STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1546

Vikki Dobie,
Appellant,

vs.

Cal Ludeman,
Commissioner of Human Services,
Respondent.

Filed June 16, 2009
Reversed and remanded
Stoneburner, Judge

Ramsey County District Court
File No. 62CV075794

Leah Montgomery, Law Offices of Southern Minnesota Regional Legal Services, Inc., Suite 200, 166 East Fourth Street, St. Paul, MN 55101; and

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Lori Swanson, Attorney General, Gail A. Feichtinger, Assistant Attorney General, 900 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 (for respondent)

Mark A. Haase, Director, Public Policy and Advocacy Council on Crime and Justice, 822 South Third Street, Minneapolis, MN 55415 (for amicus curiae Council on Crime and Justice)

Elizabeth J. Richards, Minnesota Coalition for Battered Women, Suite 410, 590 Park Street, St. Paul, MN 55103 (for amicus curiae Minnesota Coalition for Battered Women)

Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and Collins, Judge.*

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

STONEBURNER, Judge

Appellant challenges her permanent disqualification from providing direct-contact services to persons served by state-licensed facilities based on a determination that in 1991, appellant committed second-degree assault. Appellant argues that the Commissioner of Human Services (commissioner) acted arbitrarily and capriciously and committed an error of law by failing to consider the findings of mitigating circumstances surrounding her 1991 conduct and failing to determine what level of offense she could, by a preponderance of the evidence, be found to have committed. Because the applicable statute governing length of disqualification for a person found by a preponderance of the evidence to have committed second-degree assault plainly requires an assessment of the severity level of the offense committed, we conclude that the commissioner committed an error of law by arbitrarily assigning the highest severity level to appellant's conduct and imposing a permanent disqualification when substantial evidence in the record does not support that decision. Therefore, we reverse and remand.

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

FACTS

In 1991, appellant Vikki Dobie was ending an abusive two-year relationship. Just before the abuser moved out of Dobie's residence, he violently attacked her. Soon thereafter Dobie encountered her abuser and, in attempting to retrieve her electronic-benefits-transfer (EBT) card from him, ultimately chased him with a knife. Dobie was arrested for suspected second-degree assault. But Dobie was not charged with any crime as a result of this incident, and the police advised her to obtain an order for protection against her abuser.[1]

Dobie subsequently began providing care to vulnerable adults in facilities licensed by the Minnesota Department of Health (MDH) and Department of Human Services (DHS). In 1996, under the Background Studies Act (the Act), Dobie's 1991 conduct resulted in her disqualification from providing direct-contact care in licensed facilities, but DHS granted Dobie a variance that allowed her to continue providing such services. Since 1996, DHS has repeatedly granted Dobie variances or set aside the disqualification based on the commissioner's repeated determination that Dobie's low risk to the clients she serves does not warrant disqualification. Dobie continued to work in licensed facilities until 2006 when the commissioner notified Dobie that, due to 2005 amendments to the Act, the commissioner no longer has authority to set aside Dobie's disqualification.

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[1] Dobie obtained an administrative expungement of the arrest record in November 2006, but the Department of Human Services did not receive notice of the petition for expungement and was not named in the expungement order.

Dobie requested a hearing to dispute the determination that she committed a permanently disqualifying second-degree assault offense. After an April 2007 hearing, a human services judge (HSJ), found that Dobie was afraid of her abuser and that "[i]t is more likely than not that she chased him with a knife when trying to retrieve her EBT card because of his past abuse toward her." Nonetheless, the HSJ rejected Dobie's argument that self-defense or battered woman syndrome prevented a finding that she committed second-degree assault; and rejected as "speculative" Dobie's argument that, given the mitigating circumstances of her act, she would have been charged only with a lesser offense such as misdemeanor domestic assault. The HSJ found that facts drawn from the police report and Dobie's testimony "contain the elements of second-degree assault."[2] In October 2007, the HSJ, without making any findings concerning the level of second-degree assault committed (i.e. felony, gross misdemeanor, or misdemeanor), recommended that the commissioner affirm Dobie's permanent disqualification for second-degree assault which, due to 2005 amendments to the Act, precluded the possibility of a set aside. The commissioner adopted the HSJ's recommendation and affirmed the decision after Dobie requested reconsideration.

[2] The HSJ also rejected Dobie's argument that expungement of her arrest record precluded DHS from using the arrest record to disqualify her, noting that the Act allows DHS to consider criminal information obtained in a background study unless DHS received notice of a petition for expungement and is specifically named in the expungement order. Minn. Stat. § 245C.08, subd. 1(b) (2006). On appeal, Dobie does not challenge rejection of her arguments regarding self-defense, battered woman syndrome or expungement.

Dobie appealed to the district court. The district court, concluding that Dobie failed to show that the commissioner's decision was arbitrary, capricious, or unreasonable, denied Dobie's request for reversal of the disqualification. This appeal followed, in which Dobie challenges her permanent disqualification from working in facilities licensed by DHS or MDH as arbitrary and capricious and the result of an error of law.

D E C I S I O N

Judicial review of human service matters is governed by the Administrative Procedure Act, Minn. Stat. §14.69 (2008). *Zahler v. Minn. Dept. of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). This court reviews the commissioner's order independently, without deference to the district court's review. *Id*. We may reverse the decision if the substantial rights of a petitioner may have been prejudiced because the decision is affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 14.69 (d), (e), (f).

Dobie argues that the commissioner committed an error of law and acted arbitrarily and capriciously by concluding that she committed a permanently disqualifying crime despite findings of mitigating circumstances and the lack of any criminal prosecution. We agree.

The Act requires the commissioner to disqualify a person subject to a background study from any position allowing direct contact with persons receiving services from a licensed entity on receipt of information showing "a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the

crimes listed in section 245C.15, regardless of whether the preponderance of the evidence is for a felony, gross misdemeanor, or misdemeanor level crime." Minn. Stat. § 245C.14, subd. 1(a)(2) (2006). It is not disputed that Dobie is a person for whom a background study is required under section 245C or that a preponderance of the evidence indicates that Dobie's 1991 conduct meets several definitions of assault contained in various subdivisions of 245C, including, as the commissioner found, second-degree assault.

In 2006, the Act provided in relevant part that:

> An individual is disqualified under section 245C.14 if: (1) regardless of how much time has passed since the discharge of the sentence imposed, if any, for the offense; and (2) unless otherwise specified, regardless of the level of the offense, the individual has committed any of the following offenses: . . . 609.221 or 609.222 (assault in the first or second degree)[3]. . . .

Minn. Stat. § 245C. 15, subd. 1(a) (2006).

Effective August 1, 2007, while the HSJ's decision in Dobie's case was pending, the Act was amended to state that only a *felony-level* violation of section 609.222 (second degree assault) results in permanent disqualification and that gross-misdemeanor or

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[3] Minn. Stat. § 609.222, subd. 1 (2006) states: "Whoever assaults another with a dangerous weapon may be sentenced to imprisonment for not more than seven years or to payment of a fine of not more than $14,000, or both." In criminal law, second-degree assault is considered a felony, but a conviction of second-degree assault could result in a less-than-felony sentence, and a plea-negotiation could result in a conviction of a lesser offense. The Act references felony-level second-degree assault; gross-misdemeanor second-degree assault, and misdemeanor second-degree assault in apparent recognition that not all acts that meet the technical definition of second-degree assault are equal. *See* Minn. Stat. § 245C.15, subds. 1, 3, 4 (Supp. 2007) (providing different periods of disqualification for second-degree assault depending on whether the assault constituted a felony offense, a gross-misdemeanor-level, or a misdemeanor-level second-degree assault).

misdemeanor violations of section 609.222 result in ten- and seven-year disqualifications respectively. 2007 Minn. Laws ch. 112, §§ 34, 36, 37, at 694–97 (amending Minn. Stat. § 245C.15, subds. 1(a), 3, 4 (2006)). This is the law that applies to Dobie's case. *See Holen v. Minneapolis-St. Paul Metro. Airports Comm'n*, 250 Minn. 130, 136, 84 N.W.2d 282, 287 (1957) (stating that "[w]hen the legislature changes the law while a case is pending, but prior to the rendition of judgment, the court may not perpetuate the old law but must apply the new").

The commissioner appears to have relied on the 2006 version of the Act and, therefore, failed to consider that the plain language of the applicable version of the Act requires a determination of the severity level of second-degree assault that, by a preponderance of evidence, Dobie can be deemed to have committed. The commissioner found only that "[a] preponderance of the evidence shows that Dobie committed the offense of second degree assault" and, despite having found mitigating circumstances, failed to make any findings regarding the level of Dobie's offense as felony, gross-misdemeanor, or misdemeanor. Without any determination of the level of severity of Dobie's presumed offense, the commissioner arbitrarily assigned a permanent disqualification. Because the commissioner applied the wrong law (or incorrectly applied the applicable law) to the determination of Dobie's disqualification and arbitrarily determined that she is permanently disqualified, we reverse and remand for a determination of the appropriate level of offense that a preponderance of the evidence indicates Dobie presumably committed under the totality of the circumstances of her 1991 conduct.

Furthermore, based on the record as a whole, including the findings of mitigating factors and the lack of prosecution in 1991, we conclude that there is not sufficient evidence in the record to support a determination that Dobie committed a felony-level second-degree assault, therefore, on remand, the commissioner may only consider whether her offense level was gross misdemeanor or misdemeanor.

Reversed and remanded.