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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0346, A09-347**

Tiffany Lynn Mace-Firchau,
Relator,

vs.

Commissioner of Human Services,
Respondent (A09-346),

Commissioner of Health,
Respondent (A09-347).

Filed December 15, 2009

Affirmed

Wright, Judge

Department of Human Services
License No. 800993 245B-WS, Background Study No. 21883943
Department of Health
Health Facility ID 00400

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Considered and decided by Chief Judge Toussaint, Presiding Judge; Wright, Judge; and Ross, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

Relator challenges the decisions by the Commissioner of Human Services and the Commissioner of Health that relator is disqualified from having direct contact with, or access to, persons who receive services from programs licensed by the Minnesota Department of Human Services and the Minnesota Department of Health. We affirm.

FACTS

Relator Tiffany Mace-Firchau was disqualified from working in certain state-licensed facilities after entering an *Alford* plea¹ and being convicted of fifth-degree controlled-substance crime, a violation of Minn. Stat. § 152.025, subd. 2(1) (2006) (possession of a controlled substance by fraud, deceit, misrepresentation, or subterfuge). The conviction arose from an incident on March 21, 2008, in which Mace-Firchau fraudulently submitted a prescription for hydrocodone and received the narcotic commonly known by the brand name Vicodin. When she was arrested, Mace-Firchau also possessed various unlabeled pills, including Vicodin.

Because Mace-Firchau was working at facilities licensed by the Minnesota Department of Human Services (DHS) and the Minnesota Department of Health (MDH), the DHS conducted a statutorily required background study on Mace-Firchau and determined that, due to the *Alford* plea to the controlled-substance crime, Mace-Firchau

¹ An *Alford* plea is entered when a defendant maintains his or her innocence while conceding that there is a substantial likelihood that the evidence would support a jury conviction of the charged offense. *State v. Goulette*, 258 N.W.2d 758, 760-61 (Minn. 1977) (adopting holding of *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970)).

was disqualified for 15 years from working in a position involving direct contact with individuals served by the licensed facilities. *See* Minn. Stat. §§ 245C.03, subd. 1(a)(3) (requiring background studies on certain current and prospective employees of facilities licensed by Department of Human Services), 144.057, subd. 1 (requiring background studies on certain individuals providing services for facilities licensed by Department of Health) (2008). Mace-Firchau requested reconsideration of the disqualification from the Commissioner of Human Services and the Commissioner of Health, arguing that she does not pose a risk to those being served by the two facilities. Concluding that Mace-Firchau failed to demonstrate that she does not pose a risk of harm, both commissioners denied her request. This certiorari appeal followed.

D E C I S I O N

A party may appeal “from a final order, decision or judgment affecting a substantial right made in an administrative or other special proceeding.” Minn. R. Civ. App. P. 103.03(g). A commissioner’s disqualification decision after reconsideration is a final administrative-agency action, which is subject to certiorari review under Minn. Stat. § 480A.06, subd. 3 (2008). *Rodne v. Comm’r of Human Servs.*, 547 N.W.2d 440, 444 (Minn. App. 1996). On a certiorari appeal, we review the record to determine whether the decision is “arbitrary, oppressive, unreasonable, fraudulent, [the result of] an erroneous theory of law, or without any evidence to support it.” *Id.* at 444-45 (quotation omitted).

We will sustain an agency’s decision if it is supported by substantial evidence. Minn. Stat. § 14.69(e) (2008); *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121,

123 (Minn. App. 2006). Substantial evidence is “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).

To grant an application to set aside a disqualification, the commissioner must find that the applicant does not pose a risk of harm to any person served by the applicant. Minn. Stat. § 245C.22, subd. 4(a) (2008). Specifically, the commissioner shall consider (1) the nature, severity, and consequences of the event that led to the disqualification, (2) whether there was more than one event, (3) the age and vulnerability of the victim, (4) the harm suffered by the victim, (5) vulnerability of persons served by the program, (6) the similarity between the victim and the persons served by the program from which the applicant was disqualified, (7) the time elapsed without a repetition of the event, (8) whether the applicant has completed relevant training or rehabilitation, and (9) any other relevant information. *Id.*, subd. 4(b) (2008). Any one of these factors may be determinative of the commissioner’s decision, and the preeminent consideration is the safety of the persons served by the program from which the applicant was disqualified. *Id.*, subd. 3 (2008).

The record indicates that both the Commissioner of Human Services and the Commissioner of Health assessed the risk of harm posed by Mace-Firchau by considering the factors set forth in Minn. Stat. § 245C.22, subd. 4. We review the commissioners’ findings regarding these factors to determine whether their decisions to deny Mace-

Firchau's requests for reconsideration are supported by substantial evidence and are not arbitrary and capricious. Minn. Stat. § 14.69(e). We address each factor in turn.

When evaluating the nature, severity, and consequences of the disqualifying event, both commissioners found that Mace-Firchau's actions were intentional. Although Mace-Firchau contends in her request for the commissioners' reconsideration that her arrest was based on "a simple misunderstanding," the following evidence supports the commissioners' findings: (1) a woman named Stacy, who said that she worked with a physician, Dr. Gee, left a message at the pharmacy requesting the prescription for Mace-Firchau; (2) Mace-Firchau contacted the pharmacy to inquire about the prescription being filled; and (3) Mace-Firchau later went to the pharmacy and retrieved the filled prescription, which contained Vicodin. Mace-Firchau presented inconsistent explanations. When first confronted, she told the officer that she was picking up a different prescription and did not realize that she had received Vicodin. Later she represented to the commissioners that she was refilling a prescription that she had been given by her doctor and that she had "no idea how Dr. Gee's name got involved here." Based on this record, it was reasonable for the commissioners to infer that Mace-Firchau's actions were intentional.

Mace-Firchau does not dispute the commissioners' findings that there was one disqualifying event.

Regarding the three factors related to an alleged victim of a disqualifying event, both commissioners found that there was no victim in Mace-Firchau's disqualifying event. And there is no dispute as to this finding.²

As to the vulnerability of those served by the licensed programs, both commissioners found that those to be served are vulnerable due to their physical and/or cognitive disabilities. Because the vulnerability of those served is one of the nine statutory factors, Minn. Stat. § 245C.22, subd. 4(b)(5) (2008),³ Mace-Firchau's argument that patient vulnerability was erroneously considered is unavailing.

Mace-Firchau concedes that she would have direct contact with patients who are physically impaired at the MDH-licensed facility. And although she acknowledges that the patients at the DHS-licensed facility have mental or physical impairments, she contends that she "rarely [has] direct contact with them."⁴ There is no dispute, however, that the patients in question have mental or physical impairments and that the commissioners' findings that Mace-Firchau would have direct contact with individuals who are vulnerable due to those disabilities are supported by substantial evidence.

² On the form used for the assessment, the Commissioner of Health includes some analysis of factors regarding victims of the disqualifying event. Although this analysis does not specifically address the factors in question, it is relevant to the broader examination of whether Mace-Firchau poses a risk to patients. Our review establishes that this analysis did not lead to an arbitrary or capricious conclusion by the Commissioner of Health.

³ Minn. Stat. § 245C.22, subd. 4(b), was amended to include this factor, effective August 1, 2007. 2007 Minn. Laws ch. 112, § 43, at 703. The dates of the commissioners' decisions are December 30, 2008, and January 7, 2009.

⁴ Mace-Firchau is being disqualified from having direct contact with patients, and although direct contact may be rare at the DHS-licensed facility, the vulnerability of those patients is relevant to the analysis.

Regarding the time elapsed without a repetition of the disqualifying event, both commissioners found that the offense was too recent to conclude that Mace-Firchau has changed her behavior. The Commissioner of Health also observed that the legislature has determined that certain offenses warrant longer disqualifications than others because of the seriousness of the offenses and the “significant risk of harm posed to vulnerable persons.” Mace-Firchau does not dispute the recency of the disqualifying event or that it is in the category requiring a 15-year disqualification.

When analyzing Mace-Firchau’s completion of training or rehabilitation, both commissioners recognized that Mace-Firchau has complied with the conditions of her probation by completing a drug-awareness program, and there is no dispute as to these findings. The Commissioner of Health observed, however, that Mace-Firchau stated in her request for reconsideration that she does not “believe [that the drug awareness program] was designed or taught to address [her] issues,” which may imply the commissioner’s concern that the rehabilitation may not have been completely successful.

Regarding other information relevant to the analysis, the Commissioner of Human Services recognized that Mace-Firchau has worked in health and human services for more than five years. Both commissioners found that Mace-Firchau has not taken responsibility for her actions, relying in part on the fact that Mace-Firchau’s version of events differed significantly from that of the police report.

Mace-Firchau “agrees that she does not recall the events to the same degree” as the police reports, but she contends that this difference does not indicate that she has not

taken responsibility for her actions.⁵ As evidence that she has taken responsibility, Mace-Firchau points to the *Alford* plea and subsequent compliance with the conditions of her probation. But as Mace-Firchau acknowledged in her requests for reconsideration, an *Alford* plea indicates that she is “deny[ing] the allegations made against [her].” *See State v. Goulette*, 258 N.W.2d 758, 760-61 (Minn. 1977) (defining an *Alford* plea). The commissioners’ findings that Mace-Firchau has not taken responsibility for her actions, therefore, are substantially supported by the record.

In sum, the commissioners’ findings are supported by substantial evidence. The offense at issue here was recent and serious, the patients with whom Mace-Firchau would have direct contact are vulnerable, and the record does not reflect that she has taken responsibility for her actions. Any of these findings could be dispositive, particularly given that, as was recognized by both commissioners, the preeminent consideration is the safety of the persons who are served by the licensed facilities. *See* Minn. Stat. § 245C.22, subd. 3.

When reviewed in its entirety, the record establishes that the commissioners properly considered the factors, correctly applied the law, and reached a decision that is supported by the evidence.

Affirmed.

⁵ We observe that, at oral argument, Mace-Firchau’s counsel characterized her conduct as intentional procurement of prescription medication by fraud, which may be an acknowledgment of her intentional wrongful conduct. However, we review the record before the commissioners, not the comments of counsel made on Mace-Firchau’s behalf after the record has closed.