STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1661

In the Matter of the Findings of
Abuse by D.F.C.,
Appellant,

vs.

Minnesota Commissioner of Health,
Respondent.

Filed January 15, 2008
Reversed
Willis, Judge

Pine County District Court
File No. 58-C0-03-001345

Mark W. Bay, Scott A. Higbee, Peterson, Engberg & Peterson, 700 Old Republic Title Building, 400 Second Avenue South, Minneapolis, MN 55401-2498 (for appellant)

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Considered and decided by Hudson, Presiding Judge; Willis, Judge; and Minge, Judge.

U N P U B L I S H E D O P I N I O N

WILLIS, Judge

Appellant challenges respondent's determination that (1) the department of health proved by a preponderance of the evidence that appellant abused a vulnerable adult; and

(2) appellant's disqualification from positions involving direct contact with persons receiving services from certain programs was proper. Appellant argues that respondent's determinations were not supported by substantial evidence and that respondent erred by failing to address the applicability of the therapeutic-conduct exception to the definition of abuse. Because we find that respondent's determinations were not supported by substantial evidence, we reverse.

FACTS

Appellant D.F.C. is a nursing aide who began working at the Pine Medical Health Care Center, a nursing home, in 1987. On August 26, 2001, a patient at Pine Medical who was a "vulnerable adult"[1] complained to one of the nurses that a nursing aide had "treated her roughly" the day before, causing a bruise to her right forearm. The patient explained that B.S. "helped me up and was rough." When asked if she was sure that it was B.S., the patient admitted that she sometimes confused B.S. with D.F.C. In fact, D.F.C. and B.S. are similar in appearance: they are approximately the same age and height, they wear the same style of glasses, and they both have curly hair.

On August 30, 2001, one of the patient's friends reported that either B.S. or D.F.C. had been rough with the patient and had caused a bruise to her right forearm. Pine Medical began an investigation and the nurse manager directed B.S. to go to the patient's room. B.S. testified that when she went to the patient's room, the patient asked her if she

[1] The administrative-appeals referee determined that the patient was a "vulnerable adult" under Minn. Stat. § 626.5572, subd. 21 (2000). Neither party contests this determination.

was B.S. or D.F.C., and when B.S. responded that she was B.S., the patient replied, "Oh, you're the nice one."

Pine Medical's social-services director testified that he visited with the patient on August 31, 2001, and that she told him that "[D.F.C.] grabbed her wrist, clipped her thumb above hers and yanked her up like a bag of oats or something." He testified further that he interrupted the patient and directly asked her whether it was D.F.C. or B.S. who had caused the bruise and that the patient responded: "[D.F.C.] [B.S.] is gentle." That same day, the director of nursing met with the patient and asked her about the bruise. She testified that the patient responded that a nursing aide had grabbed her by the wrist and pulled her up from her chair "like a sack of oats." The director of nursing was unable to recall if the patient identified the individual who had pulled her up from her chair. The director of nursing also spoke with D.F.C. that afternoon to discuss the incident and later testified that D.F.C. stated that she had not been assigned to "[the patient's] station for a long time" but that there was a possibility that she had helped the patient recently.

On September 4, 2001, the director of nursing met with D.F.C. and a union representative. Both the director of nursing and the union representative testified that D.F.C. stated that she was not assigned to the patient's section close to the time of the incident but that she acknowledged that there was a possibility that she answered the patient's call light and assisted her close to the time of the incident.

The Minnesota Department of Health assigned a special investigator to the case. The investigator interviewed the patient in person and reported that the patient confirmed

that D.F.C. had caused the bruise by lifting her roughly twice on the same day. Based on the investigator's report, the department of health issued a decision finding that D.F.C. had abused the patient on or about August 29, 2001. Subsequently, the Minnesota Department of Human Services disqualified D.F.C. from direct-contact positions with persons receiving services from nursing homes and care homes licensed by the department of health on the ground that D.F.C. committed "serious maltreatment." The department of health denied D.F.C.'s request for reconsideration and forwarded the case to the appeals office of the department of human services. The appeals referee heard the matter and recommended that the commissioner reverse the finding of abuse.

The commissioner rejected the appeals referee's recommendation and issued an order on September 25, 2003, finding that D.F.C. abused a vulnerable adult and upholding the disqualification. The district court dismissed D.F.C.'s appeal for lack of subject-matter jurisdiction, and this court reversed the dismissal.[2] On remand, the district court affirmed the commissioner's September 25, 2003 order and found that the record that was before the commissioner supported "a finding made by a preponderance of the evidence" that D.F.C. abused a vulnerable adult. D.F.C. appeals.

D E C I S I O N

Judicial review of the commissioner's decision is authorized by Minn. Stat. § 256.045, subd. 7 (2006). This court independently reviews the commissioner's decision, and accordingly, we need not give deference to the district court's decision. *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review*

[2] *D.F.C. v. Minn. Comm'r of Health*, 693 N.W.2d 451, 452 (Minn. App. 2005).

denied (Minn. June 19, 2001). Further, "decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by the courts to the agencies' expertise." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977).

I. The commissioner's decision that D.F.C. abused a vulnerable adult is not supported by substantial evidence.

D.F.C. challenges the commissioner's decision that the department of health proved by a preponderance of the evidence that she abused a patient who was a "vulnerable adult." The Vulnerable Adults Act, Minn. Stat. §§ 626.557-.5572 (2000), protects vulnerable adults,[3] a term that includes individuals who are residents of nursing homes and individuals who possess physical or mental infirmities that impair their ability to care for themselves and protect themselves from maltreatment. Minn. Stat. § 626.5572, subd. 21. The definition of "maltreatment" includes abuse, meaning "[c]onduct which is not an accident or therapeutic conduct . . . which produces or could reasonably be expected to produce physical pain or injury or emotional distress." Minn. Stat. § 626.5572, subds. 2(b), 15. The commissioner found that D.F.C. maltreated the patient because her conduct met the definition of abuse and that, under section 245A.04, subdivision 3d(4), the maltreatment was "serious" because it resulted in "serious injury"—that is, bruising. *See* Minn. Stat. § 245A.04, subd. 3d(4) (2000)[4] (providing that

[3] The Vulnerable Adults Act has been amended since 2000. We apply the 2000 statute because the alleged abuse here occurred in late August 2001, when the 2000 statute was in effect. *See In re O'Boyle*, 655 N.W.2d 331, 334 n.1 (Minn. App. 2002). But the changes that have been made to the Act since 2000 would not affect the outcome here.

[4] This same definition of "serious maltreatment" is now codified in the current version of the statute at Minn. Stat. § 245C.02, subd. 18(a), (c) (2006).

"serious maltreatment" means "maltreatment resulting in serious injury," which includes "bruises"). On that ground, the commissioner found that the department of health's disqualification of D.F.C. was proper.

The scope of our review is governed by Minn. Stat. § 14.69 (2006). *Zahler*, 624 N.W.2d at 301. Under section 14.69, this court will reverse the commissioner's decision if, among other things, it is unsupported by substantial evidence. Minn. Stat. § 14.69. "Substantial evidence" means "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; and (5) evidence considered in its entirety." *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 563 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). The substantial-evidence test requires that we evaluate the evidence on which the commissioner relied "in view of the entire record as submitted." *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997) (quotation omitted). As long as it appears that the commissioner engaged in "reasoned decisionmaking," we will affirm, even though we may have reached a different conclusion had we been the fact-finder. *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 669 (Minn. 1984). But we will "intervene . . . where there is a combination of danger signals which suggest the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings." *Id.* (quotations omitted).

We conclude that the presence here of several danger signals suggests that intervention is warranted. First, the commissioner never firmly established the date on

which the incident occurred. Although the commissioner found that it occurred on or about August 29, 2001, the nurse who first reported the incident claimed that it occurred on August 25, 2001. The exact date of the occurrence is critical because, if the incident indeed did occur on August 25, 2001, the record shows that D.F.C. worked on station two on that day and "did not come down to" station three, the station that was responsible for providing care to the patient. Despite not being able to firmly establish the date on which the incident occurred, the commissioner determined that D.F.C. was the nursing aide who treated the patient roughly based largely on the commissioner's view that D.F.C. "admitted" that she had recently helped the patient. Although there was evidence that D.F.C. acknowledged the possibility that she recently helped the patient, the record does not show that she in fact admitted that she helped the patient close to the time of the incident. The only evidence that definitively established when D.F.C. last had contact with the patient was testimony that the last time D.F.C. worked at the station that was assigned to care for the patient was August 6, 2001.

Second, even if D.F.C. were the nursing aide who pulled the patient up roughly, there is not substantial evidence to support the commissioner's determination that it was that incident that caused the bruise. The record shows that, at the time the patient sustained the bruise, she was taking Trental, which is a prescription blood thinner that has a side effect of increasing the potential for and the severity of bruises. In addition, the record shows that after D.F.C.'s employment with Pine Medical was terminated, the patient sustained bruises even when nursing aides helped her in a way that the patient did not describe as being rough. Clearly, the patient was susceptible to bruising easily, even

when not being treated roughly. Yet the commissioner did not address the evidence of the patient's subsequent bruising or of her susceptibility to bruising easily because of the Trental.

But most importantly, the nurse who first reported that the patient had complained that a nursing aide had treated her roughly stated that the patient identified B.S. as the nursing aide who treated her roughly. It was not until B.S. was permitted to go to the patient's room, with no one else present, that the patient changed her mind and claimed that D.F.C. was the nursing aide who pulled her up roughly. The commissioner acknowledged that allowing B.S. to spend time with the patient alone shortly after the patient had accused B.S. was "flawed procedure" but concluded that it was outweighed by other evidence of the patient's identification of D.F.C. as the nursing aide who treated her roughly. We conclude that the fact that B.S. spent time alone with the patient shortly after the patient had accused B.S. cannot be so easily dismissed. The encounter raises very real questions about the reliability of the patient's later identification of D.F.C. As the nursing aide whom the patient initially accused, B.S.'s potential bias was obvious. In addition, B.S. is not an investigator and had no training in conducting an interview in a manner that is neutral and non-suggestive. Pine Medical and the department of health never questioned the patient about what happened during this meeting. The patient provided no explanation as to why she changed her mind after the meeting with B.S. and then claimed that D.F.C. was the nursing aide who treated her roughly, and because the department of health chose not to present the patient's testimony at the administrative hearing, D.F.C. had no opportunity to cross-examine her. Although the department of

health's witnesses testified that the patient identified D.F.C. as the nursing aide who treated the patient roughly, as the appeals referee aptly noted, all of these witnesses "relied upon what [B.S.] had told them, or relied on conversations with [the patient] occurring after [B.S.] had the opportunity to visit with [the patient]." The testimony of these witnesses and the entire investigation were tainted by the fact that B.S. was allowed to meet with the patient alone shortly after the patient had identified B.S. as the nursing aide who treated her roughly.

In view of the entire record, we conclude that the commissioner's decision that the department of health established by a preponderance of the evidence that D.F.C. abused the patient was not supported by substantial evidence. The combination of (1) the failure to firmly establish the date on which the incident occurred and whether D.F.C. even provided care to the patient on that day; (2) the failure to address the evidence of the patient's susceptibility to bruising easily; and (3) the disregard for the fact that B.S. was allowed to meet with the patient alone shortly after the patient had implicated B.S. and the effect that had on the rest of the investigation lead us to conclude that intervention is warranted here.

In light of these substantial problems with the investigation and the commissioner's decision, allowing the finding of abuse and subsequent disqualification to stand would result in a manifest injustice. *See Ellis v. Minneapolis Comm'n on Civil Rights*, 295 N.W.2d 523, 525 (Minn. 1980) (holding that this court need not refrain from substituting its judgment concerning inferences to be drawn from the evidence for that of the agency if there has been a manifest injustice). Therefore, we reverse the

commissioner's determination that D.F.C. abused the patient, a vulnerable adult. Consequently, the commissioner's subsequent disqualification of D.F.C. on the ground that D.F.C. committed serious maltreatment must also be reversed.

D.F.C. also argues that the commissioner erred by failing to consider the applicability of the "accident" and "therapeutic conduct" exceptions to the definition of abuse in Minn. Stat. § 626.5572, subd. 2(b). Because we conclude that the commissioner's decision was not supported by substantial evidence, we need not address this issue.

Reversed.