their children to Licensee's care. They have all had difficulty obtaining child care of quality equal to that supplied by Licensee. Their children have had difficulties with the disruption of their routines.²⁷

Additional Findings

26. Mr. Wegscheid has never previously physically assaulted Licensee or their two children.²⁸

27. Licensee has not changed the locks on the home.²⁹

²⁴ Exs. 5, 9B; Test of H. Brandborg.

²⁵ Ex. 9A; Test of H. Brandborg.

²⁶ *Id.*

²⁷ Exs. 11, 12.

²⁸ Test. of B. Wegscheid.

²⁹ *Id.*

28. Mr. Wegscheid owns two firearms. One is a muzzle loader rifle. The other is either a .22 caliber rifle or a shotgun. Both firearms are locked in a cabinet in the home and only Licensee has access to the key and cabinet.³⁰

Procedural Findings

29. On February 10, 2012, the Department issued Licensee a TIS Order that was hand delivered to Licensee on that date.³¹

30. Following a timely appeal of the TIS by Licensee, the Department issued a Notice of and Order for Hearing on February 14, 2012, scheduling a contested case hearing for March 20, 2012.³²

31. On March 13, 2012, the Administrative Law Judge issued a Prehearing Order and Protective Order that was served on the parties that day.³³

32. Because of the disagreement between the Otter Tail County Attorney and the Department regarding the appropriateness of the TIS, an Assistant Clay County Attorney represented the Department in this proceeding.³⁴

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have authority to consider and rule on the issues in this contested case proceeding pursuant to Minn. Stat. §§ 14.50 and 245A.08.³⁵

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

3. The purpose of family child care licensure statutes and rules is to ensure that minimum levels of care and service are given and to protect the care, health and safety of children.³⁶

Temporary Immediate Suspension Standards and Reasonable Cause

4. Minn. Stat. § 245A.07, subd. 2, provides, in applicable part:

³⁰ *Id.*

³¹ Exs. 1, 2; Test. of C. Johnson-Rownd and B. Wegscheid.

³² Exs. 3, Notice of and Order for Hearing.

³³ Prehearing Order and Protective Order.

³⁴ Exs. 9a, 9b; Test. of H. Brandborg.

³⁵ Minnesota Statutes are cited to the 2010 Edition.

³⁶ Minn. Stat. § 245A.07, subd. 1; Minn. R. 9502.0325. Minnesota Rules are cited to the 2011 Edition.

If the license holder's actions . . . or the actions of other individuals or conditions in the program pose an imminent risk of harm to the health, safety, or rights of persons served by the program, the commissioner shall act immediately to temporarily suspend the license.

5. In order to maintain the current temporary immediate suspension under Minn. Stat. § 245A.07, subd. 2, the Department must show that reasonable cause exists to believe that the actions of Licensee's spouse or the conditions of her child care program pose a current imminent risk of harm to the health, safety, or rights of the children served by her.

6. "Reasonable cause" for the purpose of a temporary immediate suspension means:

there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.³⁷

7. Minn. R. 9502.0435 regarding **SANITATION AND HEALTH** provides in relevant part as follows:

Subp. 5. **Firearms.** All firearms must be unloaded and inaccessible to children. Ammunition and firearms must be stored in separate locked areas.

No Violations, No Reasonable Cause to Continue the Suspension

8. Mr. Wegscheid's firearms are unloaded, locked in a cabinet inaccessible to him and to children. There is no evidence in the record that ammunition for the two firearms exists or, if it does exist, that it was not locked in a cabinet separate from the gun cabinet. Licensee did not violate Minn. R. 9502.0435.

9. Licensee has committed no violations of law or rule.

10. Licensee has committed no acts that either previously posed or now pose an imminent risk of harm to the health, safety, or rights of children served by Licensee.

11. No person has committed an act either at or near, related to, or involving children enrolled in Licensees' day care facility that now poses an imminent risk of harm to the health, safety, or rights of children served by Licensee.

12. There are no articulable facts or circumstances at this time that would provide a reasonable, prudent person with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of children served by Licensee.

³⁷ *Id.*

13. The Department has failed to demonstrate reasonable cause to believe that there is a risk of imminent harm to the health or safety of children served by the Licensee.

14. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

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 Order of Temporary Immediate Suspension suspending the family child care license of Licensee be **RESCINDED**.

Dated: April 3, 2012

s/M. Kevin Snell

M. Kevin Snell

Administrative Law Judge

Reported: Digitally recorded
No transcript prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. 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. Parties should contact Lucinda Jesson, Commissioner, Department of Human Services, PO Box 64998, St. Paul, MN 55164-0998, (651) 431-2907, to learn the procedure for filing exceptions or presenting argument.

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 Administrative Law Judge of the date the record closes. 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. In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline imposed.

Under Minn. Stat. § 14.62, subd. 1, the Department 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

Burden of Proof

At this stage, the County, on behalf of the Department, must demonstrate the existence of circumstances sufficient to warrant a cautious person to reasonably suspect that the Licensee or others pose an imminent risk of harm to the health, safety or rights of persons in the Licensee's care. This is a modest standard, intended to insure that vulnerable children are protected until there can be a full hearing and final determination on the underlying circumstances.

Permitted Evidence

During an expedited hearing regarding a temporary immediate suspension, the Department must present reliable oral testimony and/or reliable documentary evidence in support of a finding of reasonable cause. The Department and the Administrative Law Judge are entitled to rely on reliable hearsay evidence linking the license holder to an act that puts children at risk of imminent harm. The Department relied on exhibits and the testimony of the County Licensors. At this stage of the process, the Administrative Law Judge's task is to determine whether there is enough reliable evidence to maintain the suspension.

Necessity of an "Imminent" Risk of Harm

The Department argues that children in Licensees' day care are at a continuing imminent risk of harm because Mr. Wegscheid is allowed to come on the property, the locks to the home have not been changed, and, because of his actions towards Licensee on February 6, 2012, he could go to the licensed home and harm day care children. The Administrative Law Judge agrees that Mr. Wegscheid could present some risk of harm to Licensee, and perhaps to children in her care, were he to actually act on this February 6, 2012, threat and do so during day care hours. However, events since that time, or rather lack thereof, suggest that such a risk is remote and certainly not "imminent." There are no articulable facts in the record to suggest that Mr. Wegscheid would or has attempted to violate the terms of the DANCO order.

Existence of a risk of harm alone is insufficient to maintain a TIS. The risk of harm must be one that is "imminent." At a minimum, "imminent harm" means a risk of harm that is impending or about to occur,³⁸ or ready to take place.³⁹ There are insufficient articulable facts that would allow a reasonable person to suspect that day care children would be at imminent risk of harm at this time.

³⁸ See, American Heritage College Dictionary (3d ed.).

³⁹ See, Merriam-Webster Online Dictionary.

This is a case involving a Licensee who has no licensing violations of rule or law and no program conditions that present an imminent risk of harm. Neither Licensee nor any person that lives in the day care or has access to day care children has committed an act that presents an imminent risk of harm to program children. The acts that gave rise to the TIS occurred at the home outside of day care program hours on a day when no children were in care.

“The standard that the Commissioner [is] required to apply is belief based on reason.”⁴⁰ The evidence in the record in this case suggests that the standard applied by the Department in arguing to maintain the TIS is a belief based on speculation rather than a reasonable suspicion of an “imminent” risk of harm.

Opinions of the Otter Tail County Attorneys

The evidence presented by the Otter Tail County Attorney and the testimony of the Assistant Otter Tail County Attorney who is the prosecuting attorney in Mr. Wegscheid’s criminal case have been given weight by the Administrative Law Judge in determining whether or not Mr. Wegscheid presents an imminent risk of harm to the day care children. They clearly believe Mr. Wegscheid does not present an imminent risk of harm to day care children.

In addition, the lack of a response to the offer of the Otter Tail County Attorney’s offer to seek additional conditions on Mr. Wegscheid’s DANCO order has been given weight by the Administrative Law Judge. The Administrative Law Judge concludes from this lack of response that the Department considers the existing orders of the District Court to be sufficient to prevent an imminent risk of harm to children in Licensee’s care.

Analysis of Other Facts in Evidence

The day care parents, who have direct knowledge about Licensee, the day care Licensee provides, and Mr. Wegscheid’s actions, believe Licensee provides a safe environment for their children. This fact militates against a conclusion that a reasonable person could suspect that Licensee or Mr. Wegscheid present an imminent risk of harm to children. The Minnesota Court of Appeals has determined that such evidence is relevant and desirable in TIS cases.⁴¹

Finally, the relevant and reliable evidence submitted by the Department does not demonstrate that children in Licensee’s care would be at imminent risk of harm if she were permitted to resume the operation of her family child care business during the pendency of the criminal case against her husband.

Argument Raised and Not a Factor Considered by the ALJ

One argument raised by the Assistant Otter Tail County Attorney in her letter to the Department and in her testimony was not given consideration by the ALJ in reaching

⁴⁰ *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

⁴¹ *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

the conclusions in this matter. That argument was the view that issuing or maintaining the TIS is a re-victimization of the Licensee. There is only one issue in TIS licensing matters. That issue is whether or not there are sufficient articulable facts that would allow a reasonable person to suspect that children in care would be at imminent risk of harm. The adverse effects of a TIS on a Licensee are not factors under current rule or law that an Administrative Law Judge may consider. The ALJ did not consider any adverse effects that the TIS has had on Licensee. The facts must be weighed in light of the safety and welfare of children, not about the hardship that a TIS may visit upon a Licensee.

Conclusion

The relevant and reliable evidence in the record regarding the situations on February 6, 2012, and between that time and now, suggests that there is no imminent risk of harm to the health, safety, or rights of the children served by the Licensee. The weight of the evidence suggests that the purpose of family child care licensure statutes and rules (to ensure that minimum levels of care and service are given and to protect the health and safety of children)⁴² is being and will be served by Licensee. There is no evidence in the record to suggest that Mr. Wegscheid will have unsupervised access to Licensee's day care children. There are insufficient reliable and relevant articulable facts in the record that would allow a reasonable, prudent person to suspect that Licensee, the conditions in her program, or Mr. Wegscheid present an imminent risk of harm to children in her care.

The ALJ finds that imminent risk of harm is not present and respectfully suggests to the Commissioner that the TIS be immediately rescinded.

M. K. S.

⁴² Conclusion 3.