STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1826

Donise Thostenson,
Relator,

vs.

Commissioner of Human Services,
Respondent.

Filed June 17, 2008
Reversed
Worke, Judge

Minnesota Department of Human Services
File No. 61-1800-17886-2

Lindsay W. Shaw, Southern Minnesota Regional Legal Services, 166 East Fourth Street, Suite 200, St. Paul, MN 55101 (for relator)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Paul J. Kiltinen, Dodge County Attorney, Janet L. Mahle Hinds, Assistant County Attorney, 22 Sixth Street East, Dept. 91, Mantorville, MN 55955 (for respondent)

Considered and decided by Lansing, 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

On appeal from the revocation of her family child-care license, relator argues that the commissioner abused his discretion by affirming the disqualification and not setting aside the revocation because (1) substantial evidence does not support the finding of recurring maltreatment; (2) the commissioner erred by failing to consider a risk-of-harm analysis performed at the time of the hearing; and (3) substantial evidence does not support revocation. Because the commissioner's decision runs counter to the evidence, we reverse.

FACTS

In June 2006, relator Donise Thostenson provided day care for 13 children. One parent filed a complaint against relator alleging that relator often yelled at his son, left all of the children outside unsupervised, and permitted his son to walk unsupervised from the school-bus stop at the end of relator's rural driveway to the house.

Zola Bennett, a licensing worker, and Jennifer Adamson, a child-protection worker, visited relator's home to investigate the complaint. During the visit, relator denied yelling at complainant's son, but did indicate that she has a loud voice. Relator also denied leaving the children unsupervised. Relator did acknowledge that it would take complainant's eight-year-old son anywhere from 10 to 45 minutes to walk from the school-bus stop at the end of the driveway to the house, which is less than one-quarter of a mile long, but indicated that the boy enjoyed being outside and his walk to her home. Relator stated that during this time period she watched the boy from a window and if he

needed any help she could reach him in a matter of minutes. Relator also self-reported that she has a rule that the children must pick up their toys before she will provide them lunch. Relator stated that she withheld lunch on only one occasion, but provided the children with an afternoon snack. Relator also self-reported that she separated a child from the group of children for more than ten minutes, which was a rule violation, but did so at the direction of the child's parent. During the visit, Adamson also noted that relator put young children upstairs to nap without a baby monitor. And at a later date, Bennett and Adamson received information from other parents that relator put children in supervisory roles over younger children.

As a result of these deficiencies, the Department of Human Services issued a correction order citing relator for withholding lunch, failing to provide appropriate supervision, allowing children to supervise other children, and separating a child from the group for an extended period of time. The department determined that the neglect was recurring and that relator was disqualified from any position allowing direct contact with children. However, for several months relator was permitted to continue providing child-care services under the direct supervision of another adult. Relator appealed and a hearing was held before an administrative-law judge (ALJ).

The ALJ concluded that a preponderance of the evidence showed that there was recurring maltreatment in the form of neglect but that the department failed to show that relator posed a risk of harm to the children. The ALJ recommended that relator's disqualification be set aside, and that the determination to revoke relator's family child-care license be reversed.

The county appealed the ALJ's determination to respondent Commissioner of Human Services, who issued an order on the agency's final decision. The commissioner affirmed the maltreatment by neglect determination and disqualification of the license. Relator requested reconsideration and submitted information relevant to the commissioner's review. Relator argued that the withholding of food was an isolated incident and when she was told that this was inappropriate she immediately corrected the behavior. Relator also indicated that she has a baby monitor, but did not use it for a limited period of time when her home was being remodeled, but periodically checked on the children. Additionally, relator noted that the parent who filed the initial complaint no longer received child-care services from relator because the children moved. Finally, relator submitted several letters of support, which indicated that she has a "very well structured [day-care] environment," "she has compassion [and] love for the children she cares for," she appropriately punishes the children, and the children she cares for love going to her home.

The commissioner affirmed the revocation order, concluding that relator failed to submit information showing that she does not pose a risk of harm. The commissioner determined that relator repeatedly failed to appreciate the need to require supervision to vulnerable children; that she has not had repeat events, but this was due to the fact that she has not had children under her care; she did not accept responsibility for her behavior; and, although she submitted letters of support, the letters did not outweigh the risk of harm. Relator petitioned for certiorari review by this court.

D E C I S I O N

"Judicial review presumes the correctness of an agency decision." *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006). The party challenging the agency's decision bears the burden of proving that the decision was improperly reached. *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984). We will sustain the agency's decision if it is supported by substantial evidence and is not arbitrary and capricious. *Meuleners*, 725 N.W.2d at 123; Minn. Stat. § 14.69(e), (f) (2006).

> An agency's ruling is arbitrary and capricious if the agency: (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) [made a decision that is] so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

White v. Minn. Dep't. of Natural Res., 567 N.W.2d 724, 730 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Oct. 31, 1997). "The standard of review is not heightened whe[n] the final decision of the agency decision-maker differs from the recommendation of the ALJ." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). "Although a reviewing court might reach a contrary conclusion to that arrived at by an administrative body, the court cannot substitute its judgment for that of the administrative body when the finding is properly supported by the evidence." *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963). We retain "authority to review de novo administrative interpretations of statutes, [but] an agency's interpretation of a statute that it administers is entitled to

deference." *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007); *see also* Minn. Stat. § 14.69(d) (2006) (providing that we may reverse an agency's decision if it is "affected by [] error of law").

Relator argues that the commissioner's conclusion that neglect and maltreatment occurred was not supported by substantial evidence.

> 'Neglect' means:
>
> (1) failure by a person responsible for a child's care to supply a child with necessary food, clothing, shelter, health, medical, or other care required for the child's physical or mental health when reasonably able to do so;
>
> (2) failure to protect a child from conditions or actions that seriously endanger the child's physical or mental health when reasonably able to do so, including a growth delay, which may be referred to as a failure to thrive, that has been diagnosed by a physician and is due to parental neglect; [and]
>
> (3) failure to provide for necessary supervision or child care arrangements appropriate for a child after considering factors as the child's age, mental ability, physical condition, length of absence, or environment, when the child is unable to care for the child's own basic needs or safety, or the basic needs or safety of another child in their care[.]

Minn. Stat. § 626.556, subd. 2(f) (Supp. 2007). Maltreatment is defined as neglect. *Id.*, subd. 10e(f)(2) (Supp. 2007). "'Recurring maltreatment' means more than one incident of maltreatment for which there is a preponderance of evidence that the maltreatment occurred and that the subject was responsible for the maltreatment." Minn. Stat. § 245C.02, subd. 16 (2006). An individual is disqualified from a licensed program for "recurring maltreatment of a minor under section 626.556 . . . for which: (i) there is a preponderance of evidence that the maltreatment occurred, and (ii) the subject was responsible for the maltreatment." Minn. Stat. § 245C.15, subd. 4(b)(2) (Supp. 2007).

The commissioner concluded that relator failed to (1) provide necessary, appropriate supervision for an infant and a toddler because they were out of her sight and hearing on more than one occasion and she did not use a baby monitor; (2) provide necessary, appropriate supervision because she failed to provide for basic safety on more than one occasion when she allowed a boy to walk unsupervised up the driveway; and (3) supply children with necessary food on one occasion. The conclusions are supported by substantial evidence. There was testimony from relator that she did not use a baby monitor for a few months when her home was being remodeled. There was also testimony that relator left the infants under the supervision of a five or six-year-old girl. Relator also testified that she withheld lunch because the children failed to pick up their toys. The conclusions are supported by the findings, which are supported by the evidence; therefore, the commissioner's determination of maltreatment by neglect is affirmed.

But relator argues that the commissioner failed to adequately consider that she does not pose a risk of harm. The commissioner is required to make a determination as to relator's immediate risk of harm following the conclusion that relator has a disqualifying characteristic. Minn. Stat. § 245C.16, subd. 1(a) (Supp. 2007). The commissioner is required to consider relevant information, including: the recency, number, and intrusiveness of the disqualifying characteristics; the vulnerability of the victims; and whether relator has a previous disqualification. *Id.*, subd. 1(b) (Supp. 2007). Upon a request for reconsideration from the commissioner's decision, the commissioner may set aside a disqualification if he finds that the individual submits sufficient information

demonstrating that she does not pose a risk of harm. Minn. Stat. § 245C.22, subd. 4(a) (Supp. 2007). The commissioner must consider:

> (1) the nature, severity, and consequences of the event or events that led to the disqualification;
> (2) whether there is more than one disqualifying event;
> (3) the age and vulnerability of the victim at the time of the event;
> (4) the harm suffered by the victim;
> (5) vulnerability of persons served by the program;
> (6) the similarity between the victim and persons served by the program;
> (7) the time elapsed without a repeat of the same or similar event;
> (8) documentation of successful completion by the individual studied of training or rehabilitation pertinent to the event; and
> (9) any other information relevant to reconsideration.

Id., subd. 4(b).

Following the hearing, the ALJ considered the risk of harm and concluded that the department failed to show that relator posed a risk of harm to the children. The ALJ recommended that relator's disqualification be set aside, and that the determination to revoke relator's family child-care license be reversed. But the commissioner disagreed with the ALJ's risk-of-harm analysis in determining that the law creates a presumption that an individual who commits recurring maltreatment poses a risk of harm and it is relator's burden to show with sufficient information that she does not pose a risk of harm. The commissioner determined that consideration of the factors weighed against granting a set aside. We sustain decisions that are supported by substantial evidence and that are not arbitrary and capricious. Here, we are not presented with a sustainable case.

A commissioner's decision is arbitrary and capricious if the explanation offered for the decision runs counter to the evidence or if the decision is so implausible that it could not be explained as a difference in view. *See White*, 567 N.W.2d at 730. The first factors required the commissioner to consider (1) "the nature, severity, and consequences of the event" leading to disqualification, (2) the number of disqualifying events, (3) the age and vulnerability of the victims, and (4) the harm suffered. *See* Minn. Stat. § 245C.22, subd. 4(b). The commissioner determined that these factors weighed against granting a set aside, finding that relator repeatedly failed to appreciate the need to supervise the children. The evidence shows that on one occasion relator withheld lunch, but gave the children a snack; while her home was being remodeled relator did not use a baby monitor, but periodically checked on the napping children; and she allowed the children to walk from the end of her driveway to her home after the school bus dropped them off, and one child took longer to reach her home because he enjoyed being outdoors and relator watched him through a window. The evidence also shows that no child suffered any harm while under relator's care. The evidence does not support the commissioner's determination that the events leading to disqualification were numerous, severe, or consequential.

Regarding the final three factors—(1) time elapsed without a repeat of the same or similar event, (2) successful completion of training or rehabilitation, and (3) any other information relevant to reconsideration—the commissioner determined that there was nothing in the record showing any repeat conduct, no evidence that relator sought training, and that letters in support of relator were appreciated, but did "not outweigh the

risk." The commissioner attributes the fact that a significant amount of time had passed without a repeat of a same or similar event because relator does not have any children under her care. However, in August 2006, relator was sent notice that she was required to be under supervision of another adult when she provided child-care services. Relator followed this requirement until December 2006, when she was notified that she was prohibited from providing child-care services. There is no evidence that any same or similar events occured between August and December. Regarding the consideration of any training or rehabilitation relator sought after the disqualification, the commissioner found that relator denied deficiencies and failed to accept responsibility. This determination is contrary to the evidence; relator accepted responsibility and corrected each citation. Finally, the commissioner considered letters in support of relator, but determined that the support did not outweigh the risk. The commissioner failed to adequately consider other relevant information. Relevant to this case is that relator believed that she was not doing anything wrong and when she discovered that she was, she immediately took remedial measures; the children of the parent who filed the initial complaint had moved and no longer required relator's child-care services; and the parents who received child-care services from relator appreciated and praised relator's level of care and dedication to the children. Because the commissioner's decision to not set aside relator's disqualification and to affirm the revocation of her child-care license is arbitrary and capricious and runs counter to the evidence, we reverse.

Reversed.