STATE OF MINNESOTA
IN COURT OF APPEALS
A10-359

In the Matter of the Revocation of the Family Child Care License of:
Jeannie Ball

Filed March 22, 2011
Affirmed
Ross, Judge

Minnesota Department of Human Services
File No. 4-1800-20310-2

Jeannie Ball, Duluth, Minnesota (pro se relator)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Joseph M. Fischer, Assistant St. Louis County Attorney, Duluth, Minnesota (for respondent commissioner of human services)

Considered and decided by Ross, Presiding Judge; Connolly, Judge; and Crippen, Judge.*

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

ROSS, Judge

The Minnesota Department of Human Services Commissioner revoked Jeannie Ball's childcare license for failing to conduct background checks on childcare workers, failing to remove a disqualified caregiver, and failing to provide information during the

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

investigation of these things. In this certiorari appeal, Ball challenges the revocation, claiming that new evidence, the violation of her due process rights, and the acceptance of inadmissible evidence requires reversal. She also disputes the commissioner's findings of fact and the degree of the sanction. Because we conclude that there were no factual or procedural errors or constitutional violations, and because the commissioner acted within his discretion by revoking Ball's license, we affirm.

FACTS

Until the February 2009 revocation of her childcare license, Jeannie Ball had been providing twenty-four-hour childcare service for 19 years out of her Duluth home. Ball held her license under Minnesota Statutes chapter 245A (2010). A series of events constituted statutory violations and led to the revocation.

In December 2007, Ball responded to nursing student Amber Griffith's Craigslist.com nannying-job posting. Ball interviewed Griffith for a position at her childcare facility but she did not obtain a statutorily required background check. Ball left Griffith alone to watch children on two occasions. Griffith reported Ball's failure to request the background check. She also reported that a 13-year-old boy, T.D., was assisting at the childcare facility by changing diapers and helping children get their shoes on. St. Louis County investigated and issued Ball a correction order for not conducting background studies on Griffith and T.D. The Department of Human Services then issued Ball a two-year conditional license requiring her to strictly comply with the statutory requirements.

In March 2008, Ball requested a background study for a new substitute caregiver, Margaret Markey. Based on the study, the county determined that Markey was disqualified from directly caring for children. It notified both Markey and Ball that Markey could not be present in Ball's facility unless Markey requested reconsideration within 15 days. Neither the county nor the department received a timely request for reconsideration. But Markey continued working for Ball.

In July, the county received a complaint about a hungry child and improper disciplinary techniques at Ball's facility. County officials sought an appointment with Ball to investigate. They left telephonic voice messages, sent certified letters, and made an unannounced visit. Ball responded with a telephone message of her own asking for a copy of the complaint. Because Ball did not offer to make herself available for an interview as required by section 245A.07, subdivision 3, the county issued Ball another correction order for withholding relevant information during an investigation.

Also in July, Ball took the children to a playground where a two-year-old boy cut his face on a metal bracket on a slide. Ball immediately cleaned the cuts and applied adhesive bandages. She called the boy's mother and informed her that he need not be picked up immediately or see a doctor. When the mother arrived hours later, she was surprised by the severity of her son's cuts. She took him to the hospital, where he received 23 stitches. The mother complained to the county. The county temporarily suspended Ball's license, instigated a maltreatment investigation, and concluded that Ball had committed medical neglect.

In February 2009, the department revoked Ball's childcare license. The revocation was based on medical neglect and her failure to comply with terms of her conditional license, to remove a disqualified caregiver, to provide adequate supervision, to ensure playground equipment was appropriate, and to cooperate with the county's investigation. Ball appealed to an Administrative Law Judge (ALJ).

The ALJ heard the matter and concluded that Ball had violated Minnesota Statutes sections 245C.05, subdivision 2, 245C.18(1), and 245A.07, subdivision 3(a), by not requesting background studies for Griffith and T.D., failing to remove a disqualified caregiver, and knowingly withholding information from the complaint investigation. He recommended that the commissioner revoke Ball's license. The commissioner adopted the ALJ's findings and concluded that the violations warranted the license revocation. The commissioner denied Ball's request for reconsideration. This certiorari appeal follows.

D E C I S I O N

Ball contends that the commissioner improperly revoked her childcare license. We afford administrative agency decisions a presumption of correctness and reverse them only when they exceed the agency's statutory authority or jurisdiction, are made upon unlawful procedure, are arbitrary and capricious, reflect an error of law, or are unsupported by substantial evidence. Minn. Stat. § 14.69 (2010); *In re Revocation of the Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003). We will defer to the agency's fact finding. *Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 675 (Minn. 1990).

I

Ball first asks us to remand with leave under Minnesota Statutes section 14.67 (2010) to present additional evidence to the commissioner. She claims she has new evidence related to Markey's disqualification that she did not have access to until after the administrative proceeding. A licensee can request leave to augment the agency's record with additional evidence if the court of appeals decides the new evidence is material and that good reasons excuse the licensee's failure to have presented it to the agency. Minn. Stat. § 14.67. But the record reflects that all three documents that Ball suggests are new were admitted and considered by the ALJ. We need not review whether the purportedly new evidence is "material" or whether "good reasons" prevented Ball from presenting it earlier, because it is not new.

II

We next address Ball's assertion that her due process rights were violated because the department did not provide her with notice that it planned to submit exhibits relating to her prior violations record and those exhibits were admitted by the ALJ. *See* U.S. Const. amend. XIV § 1 (establishing that no state shall "deprive any person of life, liberty, or property without due process of law"). A family-childcare licensee has a protected property interest in retaining her license. *See Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 461 (Minn. App. 2000) (holding that nursing licenses issued by the department were protected property interests). Due process requires that the subject of a license-revocation proceeding receive notice and an opportunity to defend against the allegations by confronting witnesses and presenting arguments and evidence. *See Contos*

v. Herbst, 278 N.W.2d 732, 742 (Minn. 1979) ("At a minimum the due process clause requires that deprivation of property be preceded by notice and an opportunity for a hearing.").

We conclude that Ball's contention that 16 exhibits admitted at her hearing were "last minute disclosure[s]" is factually inaccurate, ending any further due process analysis. The record reflects that Ball received notice that each of her violations would be considered at her hearing when she was mailed copies of the pre-marked exhibits. Ball's former counsel acknowledged that he had received and reviewed the exhibits. Her due process rights were not violated.

III

We next address whether claimed evidentiary errors at Ball's administrative proceeding warrant reversal. Ball challenges the admission of the injured child's mother's testimony. She claims that the ALJ should not have considered this testimony and that he improperly allowed inadmissible reputation, character, and hearsay evidence. We review evidentiary rulings in administrative proceedings for an abuse of discretion. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 566 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001). An ALJ may receive all probative evidence, "including hearsay, if it is the type of evidence on which reasonable, prudent persons are accustomed to rely in the conduct of their serious affairs." Minn. R. 1400.7300, subp. 1 (2009). The ALJ is in a good position to judge the trustworthiness and reliability of evidence before him. *State ex rel. Indep. Sch. Dist. No. 276 v. Dep't of Educ.*, 256 N.W.2d 619, 627 (Minn. 1977).

The ALJ heard the mother's testimony because it was probative of Ball's treatment of the mother's injured child. Contrary to Ball's assertion, the ALJ did not challenge the parties' stipulation that the boy's injury was an accident. The ALJ did not abuse his discretion by allowing the mother to testify. The ALJ also properly exercised his discretion by allowing reliable hearsay testimony. The mother's direct examination testimony discussed a doctor's diagnosis of her child after the accident. The ALJ allowed the witness to testify about what the doctor said but not about what she believed the doctor thought. Ball made no hearsay objection. The mother's testimony was not inherently unreliable and a reasonable fact finder might reasonably rely on it. The ALJ was in the best position to judge the trustworthiness of that evidence, and we conclude that he did not abuse his discretion by allowing it.

The ALJ also did not abuse his discretion by allowing the mother to opine about the quality of care at Ball's childcare center. This testimony is actually encouraged by the rules: before a commissioner revokes a license, he must "consider facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, *[and] available consumer evaluations of the program.*" Minn. Stat. § 245A.04, subd. 6 (emphasis added). The ALJ properly accepted as evidence the mother's "evaluation of the program." And we observe the ALJ's fair treatment of this category of evidence; the ALJ also allowed testimony from a parent who spoke favorably of Ball's facility. Ball directs us to no evidentiary errors.

IV

Ball disputes the ALJ's findings that she failed to perform background checks, used a disqualified caregiver, and withheld information from an investigation. We consider whether the record contains substantial evidence to support a ALJ's findings of fact. *See* Minn. Stat. § 14.69(e). Substantial evidence is "(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; or (5) the evidence considered in its entirety." *In re Temp. Immediate Suspension of Family Child Care License of Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010) (quotation omitted).

Substantial evidence supports the finding that Ball failed to seek necessary background checks. Childcare licensees must request background studies for all prospective employees who will provide direct services and all volunteers who will have direct contact unless they are under the continuous, direct supervision of a licensee. Minn. Stat. § 245C.03, subd. 1(a) (3)–(4) (2010). The ALJ concluded that Ball allowed Griffith to provide unsupervised childcare services without being the subject of a background study and that T.D. was a "helper" who had direct contact with children without "continuous, direct supervision by a[] [qualified] individual." *Id*. There is no dispute that Ball failed to request background studies for Griffith and T.D. Griffith reported that she had direct contact with children on two occasions and was paid for her services. She also reported that T.D. aided in childcare tasks without supervision. Ball gave a different account. But we defer to an agency's credibility determinations. *Saif*

Food Mkt. v. Comm'r of Health, 664 N.W.2d 428, 431 (Minn. App. 2003). And the ALJ expressly credited Griffith's report over Ball's testimony.

Substantial evidence also supports the finding that Ball employed a disqualified provider. A license holder must remove a disqualified childcare provider from direct contact with children on notice of her disqualification unless the individual requests reconsideration within 15 days. Minn. Stat. §§ 245C.18(1), .21, subd. 2(b) (2010). The county notified both Ball and Markey that Markey was disqualified to provide care. It is undisputed that Markey continued to provide care after the disqualification notice. Although Ball and Markey contend that they requested reconsideration, the ALJ did not find Ball's or Markey's testimony to be credible.

The record also supports the finding that Ball withheld information from the investigation. The commissioner can revoke the license of a license holder who knowingly withholds relevant information bearing on legal compliance. Minn. Stat. § 245A.07, subd. 3(a). Following a complaint, officials attempted to contact and interview Ball. The county investigators repeatedly sought Ball's participation, but she never made herself available to be interviewed.

Substantial evidence supports the ALJ's findings of fact.

V

Ball maintains that the sanction is too severe. When selecting a sanction, the commissioner must "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." Minn. Stat. § 245A.07, subd. 1(a) (2010). Revocation is appropriate when

"the license holder's actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by a program." Minn. R. 9543.0100, subps. 2, 3 (2009). We defer to an agency's choice of sanction absent a clear abuse of discretion. *In re Burke*, 666 N.W.2d at 726.

The commissioner considered each factor of section 245A.07 and concluded reasonably that Ball's violations indicate significant risk to children. The violations were severe. Ball not only failed to obtain background studies, she also failed to adequately respond to a negative study. The commissioner had ample basis for his conclusion that Ball's "chronic and willful violation of background study requirements placed children at risk of serious harm." He observed that Ball also minimized the seriousness of her violations.

We recognize that some parents expressed positive experiences at Ball's facility. But the favorable reports did not require the commissioner to lessen the sanction for the clear violations. The commissioner reasonably exercised his discretion here.

Affirmed.