OAH 5-1800-38001

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Appeal by Dawn Cornelius of the Order of Conditional License and Order to Pay a Fine	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

License No. 1027252 (Family Child Care)

This matter came before Administrative Law Judge Jim Mortenson for an evidentiary hearing on May 5, 2022. The hearing was convened at the Office of Administrative Hearings, St. Paul, Minnesota. The record closed on May 19, 2022, following the filing of closing arguments.

Paul G. Beaumaster, Assistant Dakota County Attorney, appeared on behalf of the Minnesota Department of Human Services (Department). Samuel J. Merritt, The Hoffner Firm, LTD, appeared on behalf of Dawn Cornelius (Licensee).

The Department offered seven exhibits, all of which were entered into the record. Licensee offered one exhibit, consisting of 15 letters of support for Licensee, which the Judge admitted into the record. Five witnesses testified at hearing. They were: Licensee; Kimberly Leipold, Dakota County child care licensing social worker; Brian Bone, Apple Valley police department detective; Heather Nulf, Licensee's former employee; and Christine Friedrich, Licensee's neighbor.

STATEMENT OF THE ISSUES

1. Did the Department correctly determine that Licensee committed the licensing violations as set forth in detail in the Order dated November 24, 2021, pursuant to the applicable law cited for each violation?

2. Did the Department properly issue the Order to Pay a Fine in the amount of $200 based on the licensing violations, pursuant to Minn. Stat. § 245A.07, subd. 3(c)(4)(iv) (2020)?

3. Did the Department properly place Licensee's family child care license on conditional status based on the licensing violations, pursuant to Minn. Stat. § 245A.06, subd. 1 (2020), as set forth in detail in the Order dated November 24, 2021?

SUMMARY OF RECOMMENDATION

The Department correctly determined that Licensee violated Minn. R. 9502.0395, subp. 1 and 2 (2021). The Department properly issued the Order to Pay a Fine in the amount of $200, based on the licensing violations. The Department properly placed Licensee's family child care license on conditional status. Therefore, the Judge respectfully recommends the Commissioner **AFFIRM** the Order of Conditional License and Order to Pay a Fine, dated November 24, 2021, following review for modifications in light of certain facts and conclusions drawn by the Department but not established by the administrative record.

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

FINDINGS OF FACT

1. Licensee has operated a family child day care without incident for approximately 25 years.[1] Current and former parents of children in Licensee's care have expressed great and genuine satisfaction with the care she has provided their children.[2]

2. Licensee holds a C3 family child care license.[3]

3. In the fall of 2021, Licensee was caring for nine children: five toddlers; three preschoolers; and one school-age child.[4]

4. In late September 2021, Licensee lost her temper with a toddler in her care.[5] Licensee repeatedly yelled at the child, saying: "No!;" "You will wait for me, I am the boss, not you!;" "Pick them up and put them away!;" and "I don't have time for this shit! Move [child]! Pick it up!"[6] In response to the child crying and saying "daddy," Licensee yelled "I'm going to daddy you right on your behind if you keep it up!"[7]

5. Licensee's new employee reported Licensee's behavior (and had recorded the above interactions) to Dakota County.[8] The employee also made other allegations about Licensee's behavior with the children.[9]

6. On October 4, 2021, a county child protection worker, a county licensing worker (Leipold), and a police detective (Bone) came to Licensee's daycare home and interviewed her.[10] During the interview, Licensee told the investigators that she "smacked"

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[1] Testimony (Test.) of Dawn Cornelius; Exhibit (Ex.) 7.
[2] Ex. 5 at 4; Ex. 101.
[3] Test. of D. Cornelius.
[4] Ex. 3; *See* Minn. Stat. § 245A.02, subd. 19 (2020).
[5] Ex. 3 at 2; Ex. 6.
[6] Exs. 6a, 6b, 6e, 6f.
[7] Ex. 6c.
[8] Ex. 4; Ex. 6.
[9] Ex. 4.
[10] Ex. 4; Ex. 7.

children on the mouth - not hard enough to leave a mark - when they bit others in order to address biting behavior.[11]

7. Following the interview, child protection determined there was no maltreatment of children; detective Bone closed his investigation.[12]

8. Leipold determined there were licensing violations and proceeded to process the case with her supervisor and the Department.[13]

9. An Order of Temporary Immediate Suspension (TIS) was issued to Licensee on October 8, 2021, because the Department believed Licensee used corporal punishment on children who were, therefore, in imminent risk of harm.[14]

10. On November 3, 2021, Leipold and a co-worker went to Licensee's home to discuss the TIS with her.[15] Licensee denied ever yelling at children and was evasive during the discussion with Leipold about providing positive behavior guidance.[16]

11. On November 4, 2021, Leipold, her supervisor, and co-workers could not reach consensus on a recommendation for the Department regarding a sanction.[17] The team was concerned that, based on the November 3 visit with Licensee, it did not appear Licensee understood that she violated the behavior guidance rule and so "may not be workable."[18] The following day, however, the team determined to recommend to the Department that Licensee's family child care license be made conditional.[19]

12. On November 24, 2021, the Department lifted the TIS placed on Licensee's program.[20]

13. The Department also made Licensee's family child care license conditional for two years, beginning November 24, 2021.[21] The basis for the conditional license was Licensee's failure to use appropriate behavior guidance methods with children in her care.[22]

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[11] Ex. 7.
[12] Ex. 3; Test. of Brian Bone.
[13] Ex. 5; Test. of Kimberly Leipold.
[14] Ex. 1; Ex 2.
[15] Ex. 5.
[16] *Id.* at 1; Test. of K. Leipold.
[17] Ex. 5 at 1; Test. of K. Leipold.
[18] Ex. 5 at 1; Test. of K. Leipold.
[19] Ex. 5 at 1; Test. of K. Leipold.
[20] Order Lifting Temporary Immediate Suspension, Order of Conditional License, Order to Pay a Fine (Nov. 24, 2021) (Ex. 1 to Notice and Order for Prehearing Conference and Hearing), hereafter "Department Order."
[21] *Id.*
[22] *Id.* at 1

14. The Department found Licensee violated Minn. R. 9502.0395, subp. 1 and 2 (2021) and made the following assertions to support its determination to order a conditional license:

- You admitted that you have four biters and if you could not swat them on the mouth you would not know how to manage their behavior.
- You admitted to swatting a toddler age child on the mouth.
- You admitted to swatting another toddler age child on the thigh or slaps his/her fingers.
- You admitted that you place children over a gate by the arms and they sometimes fall. You do not make sure that they are stable and standing when you place them over the gate.
- You admitted to placing children as young as toddler age in a time out for up to fifteen minutes at a time.
- Dakota County obtained recordings of you screaming at children in care and children crying as a result.
- Dakota County obtained recording of you swearing at children, yelling at children, and making threats if they did not behave.[23]

15. The following conditional license terms were required of Licensee:

1. You follow and comply with all applicable Minnesota Rules and Laws.

2. No variance to age distribution or capacity will be granted during the conditional period.

3. You must operate as a class "A" license during the period of the conditional license.

4. You must submit and comply with a detailed written plan for appropriate behavior guidance. You must include how you will use appropriate behavior guidance methods without using physical discipline, yelling, threatening, or swearing at children in your care. The plan must be submitted to Dakota County **by December 15, 2021**, and must be approved by Dakota County. You must share a copy of the plan with enrolled and any new parents.

[23] *Id.* at 2. While the Department's letter states Licensee "admitted" all of these things, that is not the Judge's finding of fact. This finding only reflects the Department's statements.

5. **Within 30 days of this order**, you must obtain a mentor that is approved by Dakota County. The mentor must work with you on positive behavior guidance methods. You must sign a release so that Dakota County can obtain progress reports from the mentor.

6. You must complete at least six hours of additional training **within 90 days of this** order. The training is in addition to the annual training requirements as listed in Minnesota Statutes, section 245A.50. The training must include the four hour Developmentally Appropriate Behavior Guidance course and a two hour course on biting. Prior to attending training you must obtain approval from Dakota County that the training is appropriate. You must submit documentation of your attendance to Dakota County.

7. You must either provide a copy of the Order to Pay a Fine and Order of Conditional License to parents of children in care or document that all parents have been given an opportunity to review the Order. You must obtain parent signatures of each currently enrolled child, indicating they have either received a copy of the Order or had an opportunity to review the Order. You must provide this documentation to Dakota County **by December 15, 2021**. For new families, you must submit documentation of compliance with this term to Dakota County **within 5 days of any child's admission** to your program.[24]

16. The Department Order also required a sanction of a $200 fine for the violation.[25]

17. Any finding of fact more appropriately considered a conclusion of law is adopted as such. Any material fact in the memorandum not specifically reflected in the findings of fact is hereby incorporated into the findings of fact.

Based upon these findings of fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services (Commissioner) have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, .08 (2020).

2. The County and the Department provided the Licensee with adequate notice of the negative licensing action and Licensee timely appealed.

[24] *Id.* at 3.
[25] *Id.* at 4.

3. Based on the Commissioner's consideration of 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, the Commissioner may impose a fine on a license holder if a license holder fails to comply fully with applicable laws or rules.[26] A "license holder shall forfeit $200 for each occurrence of a violation of law or rule governing matters of health, safety, or supervision, including but not limited to the provision of adequate staff-to-child or adult ratios[.]"[27]

4. "If the commissioner finds that the . . . license holder has failed to comply with an applicable law or rule and this failure does not imminently endanger the health, safety, or rights of the persons served by the program, the commissioner may issue a correction order and an order of conditional license to the . . . license holder."[28]

5. When issuing a conditional license or applying sanctions such as a fine, 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.[29]

6. The Commissioner has the burden of demonstrating there was reasonable cause to issue the sanction and conditional license.[30] The Commissioner must substantiate the allegations that the license holder failed to comply fully with applicable law or rule.[31]

7. The Department's rules at Minn. R. 9502.0395, require the following methods for behavior guidance:

> Caregivers shall give each child guidance which helps the child acquire a positive self-concept, self-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 provider within the context of this part when guiding the behavior of a child.
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> 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.[32]

[26] Minn. Stat. § 245A.07, subds. 1(a), 3(a)(1).
[27] Minn. Stat. § 245A.07, subd. (3)(c)(4)(iv).
[28] Minn. Stat. § 245A.06, subd. 1.
[29] Minn. Stat. §§ 245A.06, subd. 1, .07, subd. (1)(a).
[30] Minn. Stat. § 245A.08, subd. (3)(a).
[31] *Id.*
[32] Minn. R. 9502.0395, subp. 1 (2021).

8. The rule prohibits corporal punishment and emotional abuse of children in care.[33] Corporal punishment is defined as "nonaccidental infliction of physical pain on a child by a caregiver."[34] The rule provides a non-exhaustive list of actions that may cause physical pain, such as "rough handling, shoving, hair pulling, ear pulling, shaking, slapping, kicking, biting, pinching, hitting, and spanking."[35]

9. The rule defines emotional abuse as "infliction of verbal or psychological abuse on a child by a caregiver." The non-exhaustive list of actions that may constitute emotional abuse includes: "name calling, ostracism, shaming, derogatory remarks about the child or child's family, and threats which threaten, humiliate, or frighten the child."[36]

10. The Department substantiated that Licensee failed to always use constructive and positive behavior guidance suited to the needs of the child, including when she "smacked" or "swatted" children's mouths in response to biting, and when she yelled at and threatened a child.[37] The yelling at and threatening of a child also meets the definition of emotional abuse. As a result, the Department demonstrated reasonable cause to issue an Order to Pay a Fine of $200 and a Conditional License to Licensee.

11. Licensee then had the burden of showing by a preponderance of the evidence that she was in full compliance with the laws and rules that the Commissioner alleges were violated, at the time that the Commissioner alleges the violations occurred.[38]

12. Licensee has not shown she was in full compliance with the laws and rules the Commissioner alleges she violated.

13. Because the nature, chronicity, or severity of the violation and the effect of the violation on the health, safety, or rights of persons served by the program is impacted by the findings of fact and conclusions of law in this report, the Commissioner must conduct a new consideration of the nature, chronicity, or severity of the narrower violation and the effect of this violation on the health, safety, or rights of persons served by the program. This may lead to a change in sanction and a modified conditional license.

Based upon the foregoing findings of fact and conclusions of law, the Administrative Law Judge makes the following:

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[33] *Id.* at subp. 2(A).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] The terms "smack" and "swat" are relative, here, because they are the terms used by the parties. But there is no evidence any child was ever injured by Licensee's behavior guidance or that she caused children physical pain. Therefore, her version of "smacking" or "swatting" was not corporal punishment as defined by the Department.
[38] *Id.*

RECOMMENDATION

The Commissioner should **AFFIRM** the Order of Conditional License and Order to Pay a Fine, dated November 24, 2021, with appropriate modifications to the terms of the Conditional License and a determination whether a sanction is necessary. Any changes should be based on the findings of fact and conclusions of law herein, including the fact that only one incident of emotional abuse was proved. The Commissioner should re-examine the nature, chronicity, or severity of the violation the Department proved in light of the facts the Department proved, so as to ensure the decision is not arbitrary and capricious.

Dated: June 23, 2022.

JIM MORTENSON
Administrative Law Judge

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 (2020), 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 Debra Schumacher, Senior General Counsel, Department of Human Services, PO Box 64254, St. Paul, MN 55164-0254, (651) 431-4319, 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 (2020). 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 (2020), the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Department carried the initial burden in this case to demonstrate reasonable cause for the Order to Pay a Fine and Conditional License to the Licensee. The Department met this burden, in part.

The Licensee then had the opportunity to demonstrate, by a preponderance of the evidence, that she did not violate the law as alleged by the Department. Specifically, she had the burden to show that it was more likely than not that she complied with the requirements of Minn. R. 9502.0395. The Licensee failed to meet this burden.

"Reasonable cause" is "analogous to the criminal law standard of probable cause."[39] This standard requires more than a suspicion. It equates to "circumstances sufficiently strong in themselves to warrant a cautious [person] in believing [the claim]."[40] Thus, the facts must be examined to determine whether it is reasonable to believe Licensee committed the violations claimed given the totality of the circumstances. The circumstances are, themselves, based on individual fact findings which the Department had the burden of substantiating. This standard is a relatively low one.

There is some convincing evidence of Licensee's non-compliant behavior guidance. The recordings of Licensee shouting at a particular child support the findings that Licensee failed to comply with the behavior guidance requirements. Licensee yelled at a child who was crying. She threatened him with punishment.[41] Licensee's assertion at trial that the words she used in speaking to the child were meaningless is concerning and ignores what any reasonable person would understand as a threat. In this case, the situation involved picking up toys. It does not matter, under the Department's rule, what the specific threat communicated to the child was. Whether a threat to "daddy," "Dawny," or otherwise spank the child, it only matters that it was a threat or that it frightened the child. This communication is clear in the recording the Department provided. It is likewise clear that the interaction with the child was not constructive, positive, and suited to the age of the child. There is reasonable cause to find a violation of Minn. R. 9502.0395.

While the failure to provide compliant behavior guidance and the use of emotional abuse are established, the use of corporal punishment is not. The Department took Licensee's statements about "swatting" children at face value and determined corporal punishment not only occurred, but that Licensee admitted it. But the terms Licensee used to describe her behavior guidance with biting children, and her description of placing children on the floor, do not alone show reasonable cause to conclude corporal punishment was used on children.

First, the Department equating Licensee placing children on the floor behind a low gate as behavior guidance is not supported by the law or facts. While corralling children may be a form of behavior guidance, it is not always the case. Just as requiring a child to sit in a chair may be, at times, behavior guidance. For example, when children are directed to sit at the table for lunch no one would reasonably equate that as behavior guidance. But if children are misbehaving and require redirection, including to sit in a chair, behavior guidance is being employed. Here, there is insufficient evidence to

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[39] *In re the Temporary Immediate Suspension of Family Child Care License of Strecker*, 777 N.W.2d 41, 46 (Minn. Ct. App. 2010) (internal citation omitted.)

[40] *State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978).

[41] Licensee testified that she told the child that she would "Dawny" his behind. She stated children referred to her as "Dawny." In the Judge's review of the recording, it sounds as though the child and Licensee say "daddy," not "Dawny." The difference in words spoken is immaterial, however, as explained herein.

suspect any child was placed on the floor behind a gate as a form of behavior guidance. Why children were placed behind the gate was never explored, which is a threshold question. Instead, the County Licensor took the position that hands may never be laid upon a child as a form of behavior guidance and, combined with an allegation that Licensee allowed a child to fall once placed on the floor, determined prohibited corporal punishment occurred. Without knowing the motivation (whether it was a form of behavior guidance) for moving the child, a violation of the behavior guidance rule cannot be found.[42]

Second, corporal punishment, under the Department's rule, is defined as "the nonaccidental infliction of physical pain on a child by a caregiver," and it is prohibited.[43] This rule provides a non-exhaustive list of actions that are, if they are employed to inflict pain on a child, examples of corporal punishment.[44] The County Licensor applied this list without consideration of the definition of corporal punishment and determined that any touch Licensee employed as a form of behavior guidance constituted corporal punishment. This was error.

The rules of statutory construction apply to agency rules.[45] The rule must be read to give certainty and effect to the entire rule.[46] If the Department did not intend for physical pain to be a component of corporal punishment, the rule would not include it. Framed another way, if the non-exhaustive list of actions that may constitute corporal punishment were to be treated as corporal punishment in every circumstance used, the rule's requirement for the infliction of physical pain would be rendered ineffective and uncertain. As a result, a finding that the care giver intentionally inflicted physical pain on children is required before it can be concluded that prohibited corporal punishment was used. No such finding was made in this case and cannot be made on this record. As a result, it cannot be concluded that prohibited corporal punishment occurred.

Statute permits the Commissioner to impose a fine if "a license holder fails to comply fully with applicable laws or rules."[47] If the Commissioner chooses to impose a fine, based on 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, statute limits the fine to "$200 for each occurrence of a violation of law or rule governing matters of health, safety, or supervision."[48] Similarly, when a conditional license is employed, the Commissioner must also "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."[49]

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[42] It is also noted that the claimed "rough handling" or "shoving" of a child or children was not established here. More detail about the County Licensor's application of the behavior guidance rule based on actions taken is addressed below.
[43] Minn. R. 9502.0395, subp. 2(A).
[44] *Id.*
[45] Minn. Stat. § 645.001 (2020).
[46] Minn. Stat. § 645.17 (2020).
[47] Minn. Stat. § 245A.07, subd. 3(a)(1).
[48] Minn. Stat. § 245A.07, subds. 1(a), 3(c)(4)(iv).
[49] Minn. Stat. § 245A.06, subd. 1(a).

Whether the nature, chronicity, or severity of the revised violation requires a fine, and what the terms and length of the conditional license should be, are within the discretion of the Commissioner. An agency's decision is arbitrary and capricious if it:

> (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is no implausible that it could not be explained as a difference in view or the result of the agency's expertise.[50]

The facts and conclusions upon which the Department's Order is based are not the same as the facts and conclusions found here. To avoid running afoul of factors (b) or (c) above, the best practice would be for the Commissioner to re-run the nature-chronicity-severity analysis so as to align the final analysis with what the Department established at trial. The facts demonstrate Licensee's failure to always employ compliant behavior guidance, but also that she has a long and clean compliance history and the support of the parents who rely on her services. A conditional license is an appropriate regulatory response to the misconduct proved, but the outcome of the analysis will help ensure both a fair result for the Licensee and reasonably ensure the fulfillment of the Department's regulatory function.

J. R. M.

[50] *Citizens Advocating Responsible Development v. Kandiyohi County Bd. of Com'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (internal citations omitted).