STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0287

In the Matter of the Revocation of the License of Victoria Stovall and Gloria Pargo to Provide Family Child Care.

Filed February 19, 2008
Affirmed
Schellhas, Judge

Minnesota Department of Human Services
File No. 12-1800-17207-2

Gloria Pargo, Victoria Stovall, 3828 Lyndale Avenue South, Minneapolis, MN 55409 (pro se relators)

Lori Swanson, Attorney General, 1400 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Mary M. Lynch, Assistant County Attorney, 525 Portland Avenue South, Suite 1210, Minneapolis, MN 55415 (for respondent Minnesota Department of Human Services)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Relators appeal from a final order by the Minnesota Commissioner of Human Services revoking their child-care license. Because the commissioner did not abuse his discretion, we affirm.

FACTS

Relators Victoria Stovall and Gloria Pargo have been licensed to provide child-care services in Stovall's South Minneapolis home since 1997. In revoking their license, the commissioner relied on the findings of fact and conclusions of law made by an administrative law judge (ALJ) following an evidentiary hearing. The ALJ found that relators had a combined "history of violations dating back to 1998," including:

1. A one-year conditional license issued on December 18, 1998, for the following violations: failure to submit background studies for substitute caregivers; exceeding capacity limits; failing to complete required paperwork; transporting a child to school without a parental consent form; failing to have a working telephone in the daycare; failing to complete required training; and failing to provide structured, age-appropriate activities for the children in care;
2. A second, one-year conditional license issued on April 28, 2000, for similar violations, including failure to complete additional training as a condition of the previous conditional license and for re-licensure; failure to maintain complete admissions and provider records; failure to provide structured, age-appropriate activities for the children; and leaving the children in a vehicle while running errands;
3. A third conditional license issued on March 28, 2003, based on repeated complaints of failure to provide adequate supervision to the children in their care. The relators' license was reinstated on December 23, 2003.

4. A correction order issued March 15, 2004, for failure to complete additional training required by the conditional license issued on March 28, 2003;
5. A correction order issued November 1, 2004, requiring completion of training;
6. A correction order issued July 12, 2005, based on a complaint about children playing unsupervised in the driveway of the child-care facility; a child napping unsupervised inside the child-care facility; and children having access to dangerous or toxic items; and
7. A correction order issued February 1, 2006, citing failure to post license and mandated-reporter information; failure to complete SIDS and shaken-baby training; failure to cover electric outlets; undergoing remodeling in child-care area while child care was in session; and leaving hazardous materials in plain sight and near children.

Based on these findings, the ALJ recommended revocation of the relators' child-care license. The commissioner of human services adopted the ALJ's findings and ordered revocation. Although relators do not specifically argue that the commissioner's findings are unsupported by substantial evidence, relators do state the following in their brief: their children are cared for in a good manner; they have no criminal convictions; they should have been given a correction order or limited license until they met the conditions of completing the training on reducing the risk of sudden infant death syndrome and shaken baby syndrome; there has never been a lack of supervision in their day care; children have not been physically punished in their care; children have not been sent home with "soiled or urine garments"; their child-care program is geared toward

single parents and parents with "non-traditional 8 to 5 jobs"; Hennepin County never informed them that there were limits to their hours of operation; their children's parents like their facility; they have two telephone lines in their home, one for the day care and one for their residence and they use the residence telephone number to keep open a constant line of communication with their child-care parents. Relators argue that the revocation of their license was unduly harsh and too severe, and request that this case be remanded for further proceedings to determine a "punishment to fit the crime." This appeal followed.

D E C I S I O N

Decisions by the commissioner of human services are subject to a "presumption of correctness" and may be reversed only when "they are arbitrary and capricious, exceed the agency's jurisdiction or statutory authority, are made upon unlawful procedure, reflect an error of law, or are unsupported by substantial evidence in view of the entire record." *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003); s*ee also* Minn. Stat. § 14.69 (2006). Here, because relators did not provide a transcript of the proceedings before the ALJ, appellate review is limited to whether the ALJ's conclusions of law, as adopted by the commissioner, are supported by the findings of fact. *See Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970). Absent a clear abuse of discretion, this court will defer to the commissioner's choice of sanction. *See Burke*, 666 N.W.2d at 726.

When applying a sanction upon a license holder who does not comply with applicable law or rule, 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." Minn. Stat. § 245A.07, subd. 1(a) (2006). "The commissioner may suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules. . . ." *Id.*, subd. 3(a) (2006).

Relators argue that the commissioner's choice of revocation as a sanction was unduly harsh, relying on this court's decision in *Burke*. In that case, this court reversed the sanction of revocation imposed on a child-care provider based upon evidence that (1) a preschooler had been unsupervised for approximately 12 minutes after wandering off with one of the provider's older children while the provider was changing another child's diaper; (2) two children had been out of hearing and sight of the provider while napping behind a closed, locked door; and (3) a child had entered the furnace room. 666 N.W.2d at 725. The revocation was also, erroneously, based on a finding that the provider had failed to report the death of a child from SIDS while under her care. *Id.* at 727-28. In fact, the child had died in its own home, and Burke had reported the death. *Id.* at 725. Moreover, it was Burke's report that triggered the licensing worker's visit—on the day after the SIDS death—during which the latter two violations were observed. *Id.* While mindful of the commissioner's broad discretion in determining sanctions on those facts, this court determined that the commissioner abused his discretion in imposing revocation. *Id.* at 728.

This case is distinguishable from *Burke*. The violations here are chronic and include not only a persistent failure to obtain required training, but also repeated violations involving the failure to properly supervise children in relators' care. The

chronic nature of the violations, combined with a number of violations evidencing disregard for the safety of the children, distinguishes this case from *Burke*, wherein the revocation was based on a significant misunderstanding about the death of a child, which overshadowed "two incidents in which a total of three rules were violated in a nine-month period" following three years' operation without incident. 666 N.W.2d at 727.

Further, relators challenge a number of the reported violations on this appeal. Without a transcript, this court's review cannot encompass the sufficiency of the evidence to support the findings on violations. The lack of a transcript in this case also distinguishes this case from *Burke*, wherein the court found that the revocation was based on erroneous findings of fact, including a mistaken finding that a baby had died of SIDS while at the child-care facility. *Id.* at 728.

We also reject relators' assertion that a lesser sanction is warranted by the ALJ's suggestion that a lesser sanction might be appropriate. The decision of whether and what sanction to impose resides in the commissioner alone. *See* Minn. Stat. § 245A.07, subd. 1; *see also City of Moorhead v. Minn. Public Utils. Comm'n*, 343 N.W.2d 843, 847 (Minn. 1984) (explaining that ALJ's findings and recommendations are not binding on agency vested with power by statute).

Finally, because training requirements are ongoing, we reject relators' assertion that their current compliance with training requirements precludes revocation. *See* Minn. Stat. §§ 245A.144(b) (requiring SIDS and shaken-baby training every five years), .40 (Supp. 2007) (addressing continuing education requirements).

Affirmed.