

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed
Revocation of the Day Care
License of Phyllis Myers.

FINDINGS OF FACT.
CONCLUSIONS OF LAW
AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge Jon L. Lunde at 9:00 a.m. on September 26, 1989, at the Hennepin County Government Center in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of and Order for Hearing dated November 25, 1988. The record closed on Wednesday, October 30, 1989 when the Licensee's written argument was filed.

John St. Marie, Assistant Hennepin County Attorney and Arlene Kelly, Senior Law Clerk practicing under the Senior Practice rules, 2000 Government Center, Minneapolis, Minnesota 55487, appeared on behalf of Hennepin County (Local Agency). Francis E. Giberson, Larkin, Hoffman, Daly & Lindgren, Ltd., Attorneys at Law, 2000 Piper Jaffray Tower, 222 South Ninth Street, Minneapolis, Minnesota 55402 appeared on behalf of Phyllis Myers (Licensee). The Licensee was present at the hearing.

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. 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 Ann Wynia, 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 proceeding is whether the Licensee neglected a day care child in violation of Minn. Rules 9502.0335, subp. 6E (1989); and, if so, whether her day care license should be revoked or suspended.

The Notice of and Order for Hearing alleges violations of Minn. Rules 9502.0365, subp. 5 and 9502.0315, subp. 29a (1989). These violations were not alleged in the Commissioner's initial notice of license revocation and at the hearing the Local Agency abandoned these alleged violations as grounds for adverse licensing action.

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

FINDINGS OF FACT

1. Phyllis Myers has been a licensed day care provider since 1984 and has cared for an undetermined number of children in her home since that time. On September 1, 1989 she provided day care for three toddlers and two infants. One of the infants was Nicholas Dally. Nicholas was 4 1/2 months old and had been in Ms. Myers, care for approximately 2 1/2 months.

2. Nicholas' mother, Patricia, used Ms. Myers as a full time day care provider. She usually brought Nicholas to the Myers home before 9:00 a.m. and picked him up shortly after 6:00 p.m. Ms. Dally usually used the back door of the Myers' house and would stay and chat with Ms. Myers when she picked her son up at night.

3. On the morning of September 1, 1989, Patricia Dally dropped off her son, Nicholas Dally, at the Myers residence. Nicholas was to have been picked up by Ms. Dally at approximately 6:10 p.m.

4. At 6:00 p.m., Phyllis Myers went down into her basement to feed the cats which are caged there. At this time, all of the day care children, except Nicholas, had been picked up. When Ms. Myers went down to the basement, she left Nicholas on a blanket on the living room floor. When Ms. Myers went down to the basement, her adult daughter, Cassandra, was within earshot of the infant.

5. While Ms. Myers was in the basement, she heard noise through the basement ceiling which she assumed was attributable to Ms. Dally arriving to pick up Nicholas. Ms. Myers called upstairs that she would be up shortly. When Ms. Myers returned to the main floor of the house, Nicholas and his blanket were no longer on the living room floor and Cassandra was upstairs changing for dinner.

6. The noise that Ms. Myers heard while in the basement was Cassandra returning from a trip to the garage. Just before Cassandra stepped out of the house, she moved Nicholas from the floor to the bassinet. The bassinet was located near the seldom-used front entrance and this location was further screened-by a partial wall. Ms. Myers did not ask Cassandra if Ms. Dally had picked up Nicholas, or visually inspect the main floor, beyond noting that Nicholas was not where she had placed him.

7. Believing that Nicholas was now with his mother, Ms. Myers encouraged her daughter to finish changing clothes quickly so they might run an errand and go to dinner. Both Ms. Myers and Cassandra left the residence shortly before Ms. Dally arrived.

8. Ms. Dally arrived at the Myers residence between 6:10 and 6:15 p.m. on September 1. Ms. Myers car was not in the driveway. The house

was dark and no one responded to her repeated knocking. Ms. Dally waited about 10 minutes. When no one returned, she went to her home and made a series of calls to her sister, her place of employment, Ms. Myers and various hospitals. Ms. Dally's sister, Cindy, went to the Myers house immediately after she received notice that Nicholas' whereabouts were unknown. Cindy had agreed to wait there until Ms. Myers returned. At approximately 7:40 Cindy telephoned Ms. Dally and told her she could hear a baby crying inside the Myers home. Ms. Dally immediately called the police then returned to the home.

9. Shortly after Dally's 911 call, two Minneapolis police officers (Merkle and Chevalier) arrived at the Myers residence. The officers knew that an infant was inside the house but no one responded to their knocks on the door. Since the officers did not have a warrant to enter the house, they obtained approval to enter from their sergeant. Approval was granted in this case since the officers believed that someone's physical welfare could be in danger. Once approval to enter the residence was obtained, one of the officers opened a storm window from the outside and crawled in through the opening.

10. Once inside the residence, Officer Merkle found Nicholas in a bassinet. With Nicholas in the bassinet was a bottle containing several ounces of formula and a blanket. Two cats were present in the area, but not near the bassinet. Officer Merkle opened the door for Ms. Dally, who removed Nicholas from the house. The officers searched the house to ensure that no one was in need of assistance. After completing their search, the officers secured the house and returned to their station. Nicholas was removed from the house at approximately 8:30 p.m.

11. Although Nicholas was normally a quiet child, he remained upset for many hours after being returned to his mother. Ms. Dally spent the night of September 1 comforting him. Nicholas expressed distress at being left alone for even the shortest period of time and did not return to his accustomed behavior for several days.

12. When Ms. Myers returned that evening, she discovered several messages on her answering machine. Only through contacting Ms. Dally did Ms. Myers discover that Nicholas was not returned to his mother at 6:00 p.m.

13. On September 2, 1989, the Local Agency's child protection division received a report regarding Nicholas' temporary abandonment on September 1. On September 6, 1989 a meeting of the child protection staff was held to consider the report. At the meeting, it was decided that a police report would be made and the matter investigated further.

14. On September 12, 1989, Beverly Orr, principal social worker with the child protection division, and Joanne Diwi, a licensing social worker, visited the Myers residence. Ms. Myers confirmed the events of September 1.

15. On September 16, 1989, Beverly Orr concluded that the report of neglect by Ms. Myers had been substantiated. As a result of this finding, the Local Agency recommended that the Commissioner of Human Services (Commissioner) revoke Ms. Myers family day care license.

16. On November 10, 1988, James G. Loving, acting director of the Department of Human Services, licensing division, wrote to the Licensee giving her notice that the Commissioner was revoking her family day care license for neglect, in violation of the Department's rules. The Licensee appealed from the Commissioner's proposed revocation and this hearing followed.

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

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. 14.50 and 245A.08 (1988).

2. The Notice and Order for Hearing issued by the Local Agency were proper in all respects and the Local Agency has complied with all relevant substantive and procedural requirements of law and rule.

3. Under Minn. Rule 9502.0335, subp. 6E (1989), a provider's license must be revoked or suspended if there is substantial evidence of child neglect by the provider or any person residing in the provider's residence.

4. Child neglect is defined in Minn. Stat. 626.556, subd. 2(c) and includes the failure of a person responsible for a child's care "to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so."

5. Minn. Stat. 626.556, subd. 2(c) covers deliberate and negligent failures to protect children, the crux of the inquiry in either case is whether the responsible person's actions are blameworthy.

6. The Licensee is a "person responsible for a child's care" as defined in Minn. Stat. 626.556, subd. 2(b) (1989).

7. The Local Agency has shown that there is substantial evidence indicating the provider has committed neglect, as defined in Minn. Stat. 626.556.

8. Once reasonable cause for believing that a day care licensee has violated a rule of the Commissioner, the burden of proof shifts to the licensee to establish, by a preponderance of the evidence, that no violation has occurred. Minn. Stat. 245A.08, subd. 3(a) (1989).

9. The Licensee failed to establish that no violation of Minn. Stat. 626.556, subd. 2(c) (1989) occurred.

10. In sanctioning day care providers for rule violations, it is necessary to consider the nature, chronicity or severity of the violation and the effect of the violation on the health, safety and rights of day care children. Minn. Stat. 245A.07, subd. 1 (1989).

11. Since the Licensee's violation was unintentional and is unlikely to recur, since the Licensee has not committed any other rule violations, and since the infant she neglected was not injured, her license should be suspended rather than revoked.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner's proposed revocation of Ms. Phyllis Myers' family day care license be REVERSED and that the license be suspended for a period of 60 to 90 days.

Dated: November 28th 1989.

JON. L. LUNDE
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

In this case, the provider, Ms. Myers, failed to note the continued presence of one of her day care children, an infant, within the day care home prior to leaving the residence. This action, without more, is a violation of the Department's day care rules. Minn. Rule 9205.0365, subp. 5 requires that children in care be supervised. Supervision is defined as a caregiver being within sight or hearing of an infant and being capable of intervening to protect the health and safety of the child. Minn. Rule 9502.0315, subp. 29a. Once Ms. Myers left the residence unattended, the infant was unsupervised and the rule violated.

The Department has sought revocation under a different theory, however. The revocation is grounded on a finding that "neglect" occurred. Neglect is defined as "failure by a person responsible for a child's care . . . to protect a child from conditions or actions which imminently and seriously endanger the child's physical or mental health when reasonably able to do so." Minn. Stat. 626.556, subd. 2(c). Under Department rules, if a day care child is neglected by the provider,

the providers license must be suspended or revoked. Minn. Rule 9502.0335, subp. 6E. Minn. Stat. 626.556, subd. 2(c) imposes a duty on day care providers to protect children from dangerous conditions. There is no requirement that the failure to protect be willful. A provider is excused from its duty only if the provider reasonably could not have furnished the required protection.

The Licensee argued that her failure to supervise and protect Nicholas was not unreasonable. That argument is not persuasive. When Ms. Myers came upstairs from the basement and discovered that Nicholas was not on the floor where she left him she should have asked her adult daughter about his whereabouts. However, she failed to do so. Instead, since she heard footsteps and the sound of the back door opening and closing while she was in the basement, she assumed that Nicholas' mother had picked him up. That assumption was unwarranted. Ms. Myers was aware that her daughter was in the home and commonly went outside to smoke. Under the circumstances, it was just as likely that the noises she heard while in the basement were made by her daughter as it was that they were made by Nicholas' mother. A reasonable person would have made an inquiry of the daughter. Since Ms. Myers made no inquiry, her failure to provide Nicholas with supervision was not reasonable.

Because the Licensee did not establish that her failure to supervise Nicholas was unreasonable, it must be determined if Nicholas' health was "imminently and seriously" endangered by being left alone. The Local Agency argued that an imminent and serious danger existed. It pointed to the possibility that the two cats in the house could have knocked over his bassinet or that Nicholas could have choked on the formula in his bottle. The Licensee argued, on the other hand, that neither of these risks was probable and that Nicholas' health was never imminently endangered.

Licensee's arguments are based on the premise that leaving an infant alone does not, by itself, place the infant's health and safety in imminent jeopardy. To prove that an infant was in imminent peril, the Licensee would also require that the Local Agency show some risk was about to happen. As noted by the Licensee, the word "imminent" means 'ready to take place; near at hand; impending; hanging threateningly over one's head; menacingly near.' The Local Agency did not show that Nicholas was likely to choke or that cats were about to upset his bassinet. Therefore, under the Licensee's theory, a finding that he was in imminent danger could not be made.

The Administrative Law Judge does not quarrel with the Licensee's definition but disagrees with the Licensee's conclusions. The condition that posed an imminent danger was the fact that Nicholas was alone and vulnerable. When an infant is left alone, no one is available to intervene to protect its health and safety when the need arises. Hence, the 'condition' that imminently endangered him was the condition of being left alone. It is immaterial that other conditions did not pose imminent threats - i.e., the presence of cats, the availability of a partially filled bottle or the likelihood of a fire. Those conditions may not have been imminent threats to Nicholas' safety. Nonetheless, Nicholas' short-term abandonment was, by itself, an imminent threat. This

conclusion is borne out by human experience and is consistent with the purposes of Minn. Stat. 626.556, subd. 2(c).

The Act requires that physical abuse, sexual abuse and neglect be reported to public agencies so that children will be protected. It is unlikely that the Legislature believed that infants could safely be left alone or that such behavior is permissible under the Act unless the infant was exposed to some impending risk other than the risks concomitant with being alone. Infants require constant supervision, care and succor. Without them, they are at risk. That risk is real, serious and imminent.

Although the Licensee is chargeable with neglect, the applicable rule does not require license revocation. It states that a licensee chargeable with neglect may have her license revoked or suspended. In determining whether revocation or suspension is appropriate here, the "nature, chronicity, or severity of the violation" as well as the "effect of the violation on the health, safety or rights of persons served by the program" must be considered. Minn. Stat. 245A.07, subd. 1 (1989).

The most striking aspect of Ms. Myers' action is its unintentional nature. She did not knowingly place Nicholas in jeopardy, and her behavior--although not excusable--was understandable. Moreover, it is unlikely that her action will be repeated. Her violation was the product of an unusual chain of events and she has taken steps to make sure that no infant will be unknowingly left alone in the future. For these reasons, and due to the absence of other violations, it is concluded that her license should be suspended rather than revoked. Revocation is too harsh given the fact that it has a 5-year duration under Minn. Stat. 245A.08, subd. 5. Because the Licensee's actions evince misplaced priorities and the Licensee must understand that her first priority must be the welfare of the children in her care, a suspension of 60 to 90 days should be imposed.

J.L.L.