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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2182**

Mohamed Shivji,
Relator,

vs.

Commissioner of Health,
Respondent.

**Filed July 28, 2009
Affirmed
Hudson, Judge**

Minnesota Department of Health
Health Facility ID: 21276

Mohamed Shivji, 6300 Welcome Avenue North, Brooklyn Park, Minnesota 55429 (pro se relator)

Lori Swanson, Attorney General, Jocelyn F. Olson, Assistant Attorney General, 1200 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130 (for respondent)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Muehlberg, Judge.*

UNPUBLISHED OPINION

HUDSON, Judge

Relator challenges the denial of his request to set aside his disqualification from any position allowing direct contact with persons receiving services from state-licensed

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

facilities. Because the commissioner's decision is supported by substantial evidence, we affirm.

FACTS

24 Hour Care is a supplemental nursing agency in Minneapolis that supplies temporary staffing to health care facilities. Pursuant to Minn. Stat. §§ 144A.70–.74 (2008), 24 Hour Care is registered with and licensed by the Minnesota Department of Health (MDH). Minnesota law requires that background studies be performed on all employees of MDH-licensed programs that have direct contact with persons served by the programs' facilities. Minn. Stat. § 245C.03, subd. 1(a)(3) (2008). Respondent Commissioner of Health is required to disqualify individuals convicted of certain specified crimes from any position allowing direct contact with persons receiving services from state-licensed facilities. Minn. Stat. § 245C.14, subd. 1(1) (2008).

Relator Mohammed Shivji worked for 24 Hour Care as a licensed practical nurse. Minnesota Department of Human Services (MDHS) conducted a background study on relator, which revealed that relator was convicted of misdemeanor indecent exposure on April 24, 2006. A conviction of indecent exposure requires a seven-year disqualification under Minn. Stat. § 245C.14, subd. 1(1). Minn. Stat. § 245C.15, subd. 4(a) (2008).

On July 30, 2008, MDHS notified relator that as a result of his conviction, he was disqualified from any position allowing direct contact with or access to persons receiving services from 24 Hour Care. Relator requested a set aside of the disqualification on the basis that he does not pose a risk of harm to the people receiving services from 24 Hour Care. The commissioner denied the set-aside request, finding that—based upon the

statutorily prescribed risk-of-harm factors—relator poses a risk of harm to the individuals served by 24 Hour Care. Relator subsequently submitted additional information to the commissioner, but the commissioner again declined to set aside the disqualification. This certiorari appeal follows.

D E C I S I O N

Relator challenges the denial of his set-aside request and the determination that he poses a risk of harm to individuals receiving treatment from 24 Hour Care. The denial of relator’s set-aside request is a final administrative-agency action subject to certiorari review under Minn. Stat. § 480A.06, subd. 3 (2008). A “party seeking review on appeal has the burden of proving that the agency has exceeded its statutory authority or jurisdiction.” *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996). “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).

This court will sustain an agency’s decision if it is supported by substantial evidence. Minn. Stat. § 14.69(e) (2008); *Meuleners*, 725 N.W.2d at 123. Substantial evidence means: “1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than ‘some evidence’; 4) more than ‘any evidence’; and 5) evidence considered in its entirety.” *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

When considering an individual's request for reconsideration of a disqualification, the commissioner is statutorily required to weigh nine different factors to determine whether the individual poses a risk of harm to any person served by the particular position the individual seeks to continue. Minn. Stat. § 245C.22, subd. 4(b) (2008).

These factors include:

- (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. These factors are not intended to serve as a checklist, and the commissioner's decision on whether to set aside an individual's disqualification may be based on "any single factor." *Id.*, subd. 3 (2008). The commissioner is required to "give preeminent weight to the safety of each person served by the . . . applicant . . . over the interests of the disqualified individual." *Id.*

Relator's principal argument is that there is no similarity between the victim of relator's crime and the patients receiving services from 24 Hour Care. We agree with relator's contention, as did the commissioner, who found that there was little or no similarity between the victim and the persons served by 24 Hour Care. We also

recognize that relator seems to be diligently pursuing treatment for his sexual behavior. Consequently, we acknowledge that there is some evidence in the record that bolsters relator's challenge.

But we conclude that the weight of the evidence supports the commissioner's determination that relator poses a risk of harm under the statutory factors. Relator admitted to the conduct that led to his indecent-exposure conviction, which supports the commissioner's determination under the statutory analysis that relator's actions were overt and intentional. Additionally, relator acknowledges that he works with vulnerable individuals—another statutory factor that supports the commissioner's determination.

Further, the commissioner expressed concerns about relator's judgment and his ability to avoid wrong choices. The record indicates that relator's crime is relatively recent, and although relator is being treated for his sexual behavior, relator's treatment efforts are still in the early stages. The recency of relator's crime and the current stage of relator's treatment support the commissioner's decision and substantiate the commissioner's concerns about relator's judgment.

Finally, the commissioner, pursuant to Minn. Stat. § 245C.22, subd. 3, gave preeminent weight to the safety of the persons served by 24 Hour Care. In light of the preeminence given to the safety of those served by 24 Hour Care, and considering the weight of the evidence in the record, we cannot say that the commissioner erred by determining that relator poses a risk of harm under the statutory factors. Therefore, substantial evidence supports the commissioner's determination, and we affirm the denial of relator's set-aside request.

Affirmed.