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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1305**

Margaret Acheaw,
Relator,

vs.

Commissioner of Human Services,
Respondent.

**Filed March 16, 2010
Affirmed
Lansing, Judge
Dissenting; Randall, Judge**

Minnesota Department of Human Services
File No. 21614042

Margaret Acheaw, St. Paul, Minnesota (pro se relator)

Lori Swanson, Attorney General, Ricardo Figueroa, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Halbrooks, Judge; and
Randall, Judge.*

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

UNPUBLISHED OPINION

LANSING, Judge

Margaret Acheaw appeals the commissioner of human services' decision on reconsideration to sustain her disqualification from employment as a personal-care attendant providing direct-contact care. Because the commissioner's decision does not lack support in the record and is within the authority granted the commissioner by statute, we affirm, but we note that Acheaw could seek a variance that would allow her to provide direct care limited only to her son.

F A C T S

Axis Home Health Care, a facility licensed by the Minnesota Department of Human Services, employed Margaret Acheaw as a personal-care attendant. In compliance with the department's requirements, Axis requested a background study on Acheaw because her employment required her to have direct contact with persons who received licensed care. The department began the study in November 2007 and, in June 2008, obtained criminal records showing that Acheaw had been convicted of a felony forgery in 1999 and a felony issuance of a dishonored check in 2004. The department's preliminary assessment confirmed that the two felonies disqualified Acheaw from working as a personal-care attendant.

The department sent letters to Axis and Acheaw in October 2008 stating that Acheaw was disqualified from any position "allowing direct contact with or access to" persons served by state-licensed entities. The letter to Acheaw stated that she could request reconsideration of her disqualification by challenging the accuracy of the

disqualifying information or by showing that she “would not harm people receiving services” despite the disqualifying events.

Acheaw sought reconsideration on the grounds that she posed no risk of harm because her work with Axis involved caring for her son and she would not steal from him. She also stated that her son’s vulnerability related to a physical impairment and that he would not be at risk for the type of behavior for which she had been convicted. Acheaw submitted a letter from Axis that commented positively on her performance and also stated that her son greatly preferred that Acheaw provide care for him. In her own letter to the commissioner, Acheaw said that she had served time for her crimes and had “not been in [] trouble again.” She did not address the 1999 conviction, but provided proof that she successfully completed probation for the 2004 conviction. She also stated that, while in prison for a 1982 offense, she attended “classes to get [her] ready to get back home and not make the same mistake.” She said that “[t]he treatment helped [her] understand that what [she] did was wrong.”

The commissioner upheld Acheaw’s disqualification in May 2009. In the letter notifying Acheaw of the decision, the commissioner stated that Acheaw’s submissions had been considered, but that she had not shown that she posed no risk of harm. The letter appended a worksheet on which the reviewing official rated each of the statutory risk-of-harm factors as low, medium, or high. The letter acknowledged that some factors were a low risk on the scale, but concluded that four of the findings were decisive in the disqualification decision. Those findings included the vulnerability of the persons with whom Acheaw has direct contact, the lack of any documentation to show that Acheaw

had been rehabilitated following the offenses, the recency of the 2004 conviction, and the fact that the letter of support from her employer was not from someone who experienced the offense or would likely receive similar treatment by Acheaw. Finally, the commissioner noted in the worksheet that criminal charges were pending against Acheaw from 2006.

By writ of certiorari, Acheaw appeals the commissioner's reconsideration decision that sustained Acheaw's disqualification from employment as a personal-care attendant for fifteen years following the discharge from the sentence imposed for the offense that resulted in the disqualification.

D E C I S I O N

Employees who perform work under licenses issued by the Minnesota Department of Human Services are subject to a background study by the commissioner. Minn. Stat. § 245C.03 (2008). The statutory framework provides a specific list of disqualifying crimes and conduct that are classified into four separate suspension periods based on the severity of the conduct. *See* Minn. Stat. § 245C.15, subds. 1-4 (2008) (providing for seven-year, ten-year, fifteen-year, and permanent disqualification for persons convicted of one or more enumerated crimes). Check forgery and issuance of a dishonored check are among felonies that require a fifteen-year disqualification. *Id.*, subd. 2. A conviction disqualifies an individual "from any position allowing direct contact with persons receiving services" from the licensed entity. Minn. Stat. § 245C.14, subd. 1(a) (2008).

When a background study results in disqualification, a direct-contact worker may request reconsideration by providing proof that the worker does not pose a risk of harm to

those served. Minn. Stat. § 245C.21, subd. 3(a)(3) (2008). Based on the worker's risk-of-harm submission, the commissioner may set aside the disqualification after considering the nature, severity, and consequences of the disqualifying events; the number of disqualifying events; the age and vulnerability of those affected by the disqualifying events; the harm suffered by them; the vulnerability of persons currently served by the applicant; the similarity between those affected by the disqualifying events and persons currently served; whether time has elapsed without repetition of disqualifying events; whether the applicant has documented training or rehabilitation relevant to the disqualifying events; and "any other relevant information." Minn. Stat. § 245C.22, subds. 4(a)-(b) (2008). The commissioner may base the decision on any single factor, and the safety of persons served is given "preeminent weight . . . over the interests of the disqualified individual." *Id.*, subd. 3 (2008). A decision to set-aside the disqualification may be limited to a specific individual who is receiving services. *Id.*, subd. 5 (2008). But if a decision does not set aside the disqualification for a specific individual, the disqualified individual may also seek a variance. Minn. Stat. § 245C.14, subd. 1(b)(3) (2008).

The commissioner's disqualification decision after a request for reconsideration is a final agency action, subject to certiorari review. *Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444 (Minn. App. 1996). On appeal we review the record to determine whether the decision was arbitrary, oppressive, unreasonable, fraudulent, made under an erroneous theory of law, or without any evidence to support it. *Id.* at 444-45.

Acheaw contends that the commissioner erred in sustaining the disqualification because she does not pose a risk of harm. Our review focuses, therefore, on the statutory risk-of-harm factors that apply to the general disqualification and the sufficiency of the evidence for the commissioner's decision. The commissioner based the decision sustaining the disqualification on four of the risk-of-harm factors. Under the statute, any single factor may be determinative of the commissioner's decision to set aside the disqualification. Minn. Stat. § 245C.22, subd. 3. For purposes of our analysis we address the findings on each of the factors.

First, the commissioner found that “[Acheaw’s] clients are vulnerable because of their physical and/or mental disabilities.” The vulnerability of persons served is a risk-of-harm factor under the statute. *Id.*, subd. 4(b)(5). Acheaw stated that her work with Axis involved caring for her son who is a paraplegic and that she helped him with “dressing, bathing, eating, toileting, housekeeping, transferring, and range of motion.” The evidence supports the commissioner’s conclusion that Acheaw would be working with a person who is vulnerable because of physical disabilities. Acheaw contends that her son is not vulnerable because he is “alert and oriented” and “is able to dial 911 and report any signs of abuse.” Acheaw also maintains that her son’s vulnerability is moderated by his “being supervis[ed] weekly [by] the home care agency.” Acheaw’s convictions directly relate to dishonesty and theft in financial transactions rather than physical misconduct toward a vulnerable individual. Thus the victims of Acheaw’s criminal conduct do not share an obvious similarity with the circumstances of her son’s vulnerability or the vulnerability of other persons cared for by Axis. Nonetheless, it was reasonable for the

commissioner to find that the persons served by the Axis program, including Acheaw's son, are vulnerable.

The commissioner's second finding focused on Acheaw's failure to provide documentation of rehabilitation, particularly the lack of any professional opinion that Acheaw had "changed [her] attitude and behavior." This factual conclusion is pertinent to the eighth statutory risk-of-harm factor, "documentation of successful completion . . . of training or rehabilitation pertinent to the [disqualifying] event." Minn. Stat. § 245C.22, subd. 4(b)(8). Acheaw stated that she received training when she was being released from prison in 1982, but she did not provide documentation. And that conviction, because of the lapse of time, was not one of her disqualifying events. She did not discuss training or rehabilitation for the relevant convictions in 1999 and 2004. The commissioner's finding is supported by the record.

Third, the commissioner found that Acheaw's more recent disqualifying conviction had occurred less than five years ago and that "it is therefore too soon to conclude that [Acheaw has] changed [her] attitude and behavior." The time that has elapsed "without a repeat of the same or similar event" is a statutory risk-of-harm factor. Minn. Stat. § 245C.22, subd. 4(b)(7). Acheaw was convicted for issuing a dishonored check in December of 2004, less than five years before the commissioner's reconsideration of her disqualification. The commissioner noted that the statute specifically includes dishonored-check convictions among those subject to the fifteen-year disqualification. Although it is not clear how the worksheet's guidelines for rating the time elapsed were applied to Acheaw, it was not unreasonable for the commissioner

to conclude that not enough time has yet passed to ensure that Acheaw will remain law-abiding.

The commissioner also noted that the licensing division had received information from the Ramsey County District Court that two similar charges from December 2006 were pending against Acheaw. The commissioner mentioned the pending charges in its initial disqualification letter and noted them again on the form appended to its final decision. Acheaw does not address these charges in her request for reconsideration, either to explain or dispute them. But the commissioner's dispositive finding about the passage of time does not rely on the 2006 charges. In stating that less than five years had passed, the commissioner was clearly referring to the 2004 conviction, not the 2006 charges, and that finding is not unreasonable.

The commissioner's last finding addressed Acheaw's letter of support from Axis. The decision states that the supervisor who wrote the letter was "not a witness to or a victim of the disqualifying act" and concludes that Acheaw's behavior in the disqualifying acts "may not be characteristic" of her interaction with the Axis supervisor. The finding appears to recognize a distinction between personal-care delivery and theft or financial dishonesty. But it also appears to address the weight or credibility given to the letter because it does not provide information on the "nature, severity, and consequences [of her criminal record] that led to the disqualification." *See* Minn. Stat. § 245C.22, subd. 4(b)(1) (including "the nature, severity, and consequences of the [disqualifying] events" among risk-of-harm factors). The record does not demonstrate that Axis knew the details of Acheaw's disqualifying convictions, and Acheaw said only that her son

“was aware of the offense[s].” The record permitted the commissioner to afford less weight to Axis’s and Acheaw’s son’s opinions about the risk of harm.

Because all four of the commissioner’s determinative findings reflect consideration of the statutory factors and find support in the record, the decision is not “made under an erroneous theory of law, or without any evidence to support it.” *Rodne*, 547 N.W.2d at 445.

Acheaw argues that the decision, even if supported by the evidence and the law, is nonetheless oppressive or unreasonable in her case. The record supports her basic assertion that her son has not been harmed by her, and the commissioner’s risk-of-harm assessment indicates that Acheaw’s clients were dissimilar from the victims of her crimes. Crimes that involve direct physical misconduct or injury, of course, present a greater threat to vulnerable individuals. That differentiation is recognized by the statutory framework that provides for a disqualification period ranging from a seven-year disqualification to a permanent disqualification. We also recognize that Acheaw’s ability to provide personal care for her son may well be the circumstance that her son would prefer. Nonetheless, the state has a strong interest in protecting vulnerable adults and the statute accordingly provides the commissioner with broad authority to regulate those who work with vulnerable adults. The statute explicitly values the safety of the vulnerable over the interests of the direct-care workers, and the commissioner explicitly asserted its compliance with that requirement in its decision.

The regulations, although strict on issues of general disqualification, also provide for a variance that would allow Acheaw to provide direct care limited only to her son.

See Minn. Stat. § 245C.30 (2008) (permitting commissioner to issue variance). In light of Axis’s support and the increase in the amount of time that has elapsed since the 2004 conviction, Acheaw may be able to obtain a variance to permit her to provide appropriately supervised direct care that is limited to her son. *See id.*, subd. 1 (stating that variance is permitted when “there are conditions under which the disqualified individual may provide direct contact services or have access to people receiving services that minimize the risk of harm”). Under the provisions of the statute, the license holder could apply for a suitably conditioned variance that would provide a greater opportunity for enforceable safeguards, sufficient to address any concerns the commissioner might have about the risk of harm if Acheaw was limited to providing direct care only to her son.

Affirmed.

RANDALL, Judge (dissenting)

I respectfully dissent. Although the decision to affirm the commissioner of human services “may be legal,” it is an unjust result. I would reverse and remand to the commissioner to work out a limited license for relator Margaret Acheaw to allow her to continue as a personal care attendant for her son.

Relator has been the personal care attendant for her son under the auspices of Axis since March of 2008. The record is clear that her son, the vulnerable adult, whom the commissioner “is supposed to be concerned about,” wants his mother to continue. Axis Home Health Care, as the facts show, is an entity licensed by the department of human services and employs relator, and Axis wants her to continue. The majority correctly notes, “Acheaw submitted a letter from Axis that commented positively on her performance and also stated that her son greatly preferred that Acheaw provide care for him.” In the letter, Axis states that Acheaw “possesses the necessary passion and ability” to be a personal care attendant and that she “has a great understanding of the client’s needs and [is] always on top of her job performance.”

Relator’s son wants her to continue as his personal care attendant and the commissioner does not. The common-sense tie-breaker in this instance would be Axis. They have other people they could hire to help relator’s son. They are licensed by the department and therefore have a vested interest in not having any of their employees, including relator, foul up and make them subject to a personal lawsuit. They, not relator, would be the target of a lawsuit because they are the “deep pockets.” Despite that

possible exposure, Axis has commented positively on relator's performance, wants her to continue, and points out that her son wants his mother to stay with him.

All I can see the state doing in this case is acting like the classic bureaucrat and being more interested in protecting itself than in taking care of relator's son, who is supposed to be the focus of the department in this case.

The commissioner had some findings. The first factor is that relator's son was found to be vulnerable because of physical disabilities. Who is surprised? Of course he is vulnerable—that is why the commissioner authorized Axis to hire someone to take care of him. Assuming he receives personal-care services through the state's medical assistance program, he is necessarily considered a "vulnerable adult." *See* Minn. Stat. § 626.5572, subd. 21(a)(3) (defining "vulnerable adult" in mandated reporting context and including those who receive personal care services under Minn. Stat. § 256B.0659). The commissioner's second finding is "failure to provide documentation of rehabilitation." Rehabilitation is directly in the eye of the beholder. If the department wants relator to continue to care for her son, it would find rehabilitation. If it does not want her to care for her son, then it will find no rehabilitation.

The next finding is about dishonored checks "less than five years ago." So. The last few years, the State of Minnesota has been subjected to a handful of Ponzi-type frauds that have stolen from Minnesotans and people out of state hundreds of millions of dollars. All those investigations are public record and are ongoing. The suspects in each of those are white-collar men and women who, to my knowledge, were never convicted two or three or four years ago on account of a bad check. Bad checks are not good, but I

do not put small amounts in the “hall of shame,” deserving anything close to a flat 15-year disqualification.¹ That is the treachery of inflexible guidelines. Minnesota lawyers and Minnesota judges, state and appellate, learned a long time ago that inflexible criminal sentencing guidelines and inflexible child-support guidelines are a downhill slope to mediocrity, and rigid application does far more harm than good.

The commissioner also noted the absence of details or explanations for relator’s past criminal behavior. What is there to explain? All criminal convictions are a matter of public record, well noted in court dockets, and check forgery and issuing a dishonored check are not hard to understand.

On the issue of relator’s “risk of harm” to her son, I can only point out the obvious. She has already cared for him for several months, with no problems, as to him, of record. The courts see these cases. The majority of abuse-of-vulnerable-adult cases involve attendants, nursing-home employees, etc. who, except for the job, are strangers to the victim. It is not common with close relatives. You can have cases where adult children take financial advantage of vulnerable parents, particularly those suffering from memory loss, but this is not that case. I do not find any cases where mothers have been convicted or successfully sued civilly for abuses proven to have happened while they were caring for their own children under the auspices of a certified home-care provider like Axis.

¹ We do not know the amount of Acheaw’s dishonored check, but her crime was surely less serious and less relevant than other crimes to which a statutory 15-year disqualification also applies. See Minn. Stat. § 245C.15, subd. 2 (2008) (requiring 15-year disqualification, for example, for criminal vehicular homicide, second-degree arson, third-degree assault, and criminal abuse of a vulnerable adult).

Yes, everybody is technically at risk. In Minnesota, getting out of your house and getting to work in the winter “puts you at risk.” But I suggest the risk to relator’s son, “a vulnerable adult,” will be greater from a total stranger than from his mother. If common sense and empathy have any standing in the hierarchy of bureaucracy, this case is simple. The solution is simple. The commissioner has a round-table discussion with relator and a representative from Axis. The conversation goes like this:

The commissioner says: “Alright Mrs. Acheaw and Axis, here’s the deal. We will give you a limited license to continue caring for your son. If you successfully complete one year (or two or three—that is negotiable) without any incidents, we will consider—not guarantee—restoring you to full-time good standing. In the meantime, your patient list is one—your son. Axis, she works for you, and so you are under the gun to keep an eye on relator and her son so the quality of care he is entitled to will be delivered. Mrs. Acheaw and Axis, do we have a deal?”

If the answer from relator and Axis is “yes,” then the commissioner has a workable deal, which will benefit the person they are supposed to be concerned about—relator’s vulnerable son.

If the bureaucracy comes to work determined to preserve their turf and takes every opportunity to display the authority they have, perhaps it is time to find a change of work. Find a job where you enjoy coming to work, where you use whatever power your job gives you to try to help, when you can, the people you are responsible for, not hurt them.

I would reverse and remand to the commissioner for specific instructions to work out a satisfactory arrangement with relator and Axis, so that relator, under guidance, could continue to care for her vulnerable son.