STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1972

James Arthur Kasper,
Relator,

vs.

Commissioner of Human Services,
Respondent.

Filed July 21, 2009
Affirmed
Worke, Judge
Dissenting, Minge, Judge

Minnesota Department of Human Services
File No. 21759275

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Lori Swanson, Attorney General, Cynthia B. Jahnke, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Minge, 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 his disqualification from direct-contact employment in licensed facilities, arguing that (1) respondent-commissioner's application of Minn. Stat. § 245C.24 (2008) to deny a set-aside that had previously been granted was arbitrary, capricious, unreasonable and without evidence to support it; (2) respondent was collaterally estopped from revisiting the set-aside decision; and (3) the 2005 amendments to section 245C.24 violate equal-protection rights, deny due process of law, and deprive relator a remedy guaranteed by the Minnesota Constitution. We affirm.

FACTS

In 1985, relator James Arthur Kasper was convicted of first-degree intrafamilial sexual abuse, in violation of Minn. Stat. § 609.3641, subd. 1 (1984). This statute has since been repealed. The closest equivalent to the repealed statute is Minn. Stat. § 609.342 (2008), which defines first-degree criminal sexual conduct.

In February 2000, Bethesda Rehabilitation Hospital submitted a background study request on relator after he submitted an application for employment. Based on his felony conviction, respondent commissioner of human services recommended that relator be disqualified from positions allowing direct contact with persons receiving services from the licensed facility. A risk-of-harm assessment was conducted that considered (1) the recency of the disqualifying act, (2) the associated violence, (3) the vulnerability of the victim, (4) the similarity between the victim to the persons served by the facility, and (5) the relation of the disqualifying act to the type of service provided. Respondent notified

relator that he had been disqualified from providing direct-contact services and relator requested reconsideration. In June 2000, relator was informed that his disqualification would not be set aside because he failed to show that he did not pose a risk of harm. Soon after, an attorney requested relator's file from respondent. The record does not show what transpired after this request; however, in October 2000, relator was granted a set-aside and allowed to work in a direct-contact position at Bethesda.

In 2008, after amendments to the Department of Human Services Background Studies Act (BSA), Minn. Stat. §§ 245C.01-.34 (2008), Lowell Lundstrom Ministries d/b/a Celebration Church submitted a background study request on relator after he sought employment. Relator was deemed disqualified from direct-contact positions based on his 1985 conviction. Relator again sought reconsideration. In October 2008, respondent affirmed relator's disqualification. Respondent explained that, based on amendments to the relevant statute, relator was permanently disqualified; respondent could not grant a set-aside, regardless of how much time had passed and regardless of whether relator showed that he did not pose a risk of harm; and respondent had no authority to grant a variance. This writ of certiorari follows.

D E C I S I O N

Relator challenges respondent's decision to permanently disqualify him from positions requiring direct contact with individuals served by the licensed facility. A quasi-judicial agency decision not subject to the Administrative Procedure Act is reviewed on writ of certiorari by inspecting the record to determine whether the decision was "'arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law,

or without any evidence to support it.'" *Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444-45 (Minn. App. 1996) (quoting *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992) (other quotations omitted)). This court may reverse an administrative decision if it is not supported by substantial evidence or is arbitrary and capricious. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 277 (Minn. 2001). An agency's conclusion is arbitrary and capricious if there is no rational connection between the facts and the agency's decision. *Id.* Further, this court presumes that "the agency's decision . . . is correct, but the court may reverse an agency decision if the decision was affected by an error of law." *N. States Power Co. v. Minn. Pub. Utils. Comm'n*, 344 N.W.2d 374, 377 (Minn. 1984) (citations omitted). "Evaluating a statute's constitutionality is a question of law." *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999).

Arbitrary, oppressive, and unreasonable

Relator first argues that his permanent disqualification is arbitrary, oppressive, and unreasonable, and is without evidence to support it because it is based solely on his 1985 conviction and the amendment to the statute, in spite of his previous set-aside.

The BSA requires respondent to conduct a background study on "current or prospective employees . . . who will have direct contact with persons served by the facility, agency, or program." Minn. Stat. § 245C.03, subd. 1(a)(3); *see also* Minn. Stat. § 245C.02, subd. 5 (defining background study to mean a review of records to determine whether a subject is disqualified from direct contact with persons served by a program). As part of the study, respondent reviews information from the Bureau of Criminal

Apprehension. Minn. Stat. § 245C.08, subd. 1(a)(4). Respondent must disqualify an individual from any position allowing direct contact with persons served by the licensed facility if information shows a conviction of statutorily identified crimes. Minn. Stat. § 245C.14, subd. 1(a)(1). An individual is permanently disqualified, regardless of how much time has passed since the discharge of the sentence imposed, if the individual committed criminal sexual conduct in the first degree, in violation of Minn. Stat. § 609.342. Minn. Stat. § 245C.15, subd. 1(a).

Respondent has discretion to set aside a disqualification if the individual sufficiently demonstrates that he "does not pose a risk of harm to any person served by the [licensed facility]." Minn. Stat. § 245C.22, subd. 4(a). In doing so, respondent is required to "give preeminent weight to the safety of each person served by the [licensed facility]." *Id.*, subd. 3. But in 2005, the legislature amended Minn. Stat. § 245C.24, subd. 2, establishing a permanent bar for setting aside a disqualification, "regardless of how much time has passed, if the individual was disqualified for a crime or conduct listed in section 245C.15, subdivision 1." 2005 Minn. Laws ch. 136, art. 6, § 7, at 985. Thus, following this amendment, respondent no longer had discretion to set aside a disqualification of a person convicted of first-degree criminal sexual conduct, regardless of how long ago the conviction occurred.

In 1985, relator was convicted of intrafamilial sexual abuse. Under Minn. Stat. § 609.3641, subd. 1, it was a crime if an individual (1) had a family relation to and engaged in sexual penetration with a child, or (2) had a family relation to and engaged in sexual penetration with a child and (a) used force or coercion; (b) was armed with a

dangerous weapon and used or threatened to use it; (c) caused the victim to reasonably fear imminent great bodily harm; (d) caused personal injury; or (e) committed multiple acts over an extended period of time. That statute was repealed and the closest equivalent is Minn. Stat. § 609.342, first-degree criminal sexual conduct. Relator does not challenge the elements of the crime or the determination that the elements of the crime fit under the current statute. Rather, relator argues that respondent could not permanently disqualify him for this conduct when he was previously granted a set-aside based on the same conduct.

Relator relies on *Malloy v. Comm'r of Human Servs.* to support his argument that a set-aside becomes final and cannot be rescinded based on subsequent information. 657 N.W.2d 894 (Minn. App. 2003). In *Malloy*, a background study revealed a misdemeanor theft conviction, which resulted in the relator's disqualification. *Id.* at 895. The relator requested reconsideration and was granted a set-aside. *Id.* A little over a year later, respondent found the relator culpable for maltreatment following an incident at the daycare center where he worked, and reversed the earlier set-aside. *Id.* Several months later, the relator applied for a new job. *Id.* Following a new study, respondent ordered the employer to remove the relator from a direct-contact position because of the prior disqualification. *Id.* Respondent denied the relator's request for reconsideration. *Id.* The relator argued to this court that respondent exceeded its statutory authority by denying reconsideration because the denial was based on the improper reversal of the prior set-aside. *Id.* at 896.

This court determined that respondent exceeded its statutory authority because the statutory scheme at the time did not contemplate a reversal of a set-aside. *Id.* That determination was based on the fact that the relator received notice that his status after the set-aside was "the same [] as someone who had not been disqualified." *Id.* The court also determined that respondent could not disqualify or reverse the set-aside because the finding of maltreatment was not serious or recurring, which was required under the statute to disqualify a person for a finding of maltreatment. *Id.* at 897.

This case is distinguishable because respondent did not exceed any statutory authority. Indeed, respondent did as the statute required, that is, imposing a permanent disqualification if the information shows that the person studied was convicted of a disqualifying crime. *See* Minn. Stat. §§ 245C.14, subd. 1(a)(1), .15, subd. 1(a). Relator argues that respondent cannot disqualify him because he was previously granted a set-aside. But under the current statutory scheme, a disqualified person who is granted a set-aside remains a disqualified person. Minn. Stat. § 245C.22, subd. 5. And respondent is now allowed by statute to rescind a previous set-aside. *Id.*, subd. 6.

Additionally, a set-aside is limited to the licensed program or facility specified in the set-aside notice. *Id.*, subd. 5. Here, relator received a set-aside as it related to his employment with Bethesda in 2000. In 2008, a new background study was requested by Celebration Church with respect to new employment, which followed the statutory amendments. *See* Minn. Stat. § 245C.03, subd. 1(a)(3) (stating a background study is conducted on "current or prospective employees"). Further, a previous set-aside would have been based on the risk-of-harm assessment, which looks at items relevant to the

persons served by a particular facility. *See* Minn. Stat. § 245C.22, subd. 4 (providing that in determining whether an individual poses a risk of harm respondent must consider, among other things, "vulnerability of persons served by *the program*" and "the similarity between the victim and persons served by *the program*"). (Emphasis added.) Therefore, relator's argument that respondent's decision was arbitrary, oppressive, unreasonable, or without evidence fails because respondent was bound by law to permanently disqualify relator.

Estoppel

Relator next argues that respondent should be estopped from disqualifying him. Estoppel may apply to agency decisions. *Graham v. Special Sch. Dist. No. 1*, 472 N.W.2d 114, 116 (Minn. 1991). There are five factors that must be met in order for estoppel to apply: (1) the issue to be precluded must be identical to the issue previously raised; (2) the issue must have been necessary to the earlier decision and properly before the agency; (3) the decision must be a final adjudication; (4) the party sought to be estopped was a party or in privity to the earlier determination; and (5) the party sought to be estopped was given a full and fair opportunity to be heard. *Id.*

Relator fails on the first factor because the issues are not identical. The first issue involved respondent granting a set-aside of relator's disqualification from direct-contact services at Bethesda and the current issue involves respondent permanently disqualifying relator from direct-contact services at Celebration Church. Further, this case involves the application of an amended statute. It cannot be said that the matters involve identical issues when the applicable law has changed. Previously, respondent was permitted to

grant a set-aside if the disqualified person showed that he did not pose a risk of harm. The current statutory scheme does not permit respondent to grant a set-aside when the disqualifying conduct is the equivalent of first-degree criminal sexual conduct. Therefore, relator's estoppel claim fails.

Constitutional Challenges

Relator's final three arguments involve the constitutionality of the statute. Evaluating a statute's constitutionality presents a question of law, which this court reviews de novo. *Hamilton*, 600 N.W.2d at 722. In doing so, we presume that the statute at issue is constitutional, exercising our power to declare it unconstitutional "with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). This court will not strike down a statute unless the challenging party demonstrates its unconstitutionality beyond a reasonable doubt. *Id.* And we will not substitute our judgment for that of the legislature; if the record indicates that the statute is rationally related to the achievement of a legitimate governmental purpose, it will be upheld. *Essling v. Markman*, 335 N.W.2d 237, 239 (Minn. 1983).

Equal Protection

Relator argues that a permanent disqualification based on his 1985 conviction violated his rights to equal protection of the laws under the Minnesota Constitution. Under the equal-protection clause, "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. "The Equal

Protection Clause . . . requires that people in similar circumstances be similarly treated under the law." *Hawes v. 1997 Jeep Wrangler*, 602 N.W.2d 874, 880 (Minn. App. 1999).

Relator argues that the amended statute treats similarly situated people differently without any rational basis for doing so. Relator contends that the statute creates two groups: (1) people who have a permanent disqualification, and (2) people who do not. Thus, we must first determine whether relator and his group of persons claiming disparate treatment are actually "similarly situated to those to whom they compare themselves." *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 733 N.W.2d 490, 494 (Minn. App. 2007), *aff'd*, 755 N.W.2d 713 (Minn. 2008) (quotation omitted). Whether two groups are similarly situated depends on their respective structure and makeup in light of the statute's purpose. *Erickson v. Fullerton*, 619 N.W.2d 204, 209 (Minn. App. 2000). To be similarly situated, the groups "must be alike in all relevant respects." *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996) (quotation omitted), *review denied* (Minn. Jan. 7, 1997).

Relator contends that there is no basis to treat people who have very old offenses differently than people who have recent or multiple offenses. There are numerous offenses for which individuals are permanently disqualified regardless of how much time has passed since the discharge of the imposed sentence. Minn. Stat. § 245C.15, subd. 1 (disqualifying offenses include, but are not limited to: first-, second-, and third-degree murder; first- and second-degree manslaughter; first- and second-degree assault; felony-level domestic assault, child abuse or neglect, or a crime against children; great bodily harm caused by distribution of drugs; aggravated robbery; kidnapping; first-, second-,

and third-degree murder of an unborn child; solicitation, inducement, and promotion of prostitution; first-, second-, third-, fourth-, and fifth-degree criminal sexual conduct; solicitation of children; incest; first-degree arson; drive-by shooting; felony harassment; use of minors in sexual performance; and possession of pictorial representations of minors).

The statute also provides for 15-year, ten-year, and seven-year disqualification periods. Minn. Stat. § 245C.15, subds. 2, 3, 4. For example, an individual is disqualified for 15-years if "(1) less than 15 years have passed since the discharge of the sentence imposed, if any, for the offense; and (2) the individual has committed a felony-level violation of any of the following offenses . . . ." *Id.*, subd. 2 (offenses include, but are not limited to federal Food Stamp Program fraud; felon ineligible to possess firearm; criminal vehicular homicide and injury; third-, fourth-, and fifth-degree assault; criminal abuse of a vulnerable adult; financial exploitation of a vulnerable adult; false imprisonment; first- and second-degree manslaughter of an unborn child; first- and second-degree assault of an unborn child; coercion; medical-assistance fraud; theft; second- and third-degree arson; burglary; insurance fraud; forgery; dangerous weapons; terroristic threats; financial transaction card fraud; indecent exposure not involving a minor; and a felony-level conviction involving alcohol or drug use). A ten-year disqualification period relates to gross-misdemeanor level offenses. *Id.*, subd. 3. And a seven-year disqualification relates to misdemeanor level offenses. *Id.*, subd. 4.

Relator's equal-protection argument is meritless because the groups are not similarly situated because they are not alike in all relevant respects.[1] Further, from the perspective of the statute's purpose, these groups of individuals are not similarly situated.[2] There is a legitimate purpose for the challenged legislation: to protect children and vulnerable adults served by licensed facilities. *See* Minn. Stat. § 245C.22, subds. 3 (requiring respondent, in reconsidering a disqualification, to "give preeminent weight to the safety of each person served by the license holder"), 4(a) (authorizing set-asides for individuals who demonstrate that they "do[] not pose a risk of harm" to the persons served); *Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 319 (Minn. App. 2005) (providing that the state has a "legitimate interest in protecting vulnerable adults from sex

[1] We note that a more viable equal-protection argument could be made in a situation that we are not presented with here. For example, two employees with similar convictions working at the same licensed facility, both receive set-asides, and then some time later, one employee leaves seeking new employment. After the employee is unable to secure new employment and attempts to return to his previous employer, a new background study would disqualify the employee, while the other employee remained in a similar position. In that situation, we would have similarly situated individuals treated differently.

[2] Recently, this court released an opinion addressing a similar equal-protection argument. *Murphy v. Comm'r of Human Servs.*, 765 N.W.2d 100 (Minn. App. 2009). In *Murphy*, the relator was permanently disqualified from direct-contact positions because years earlier she had her parental rights involuntarily terminated. *Id.* at 102-03. This court reversed the disqualification based on an equal-protection challenge, holding that "to the extent that the BSA bars the commissioner from setting aside the disqualification of an individual whose parental rights were involuntarily terminated under circumstances where the commissioner could set aside the disqualification if the individual's parental rights had been voluntarily terminated, the BSA denies the individual the equal protection of the law." *Id.* at 108. This case can be distinguished from *Murphy* because *Murphy* deals with parental-rights terminations—the only noncriminal conduct listed in Minn. Stat. § 245C.15, subd. 1.

offenders" disqualified under the BSA), *review denied* (Minn. Nov. 15, 2005). The legislature believed that this classification would promote that purpose by permanently disqualifying individuals who have been convicted of certain serious violent crimes and crimes involving children.

Even if the groups were similarly situated, the statute would still pass the rational-basis test. Because a fundamental right or a suspect class is not involved, whether the statute will survive this constitutional challenge depends on whether there is some rational relationship to a legitimate state purpose. *Skeen v. State*, 505 N.W.2d 299, 313 (Minn. 1993). The rational-basis test requires "(1) a legitimate purpose for the challenged legislation, and (2) that it was reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose." *State v. Russell*, 477 N.W.2d 886, 887 (Minn. 1991). The legitimate purpose here is to protect children and vulnerable adults. And it was reasonable for lawmakers to believe that imposing permanent disqualifications for individuals convicted of serious violent crimes would promote that purpose.

Due Process

Relator also argues that his procedural due-process rights were violated because he is permanently barred from working in his chosen career regardless of whether he can demonstrate that he poses no risk of harm. Because Minnesota's Due-Process Clause protects an individual's property interest in pursuing work with a department-licensed facility, this court must determine what process is due by applying the balancing test set

forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976). *Sweet*, 702 N.W.2d at 319-20.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333, 96 S. Ct. at 902 (quotation omitted). However, what procedural protections may be "due" in a particular situation varies because, "unlike some legal rules, [due process] is not a technical conception with a fixed content unrelated to time, place and circumstances." *Id.* at 334, 96 S. Ct. at 902 (quotation omitted). Whether an administrative procedure passes constitutional muster requires this court to analyze the particular government and private interests affected. *Id.* This entails consideration of three factors: (1) the private interest; (2) the risk that the existing procedures will erroneously deprive a person of that interest and "the probable value, if any, of additional or substitute procedural safeguards"; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335, 96 S. Ct. at 903.

It has already been established that relator has a protected interest. On the second factor, relator was given an opportunity to show that respondent relied on false information and to request reconsideration. Thus, relator was given an opportunity to correct an error. But relator was not erroneously deprived of his employment because he does not challenge his conviction. Rather, relator argues that he should be given an opportunity to show that he does not pose a risk of harm; this opportunity, however, is not available to him under the statute. Finally, regarding the government's interest,

administratively, respondent is required to conduct studies and determine disqualifications. Respondent also still has the burden of reconsidering disqualifications and determining whether to grant set-asides. But respondent is no longer required to do so in cases involving permanent disqualifications, which is justified because these individuals have been convicted of serious felonies, and have been determined to pose a risk of harm. Therefore, relator's due-process rights have not been violated.

Remedy

Finally, relator argues that his permanent disqualification violates the Remedies Clause of the Minnesota Constitution, which provides that "[e]very person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws." Minn. Const. art. 1, § 8. But this clause "is not a separate and independent source of legal rights." *Hoeft v. Hennepin County*, 754 N.W.2d 717, 726 (Minn. App. 2008), *review denied* (Minn. Nov. 18, 2008). The clause "does not guarantee redress for every wrong, but instead enjoins the legislature from eliminating those remedies that have vested at common law" without either a legitimate legislative purpose or reasonable legislative substitute. *Id.* (emphasis and quotations omitted). Relator cites no vested common-law right that was eliminated by his permanent disqualification. Therefore, this argument fails.

Affirmed.

MINGE, Judge (dissenting)

Because I conclude the constitutional equal protection and due process provisions are violated, I dissent.

As a result of an amendment, the statute effectively places in different categories the following individuals: past offenders who have been granted set-asides and who remain in a job, and past offenders who have been granted set-asides and are changing jobs or seeking to reenter the work force. Those in the first category have a continuing set-aside, are allowed to continue working, and no new review takes place. People in the second category are disqualified from any consideration for doing similar work and are denied the opportunity for any hearing. There is no showing of any substantial state interest in denying the second group any opportunity for a hearing. There is no showing that there is a factual basis for concluding that persons in the second group somehow have become so inherently dangerous that they should not even be accorded the due process of a fair hearing to determine whether they pose a threat.

Appellant was granted set-aside to work at Bethesda Rehabilitation Hospital. He left that position. There is no claim that he left Bethesda for any reason related to his work performance or character. In fact, at oral argument, in response to a question, counsel stated that appellant left Bethesda to care for a family member. Now appellant has applied for a position with Celebration Church, a part of Lowell Lundstrom Ministries. Based on the reasoning and result in our recent case of *Murphy v. Comm'r of Human Servs.*, 765 N.W.2d 100, (Minn. App. May 5, 2009), I conclude that this new

classification violates appellant's right to equal protection and due process of the law when a set-aside is precluded without an opportunity for a hearing. I would reverse.