

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the
Revocation of the Family
Day Care License of
Donna Volk.

FINDINGS_OF_FACT,
CONCLUSIONS AND
RECOMMENDATION

The above -entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha at 9:00 A.M. on May 19, 1989, at the Anoka County Courthouse, 325 East Main Street, Anoka, Minnesota. The hearing record closed on June 14, 1989.

John R. Speakman, Assistant Anoka County Attorney, Anoka County Attorneys Office, Courthouse, Anoka, Minnesota 55303, appeared on behalf of the Anoka County Human Services Department (Local Agency). Donna Volk (Licensee), 6 Central Road, Circle Pines, Minnesota 55014, appeared on her own behalf

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Human Services will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. sec. 14.61, the final decision of the Commissioner shall not be made 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 Sandra S. Gardebring, Commissioner, Minnesota Department of Human Services, 200 Human Services Building, 444 Lafayette Road, St. Paul, Minnesota 55155-3815 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this Case is whether Donna Volk used corporal punishment to discipline a 5-year-old child in the licensed day care of Betty Volk; and if so, whether her family day care license should be suspended, revoked or made probationary pursuant to Minn. Stat. 245A.07 (1988) and Minn, Rule 9502.0395 (1987).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Donna Volk is a licensed day care provider with a Class A license which permits her to care for a maximum of 10 children in her home. She has

been licensed since August of 1987.

2 . Donna Volk initiated her application process on June 15, 1981 when her application was received by the Local Agency. As part of the application process , Donna Volk attended a one-day day care orientation at the Anoka County Courthouse. In addition, the day care licensing social worker conducted a number of home inspections and interviews. Inspections and interview were conducted on June 29, 1987 and on July 6, 1987. During both interviews, the licensing social worker observed the Licensee with her young toddler and spoke briefly with the Licensee's husband.

3. During the application process for her day Care license , Donna Volk informed the licensing social worker, Lorna Jones, that she had used physical punishment with her own child and believed it to be a useful method of discipline. She did not see the use of physical discipline is physically abusive but understood that it could be interpreted that way if used on someone else's child. Ms. Jones informed the Licensee that the state day care licensing rules did not allow physical discipline or punishment for day care children. The rule did not prohibit, however, the use of physical discipline on her own child. (Ex. 4; Ex. 6).

4. On June 29, 1981, the Licensee met with Ms. Jones to review and sign the family day care licensing agreement, At this time, Ms. Jones reviewed with the Licensee the rule prohibiting the use of corporal punishment and emotional abuse. The licensing agreement contains the following provision:

4. I will not use harsh or threatening discipline, including corporal punishment (slapping, pinching, shaking, spanking, etc.), psychological abuse or verbal abuse with day care children. I will not punish any day care child for lapses in toilet training.

The Licensee read and signed the agreement, indicating that she understood and agreed to abide by the rules set forth therein. (Ex. 5). The Licensee understood that the rule required there to be no physical discipline whatsoever of day care children.

5. Donna Volk resides in an upstairs unit of a duplex owned by her mother-in-law, Betty Volk. Betty Volk is also a licensed day care provider and occupies and provides day care services on the first floor of the duplex. Because of this close proximity, Donna Volk has taken her day care children

downstairs where the children of both day care operations work and play together on crafts and play activities. If one of the day Care provider is busy with another activity, such as preparing lunch, the other will be responsible for monitoring the activities of all of the children.

6. On or about December 1, 1988, Donna Volk brought her three day care children down to the Betty Volk living unit. While Betty Volk was in the kitchen, a 5-year-old child in the day care of Betty Volk jumped off of the living room couch and bumped an 8-month-old child who was sitting on the floor. Instinctively, Donna Volk slapped with her hand the backs of the legs of the 5-year-old child. The slap was described as a "glancing hand slap". It left no bruises or other marks on the 5-year-old child's legs.

7. Gerri Robole is the mother of 5-year-old Alexis Robole, the day care child slapped by Donna Volk. Ms. Robole has another child, Michael, who is also in the day care of Betty Volk. In December of 1988, Michael was 16

months old. On or about December 1, 1988, Alexis told her mother that "Donna spanked me". Ms. Robole called Betty Volk and confronted her with this information. Betty spoke with Donna about the incident and Donna admitted that she had "spanked Alexis". Betty called back Ms. Robole and apologized to her stating that it would never happen again.

8. Ms. Robole did not report the incident to the Local Agency for two weeks because she did not want to make any trouble. However, on December 14, 1988, Ms. Robole reported to the Local Agency that Donna Volk had spanked or slapped her 5-year-old child.

9. On or about December 21, 1988, Alexis told her mother that "Donna spanked Michael". Ms. Robole became very angry and upset and called Donna to confront her. Donna Volk denied spanking Michael. The next day Alexis told her mother that she "didn't tell the truth" and that "Donna didn't spank Michael." Alexis further said that her brother Michael was carrying around a throw rug and started crying when Donna took the throw rug away from Michael, Alexis said she only "thought Donna spanked Michael, but didn't see it-" Ms Robole reported the second incident to the Local Agency.

10. On December 23, 1988, Anoka County licensing social worker Kathy Weinbeck conducted a home visit to investigate the two reported incidents. Also present during the visit was Kathy Speggan, an employee of the Anoka County Department of Social Services, Licensing Division. During the visit, Donna Volk admitted to slapping Alexis on the back of the legs on December 1, 1988. She denied spanking Michael on December 21, 1988.

11. During the home visit on December 23, 1988, Ms. Weinbeck and Ms. Speggan observed Donna Volk slap her own child's hand when the child refused to stop playing with Christmas wrapping paper.

12. Ms. Weinbeck and Ms. Speggan did not interview 5-year-old Alexis, 16-month-old Michael or any of the other day care children in either the Donna Volk or Betty Volk home regarding the two reported incidents-

13. Anoka County has received no other complaints about Donna Volk as a day care provider.

14. On February 22, 1989, Acting Director, James G. Loving, on behalf of the Commissioner of the Department of Human Services, informed Donna Volk by letter that, based upon the recommendation of the Anoka County Social Services Department, the Commissioner was revoking her day care license. The letter explained that this action was being taken as a result of her own admission that she had used corporal punishment to discipline a 5-year-old child and had

hit her own child after he continued to play with Christmas wrapping paper.

The letter informed Donna Volk of her right to appeal this action,

15, The Licensee filed a timely written appeal.

16. On March 9, 1989, a Notice of and Order of Hearing was issued on behalf of the Commissioner of the Department of Human Services setting May 19, 1989 for a contested case hearing in the matter.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Human Services and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. SS 245A.07 and 14.50.

2. The Notice of and Order for Hearing in this case was, proper and all relevant substantive and procedural requirements of law or rule have been satisfied.

3. Minn. Stat. sec. 245A.07, subd. 3 provides as follows:

The commissioner may suspend, revoke or make probationary d license if a license holder fails to comply fully with applicable laws or rules.

4. Minn. Rule pt.9502.0395, subp. 1.A. and B, and subp. 2.A., provides as follows:

Subp. T. Methods. Caregivers shall give each chill guidance which helps the child acquire a positive self concept, %elf control and teaches acceptable behavior.

A. The provider shall discuss methods of behavior guidance with parents at the time of admission and the parent's standards shall be considered by the provide, within the context of this part when guiding the behavior of tie child,

B. Behavior guidance used by caregivers must be constructive, positive, and suited to the age of the child. Methods of intervention, guidance, and redirection must be used.

Subp. 2. Standards. The following shall apply to all caregivers when guiding behavior in children.

A. No child shall be subject to corporal punishment or emotional abuse. "Corporal punishment" means a nonaccidental infliction of physical pain on a child by a caregiver, Corporal punishment includes, but is not limited to, rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, pinching, hitting, and spanking. "Emotional abuse" means the infliction of verbal or psychological abuse on a child by a caregiver. Emotional abuse includes, but is not limited to, name calling, ostracism, shaming, derogatory remarks about the child or the child's family, and threats which threaten, humiliate, or frighten the child,

5. There is substantial evidence in the record which indicates that the Licensee hit or spanked a 5-year-old day care child and that this constitutes

corporal punishment as this term is defined in Minn. Rule pt. 9502.0395,
subp.
2 . A

6. The Local Agency has demonstrated reasonable cause to believe that the Licensee violated Minn. Rule pt. 9502.0395, subps . 1. A. , 1. B. and 2 A., and that the Licensee has failed to show by a preponderance of the evidence that she has not violated this rule

1. These Conclusions are made for the reasons set out in the Memorandum which follows and which is incorporated by reference herein

Based upon the foregoing Conclusions, the Administrative Law Judge Makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Human Services suspend the day care license of Donna Volk for a period of thirty (30) days during which the Licensee shall successfully complete six hours of training , approved by the Agency, in the appropriate methods of guiding behavior and discipline. If the Licensee fails to complete the training as proposed, it is recommended that her day care license be revoked.

Dated: July 4th, 1989

PHYLLIS A. REHA
Administrative Law Judge

NOTICE

Pursuant to 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.

Reported: Taped.

MEMORANDUM

The rules governing the delivery of day care services clearly state that corporal punishment is prohibited. 'Corporal punishment' is defined in the rule as the "nonaccidental infliction of physical pain on a child by a caregiver." Minn. Rule 9502.0395, subp. 2.A. The rule goes on to specify the types of punishment included within this definition. The rule specifically prohibits slapping , hitting and spanking , regardless of the reason it is employed. Any spanking, hitting or slapping is considered a form of corporal punishment and is strictly prohibited as a method of guiding behavior or discipline in a licensed day care facility.

The Licensee has described the slap of the 5-year-old child as a "glancing slap". She further testified that her action was instinctive and she attempted to stop her arm in mid-swing but was unable to do so. This

testimony indicates to the Administrative Law Judge that the Licensee was not in control in imposing discipline. Although physical discipline of one's child is not prohibited by the rules, the fact that the Licensee utilizes physical discipline to discipline her own child indicates to the Administrative Law Judge that the Licensee needs counseling so that she can better control her "instinctive" actions to utilize physical discipline on day care children.

The Administrative Law Judge recognizes some mitigating factors in this case. The Licensee was appropriately concerned for the safety of the 8-month-old child sitting on the floor. Certainly continued jumping by a 5-year old child could have caused substantial danger to a much smaller infant, The circumstances surrounding the incident left little time to the Licensee to reflect upon the appropriate discipline to be imposed upon the 5-year-old for her misbehavior. Since this incident is an isolated one, and there are mitigating circumstances surrounding the incident, the Administrative Law Judge has recommended a suspension of the licensee's license rather than a revocation. Further, since the Licensee's own testimony was that she "instinctively" slapped the 5-year-old child, it is appropriate to recommend that the Licensee attend a training program on appropriate methods of guiding behavior and discipline during her 30 day period of suspension.

The County has recommended revocation. The Local Agency stressed the fact that the Licensee was counseled on several occasions during the application process on the prohibition against the use of any physical punishment as a form of discipline. The record makes clear that the Licensee fully understood when she signed the day care licensing agreement on June 29, 1987, that the rules prohibited any form of physical discipline or threats of physical discipline by a day care provider. When she signed that statement and became a licensed day care provider, she agreed that she would not, under any circumstances, use physical discipline. However, the Administrative Law Judge believes that revocation is too harsh a penalty under these circumstances. The slapping incident was not totally unjustified. Her violation was not

flagrant but instinctive. She realized that her actions were wrong and attempted to restrain her action. The slapping did not cause any bruises or marks on the 5-year-old child. The rule violation is an isolated incident, Minn. Stat. 245A.07 requires the factfinder to consider appropriate sanctions for rule violations. It provides in part, as follows:

Subdivision 1, Sanctions available. In addition to offering forfeiture of fines, the commissioner may propose to suspend, revoke, or make probationary the license or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, 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. (Emphasis added).

Considering the fact that this is an isolated incident of a rule violation and the other mitigating circumstances in this case, revocation is too harsh a remedy. The more appropriate sanction is to suspend the day (are license of

Donna Volk and require her to attend an approved program on behavior guidance and discipline

The other allegations concerning the 16-month-old child, Michael, were not substantiated at the hearing. The child admitted to the parent that she had lied regarding her report to her mother that her brother had been hit by the Licensee. The Licensee's testimony was completely credible on this issue. Furthermore, the Notice of and Order for Hearing did not include the incident as one of the bases for the revocation Order.

There was some general testimony that the Licensee had been heard from outside of her house yelling in a hostile tone toward day care children. The witness was unable to testify with certainty as to whether or not there were day Care children in the home at the time she heard the yelling. Furthermore, this testimony is fraught with such speculation and unreliability that it is found to be non probative and irrelevant.

The testimony from the licensing social workers that they witnessed Donna Volk slap her own child on the hand is relevant only insofar as it shows that the Licensee utilizes physical punishment as a form of discipline. The rules do not prohibit a parent from slapping the hands of her own child as a form of discipline

P.A.R.