STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1259

In the Matter of the Temporary Immediate Suspension of the Family Child Care License of Lori Gilbertson.

Filed March 17, 2014
Reversed and remanded
Hudson, Judge

Minnesota Department of Human Services
OAH Docket No. 66-1800-30637

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Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Stauber, Judge.

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

HUDSON, Judge

Relator child-care licensee challenges respondent commissioner of human service's temporary immediate suspension (TIS) of her child-care license, based on her allegedly improper supervision of a child who fell into a septic tank. Because we conclude that the commissioner's decision was arbitrary and capricious and unsupported by substantial evidence, we reverse and remand for the commissioner to rescind the TIS.

FACTS

Relator Lori Gilbertson is a licensed child-care provider operating out of her home in Lindstrom. On April 25, 2013, relator was caring for ten children, ranging from 11 months to six years old. Relator had been supervising eight of the children in the backyard, which extended out from the lower level of relator's home and was accessed by a patio door. Because one of the children was misbehaving, relator took him inside and talked to him while bending down with her back to the patio door. Although the screen portion of the door was shut, the glass portion was open. About one minute later, one of the children outside called to relator that E.H., a three-year-old boy, had fallen into a "hole."

Relator ran to investigate and discovered that the lid on her septic tank had given way and E.H. had fallen into the tank, which had been pumped four months earlier and was about eight feet deep down to the surface of the sewage. She immediately jumped into the tank and held E.H.'s head above the surface of the sewage so he was not completely submerged. Within three to four minutes, a parent arrived to pick up another child. When that parent heard relator call for help, she was able to take the child from relator and assist relator from the tank. Relator washed E.H. off and called his mother, who arrived in approximately ten minutes. As a precautionary measure, relator advised her to have E.H. checked at a hospital. E.H.'s mother did so, and the examining doctor determined that E.H. had no injuries and that his medical condition was normal. E.H.'s mother continued to send him to daycare with relator.

Relator believed that, because E.H. was not injured, she was not required to report the incident. The Chisago County Human Services Department learned of the incident when the hospital sent a copy of E.H.'s chart to the department. After the county conducted an investigation and identified relator, a county social worker made an unannounced visit to relator's home and relator acknowledged the incident. The social worker examined the backyard and observed that the septic tank had a new lid and had been fenced off. The social worker asked relator how she could supervise the children adequately when some were outside and some were inside; relator stated that she "floats" about.

The social worker consulted with the Chisago County Attorney and the Minnesota Department of Human Services; the department decided to issue a TIS based on relator's inadequate supervision and failure to report the incident. Relator challenged the TIS, arguing that her supervision was adequate because she was within hearing of the child at the time the accident occurred and that E.H. did not require medical attention. At a hearing before an administrative-law judge (ALJ), relator presented affidavits from four parents and testimony from four other parents supporting the quality of her care and level of attention to the children.

The ALJ recommended that the TIS be rescinded, concluding that the commissioner of human services had failed to show reasonable cause to believe that relator had either acted or failed to act in compliance with the law, posing an imminent risk of harm to the health, safety, or rights of persons served. The ALJ found that, although regulations state that a provider shall report a "serious injury," which is defined

as an injury treated by a physician, that issue did not need to be resolved to decide whether the facts justified a finding of imminent risk.

The commissioner declined to adopt the ALJ's recommendation and affirmed the TIS. The commissioner made only minor clerical changes to the ALJ's findings and found that relator's failure to report the incident was not determinative. But the commissioner found that, at the time of the incident, relator was not within sight of E.H., and the fact that she heard a commotion and was informed of the accident by another child did not provide sufficient evidence that she was within hearing of E.H. at all times, as required by law. The commissioner concluded that, although the septic tank no longer posed an imminent risk of harm, "without a showing of how [relator's] supervision practices will now align with the law," sufficient facts existed to believe that conditions in her daycare operation posed an imminent risk of harm to children in her care. This certiorari appeal follows.

D E C I S I O N

This court will reverse or modify an agency decision if the agency's findings and inferences are unsupported by substantial evidence or its decision is arbitrary or capricious or affected by legal error. Minn. Stat. § 14.69 (d)-(f) (2012); *see In re Revocation of the Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003). A reviewing court accords an agency decision a presumption of correctness and defers to agency expertise and special knowledge within the scope of the agency's authority. *In re Excess Surplus Status of Blue Cross & Blue Shield*, 624 N.W.2d 264, 278

(Minn. 2001). But we are not bound by an agency's ruling on a legal issue. *In re Burke*, 666 N.W.2d at 726.

When an agency reviews the recommendation of an ALJ, the agency decisionmaker must independently review the evidence and need not defer to the ALJ's findings, conclusions, and recommendations. *In re Excess Surplus Status*, 624 N.W.2d at 278. This court does not have a heightened standard of review when the agency decisionmaker arrives at a final decision that differs from the ALJ's recommendation. *Id.* But "[r]ejection of the ALJ's recommendations without explanation . . . may suggest that the agency exercised its will rather than its judgment and was therefore arbitrary and capricious." *Id.* An agency's decision must articulate a "rational connection between the facts found and the choice made." *In re Excess Surplus Status*, 624 N.W.2d at 277 (quotation omitted).

Substantial evidence has been defined as "(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; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002). A lack of articulated standards and reflective findings may suggest that an agency decision is unsupported by substantial evidence. *Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668–69 (Minn. 1984). When determining whether an agency's decision is supported by substantial evidence, this court must "review . . . the entire record" and take into account contradictory evidence "because evidence which might be conclusive if unexplained,

may lose all probative force when supplemented or explained by other testimony." *In re Temp. Immediate Suspension of Family Child Care License of Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010) (quotation omitted).

By statute, the commissioner shall immediately temporarily suspend the license of a daycare provider if the provider's actions, failure to comply with law or regulations, or program conditions pose an imminent risk of harm to the safety or health of persons served by the program. Minn. Stat. § 245A.07, subd. 2 (2012). A provider may demand an expedited hearing to consider whether the commissioner has shown reasonable cause for the suspension. *Id*., subd. 2a(a). "Reasonable cause" requires "specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served." *Id*.

Minnesota law requires that a provider must be "within sight or hearing of an infant, toddler, or preschooler at all times, so that the caregiver is capable of intervening to protect the health or safety of the child." Minn. R. 9502.0315, subp. 29a (2012). The commissioner found that relator did not provide proper supervision at the time of the accident because she had her back to the yard, so that she was not within sight of E.H., and that there was insufficient evidence that she was within hearing of E.H. Therefore, the commissioner concluded, reasonable cause existed to believe that she failed to act in compliance with the law and posed an imminent risk of harm to the children in her care.

Relator, however, argues that the commissioner's decision was arbitrary because it does not demonstrate a rational connection between the facts found and the choice made to impose a TIS. She argues that, because she heard a commotion and heard another

child call for help, the record does not support a finding that she was not within hearing of E.H. Relator also notes that E.H.'s mother testified that relator's actions saved his life, that the septic tank has now been fenced off, and that a subsequent child-protection investigation did not find that children in her care were in imminent danger. Therefore, she argues, the evidence does not rise to the level of reasonable cause to show "specific articulable facts or circumstances" providing a reasonable suspicion of an imminent risk of harm to the children's health or safety.

We agree. Although the commissioner's decision reflects an appropriate concern for supervision of children in licensed child-care settings, on this record, it is unsupported by substantial evidence. The ALJ found that relator had the glass door to the back yard open, that she heard a call for help, and that her ability to respond to E.H. immediately was consistent with her location just inside the door. The ALJ's detailed findings, which were unchallenged by the commissioner, do not support the commissioner's determination that relator was not within hearing of the children. On this record, the commissioner's rejection of the ALJ's recommendation without explanation or additional findings of its own supports a conclusion "that the agency exercised its will rather than its judgment and was therefore arbitrary and capricious." *In re Excess Surplus Status*, 624 N.W.2d at 278; *see also CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *review denied* (Minn. Nov. 13, 2001) (concluding that an agency decision was arbitrary and capricious when the agency significantly deviated from the ALJ's recommendations without explanation or additional findings to support its disposition). In addition, the record shows that E.H.'s mother, who sent him to relator's

home the day after the incident, testified that she was "absolutely" satisfied with relator's care; other parents also testified in relator's support. *See In re Burke*, 666 N.W.2d at 728 (reversing and remanding order for revocation of a family child-care license when the record lacked evidence of deliberate disregard for the children or injury or near injury to the children, and parents came to the defense of the license holder).

The commissioner argues that E.H.'s fall reflects relator's inadequate supervision practices because, at the time of the incident, relator had seven other children playing in her back yard, she neither heard nor saw E.H. fall into the tank, and many kinds of accidents could have happened during the brief period when she was inside. These are legitimate concerns. But the commissioner has never alleged that the number of children in relator's care exceeded those permitted by licensing regulations—a fact confirmed by the commissioner's counsel at oral argument before this court. And although investigating DHS workers questioned relator's style of supervision, the ALJ's uncontradicted findings demonstrate that relator was within hearing of the children, as required by law. *See* Minn. R. 9502.0315, subp. 29a. Thus, substantial evidence does not support the commissioner's conclusion that "specific articulable facts or circumstances" pose an imminent risk of harm to children in relator's care under Minn. Stat. § 245A.07, subd. 2a, and we reverse and remand for the commissioner to rescind the TIS.

Reversed and remanded.