STATE OF MINNESOTA
IN COURT OF APPEALS
A07-992

Trina Marie Taylor,
Relator,

vs.

Commissioner of Minnesota Department of Health,
Respondent.

Filed May 13, 2008
Affirmed
Worke, Judge

Minnesota Department of Health
File Nos. 21425903, 21400658, 00260, 00235

Trina Marie Taylor, 6910 54th Avenue North, Apt. 301, Crystal, MN 55428 (pro se relator)

Lori Swanson, Attorney General, Audrey Kaiser Manka, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.*

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

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

WORKE, Judge

Relator challenges on certiorari review the Commissioner of the Minnesota Department of Health's decision affirming her disqualification from positions involving direct contact with persons receiving services through certain state-licensed agencies, arguing that she did not commit the second-degree assault on which the disqualification was based and that her criminal record was expunged. Because the information underlying the disqualification was accurate and the commissioner properly considered relator's arrest and investigative data, we affirm.

D E C I S I O N

The decision of respondent Commissioner of Minnesota Department of Health not to set aside relator Trina Marie Taylor's disqualification from working with persons receiving care from certain facilities is a final decision, subject to certiorari review under Minn. Stat. § 480A.06, subd. 3 (2006). Because a contested-case hearing was not held and relator petitioned for certiorari review directly to this court, we examine the record to determine whether the commissioner's decision "was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *See Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 445 (Minn. App. 1996) (quotation omitted). We will reverse an agency's decision when the evidence does not provide a substantial basis for that decision as a matter of law. *Crookston Cattle Co. v. Minn. Dep't of Natural Res.*, 300 N.W.2d 769, 777 (Minn. 1980).

The Department of Human Services (DHS) Background Studies Act provides that the commissioner shall disqualify an individual from providing direct contact if a background study shows that (1) the individual was convicted of or admitted to certain crimes, or (2) a preponderance of the evidence shows that the individual has committed an act that meets the definition of those crimes. Minn. Stat. § 245C.14, subd. 1(a) (2006). The disqualification applies "regardless of whether [the conviction, admission, or] the preponderance of the evidence is for a felony, gross misdemeanor, or misdemeanor level crime." *Id.* An individual's offense in another state is also disqualifying conduct when the elements of the offense "are substantially similar" to those of a listed offense. Minn. Stat. § 245C.15, subd. 1(c) (2006).

An individual is permanently disqualified for a conviction of, or admission to, the crime of second-degree assault, or conduct meeting the elements of that crime. *Id.*, subd. 1(a), (d) (2006). An individual is disqualified for seven years for conduct meeting the elements of fifth-degree assault. *Id.*, subd. 4(a), (e) (2006). The DHS conducted a background study on relator and determined that she had three disqualifying acts: a 2001 Illinois misdemeanor conviction of aggravated assault; a 2001 Illinois misdemeanor conviction of battery; and a 2005 arrest in Hennepin County for which there was a preponderance of evidence that she committed an act meeting the definition of second-degree assault. The DHS determined that the 2005 arrest was the result of an act that supported permanent disqualification and that the Illinois offenses also disqualified relator because they were "substantially the same" as the disqualifying Minnesota crimes

of second-degree assault and fifth-degree assault. The commissioner denied relator's request to set aside the disqualification.

Relator argues that the information on her Illinois convictions and Minnesota act was incorrect and that she "never committed any crime of a second-degree felony assault" in either Minnesota or Illinois. In the case of a permanent disqualification for specified criminal conduct, the commissioner may not set aside the disqualification using a risk-of-harm analysis, but only on the ground that the information relied on to disqualify the individual was inaccurate or incorrect. Minn. Stat. §§ 245C.22, subd. 2, .24, subd. 2 (2006).

A conviction of second-degree assault, assault with a dangerous weapon, in violation of Minn. Stat. § 609.222 (2006), is listed as an offense that supports permanent disqualification. Minn. Stat. § 245C.15, subd. 1. Relator was convicted in Illinois of misdemeanor aggravated assault, which provides that an assault was committed using "a deadly weapon or any device manufactured and designed to be substantially similar in appearance to a firearm." 720 Ill. Comp. Stat. Ann. 5/12-2 (West 2002). Thus, the elements of relator's Illinois aggravated-assault crime are substantially similar to the elements of the disqualifying Minnesota crime of second-degree assault. In addition, relator's crime of battery in Illinois is substantially similar to the Minnesota crime of fifth-degree assault, which supports a seven-year disqualification. *Compare* 720 Ill. Comp. Stat. Ann. 5/12-3 (West 2002) (defining battery) *with* Minn. Stat. § 609.224, subd. 1 (2006) (defining fifth-degree assault).

The record also contains a Minneapolis police report that supports the determination that relator committed an act in Minnesota meeting the definition of second-degree assault, assault with a dangerous weapon. The report shows that relator was arrested after a 2005 incident in which she started a car, drove forward into a victim, knocked the victim down on her back, and continued to drive over the lower half of the victim's body. A car may be considered a dangerous weapon if it is driven in a manner that is likely to produce death or great bodily harm. *See* Minn. Stat. § 609.02, subd. 6 (2004) (defining dangerous weapon as a "device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm"). Even though relator was not charged with a crime as a result of the incident, the act meets the definition of assault with a dangerous weapon because the manner in which the car was driven was likely to produce great bodily harm. Therefore, the commissioner correctly determined that a preponderance of the evidence showed that the act constituted conduct that supports permanent disqualification.

Relator also argues that the commissioner improperly denied her request to set aside the disqualification because she "now [has] a clean background." Relator submitted a letter from the Minnesota Bureau of Criminal Apprehension (BCA) indicating that she requested, and was granted, an expungement of the identification and arrest data relating to the Minnesota incident. Relator also submitted, and this court has judicially noticed, the Cook County Circuit Court's order granting an expungement petition as to the Illinois offenses. *See* Minn. R. Evid. 201(b); *Smisek v. Comm'r of Pub.*

Safety, 400 N.W.2d 766, 768 (Minn. App. 1987) (holding that an appellate court may take judicial notice of a fact for the first time on appeal).

Notwithstanding expungement, if the commissioner has reasonable cause to believe that arrest and investigative information from the BCA or other states is pertinent to disqualification, the commissioner may consider that information, "unless the commissioner received notice of the petition for expungement and the court order for expungement is directed specifically to the commissioner." Minn. Stat. § 245C.08, subd. 2(c) (2006). The record does not show that the commissioner received notice of either the Minnesota or Illinois expungement, or that the BCA notice or the Illinois court order was directed to the commissioner. Therefore, the information concerning relator's Minnesota arrest and her Illinois convictions remained available for the commissioner's consideration, and the commissioner properly considered it in reviewing relator's disqualification. Because the record provides a substantial basis for the commissioner's decision not to set aside relator's disqualification, we affirm.

Affirmed.