STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1322

Douglas Place Treatment Center, LLC,
Relator,

vs.

Commissioner of Human Services,
Respondent.

Filed May 15, 2017
Affirmed in part, reversed in part, and remanded
Ross, Judge

Minnesota Department of Human Services Licensing Division
License No. 1071339

Christianna L. Finnern and Quin C. Seiler, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, James H. Clark III, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Ross, Judge; and Rodenberg, Judge.

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

ROSS, Judge

The Minnesota Commissioner of Human Services put the Douglas Place chemical-dependency treatment center on conditional-license status for 70 license citations. Douglas Place challenged many of those citations, but 34 are uncontested on appeal. We have

reviewed the challenged citations, and we reverse some of them, but not all. Although even a single citation might justify a conditional-license order, the order is unclear as to which citation or grouping of citations, if any, is allegedly so serious as to support the order. Because we do not know whether the commissioner would base the conditional-license order on the combination of unchallenged and affirmed citations, we remand for further proceedings.

FACTS

Relator Douglas Place Treatment Center LLC is an East Grand Forks chemical-dependency treatment center. A Department of Human Services (DHS) licensor investigated complaints about the center in March 2015. The licensor found several dozen infractions warranting citation under the statutes and rules governing chemical-dependency treatment services. *See* Minn. Stat. §§ 245A.01–.66 (2016); Minn. R. 9530.6405–.6505 (2015).

The Commissioner of Human Services confirmed the licensor's findings and organized the 70 statutory citations into 33 license violations. Based on the "number and nature of the licensing violations," the commissioner put Douglas Place on conditional status for two years, beginning August 12, 2015, under Minnesota Statutes section 245A.06, subdivision 1(a). She made specific findings for each citation and listed the following summary reasons for the conditional license:

> - The license holder submitted requests for payment of public funds for treatment services that were not provided or were not accurately documented when being provided.

- The license holder failed to provide required services to clients enrolled in the program's high and medium intensity level tracks.

- The license holder did not complete client assessments, did not develop treatment plans, did not document progress toward treatment, did not complete treatment plan reviews, did not complete discharge summaries and did not provide orientation to all clients on the grievance procedure.

- The license holder failed to obtain required documentation when staff persons were hired, failed to provide required orientation and annual trainings, and did not complete annual performance evaluations.

Additionally, the license holder failed to comply with background study requirements under Minnesota Statutes, chapter 245C. On June 18, 2015, an Order to Pay a Fine was issued for four background study violations.

The commissioner stated that she had "considered the nature, chronicity, and severity of the licensing violations" and ordered Douglas Place to document that it has corrected the violations within 30 days or face license revocation.

Douglas Place asked the commissioner to reconsider 38 of the 70 citations and to replace the conditional-license order with a correction order. It asked alternatively that she reduce the conditional-license period from two years to six months. The commissioner affirmed nearly all of the disputed citations, rescinded two in full and one in part, and revised and affirmed two others. Because the conditional-license period was stayed pending reconsideration, the commissioner restarted the two-year period on the date of her reconsideration order in June 2016.

Douglas Place appeals for certiorari review.

D E C I S I O N

Douglas Place challenges the commissioner's decision to affirm the conditional-license order. "The commissioner's disposition of a request for reconsideration is final and not subject to appeal under [the Minnesota Administrative Procedure Act]." Minn. Stat. § 245A.06, subds. 2, 4. On appeal from a quasi-judicial agency decision not subject to the act, we examine the record to review, "as to the merits of the controversy, whether the order or determination . . . was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Anderson v. Comm'r of Health*, 811 N.W.2d 162, 165 (Minn. App. 2012) (quoting *Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444–45 (Minn. App. 1996)), *review denied* (Minn. Apr. 17, 2012).

Douglas Place asks us to reverse on three grounds. It argues that several dozen citations are unsupported by evidence, unreasonable, or based on legal error. It also argues that the commissioner failed to make findings showing that she considered certain statutory factors. And it argues finally that the conditional license is a disproportionately harsh penalty. The commissioner asks us not to reach these arguments because Douglas Place does not challenge many of the bases of the order and we can affirm on those. We first address the commissioner's position that we may affirm the order based on the citations that Douglas Place has not challenged.

I

We reject the commissioner's contention that we need not address the challenged citations because the unchallenged citations can support the conditional-license order. It is true that if a DHS licensee violates, even once, "an applicable law or rule . . . the

commissioner may issue a correction order and an order of conditional license." Minn. Stat. § 245A.06, subd. 1(a). And it is true that we defer to an agency's choice of sanction unless it reflects a clear abuse of discretion. *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 726 (Minn. App. 2003). But the sanction's severity must reflect the violation's seriousness. *Id.* at 728. And we do not know from the commissioner's order whether any one of the citations, or any particular group of them, independently supports her sanctions decision. She expressly based her decision on the "number and nature of the licensing violations," leaving it unclear whether our reversing several of them would change the result. Given the discretionary nature of the commissioner's decision ("the commissioner *may* issue . . . an order of conditional license," Minn. Stat. § 245.06, subd. 1(a) (emphasis added)), we are unsure whether the commissioner would have exercised her discretion in the same way based only on the uncontested citations. We therefore turn to the challenged citations.

II

Douglas Place challenges the commissioner's decision to affirm citations 2, 3b, 7a, 7c, 8b, 10b, 10c, 10d, 10e, 11a, 11b, 11e, 11f, 14a, 15, 16, 17, 18, 20, 21, 22, 26, 27b(3), 30, and 31. We review the merits of a quasi-judicial order by examining the record to determine whether the order is arbitrary, oppressive, unreasonable, fraudulent, made under an erroneous theory of law, or without any evidentiary support. *Anderson*, 811 N.W.2d at 165. An agency's determination is arbitrary when "there is no rational connection between the facts and the agency's decision." *Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005). We look to the record in its

entirety to decide whether evidence supports the agency's decision. *Carter v. Olmsted Cty. Hous. & Redevelopment Auth.*, 574 N.W.2d 725, 730 (Minn. App. 1998). We defer to an agency's factual conclusions in the area of its expertise. *See Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984). And we presume administrative agency decisions are correct. *Burke*, 666 N.W.2d at 726. But we review an agency's legal analysis de novo. *See id.*

Douglas Place argues that the citations are arbitrary, unreasonable, based on an erroneous theory of law, or without evidentiary support. After a careful review of the record, we affirm most of the challenged citations for the following summary reasons: the commissioner's findings were at least tied to some reported deficiency in Douglas Place's policies or documentation; the commissioner did not misinterpret the applicable rules and statutes; the documents in the record and the licensor's reported observations satisfy the "any evidence" standard; and Douglas Place has not provided sufficient evidence to overcome the deference we afford the commissioner.

We are also not persuaded by Douglas Place's argument that the commissioner improperly relied on statements by Douglas Place employees in affirming Citations 2, 10c, 11f, 22, and 31 because the DHS licensor allegedly failed to give what is commonly called a Tennessen warning. The Minnesota Government Data Practices Act specifically requires that a Tennessen warning be given to "[a]n individual asked to supply private or confidential data concerning the individual . . . ." Minn. Stat. § 13.04, subd. 2 (2016). The act defines "individual" to mean a natural person. Minn. Stat. § 13.02, subd. 8 (2016). And it defines "data on individuals" in part as "all government data in which any individual *is*

or can be identified as the subject of that data . . ." Minn. Stat. § 13.02, subd. 5 (2016) (emphasis added).

Douglas Place asks us to misapply the Tennessen-warning requirement so as to protect Douglas Place, not to protect those employees who gave statements without the warning. Douglas Place also appears to misunderstand the employees' statements. It contends that its employees' statements constitute "data concerning the individual" because the employees reported on documentation that they produced or procedures that they followed. Even if an employee described her own conduct, the investigation concerned the methods by which Douglas Place implements its policies; Douglas Place itself, not its employees, was the subject of the investigation. This is evidenced not only by the substance of the statements, but by the exclusion of any employee names in the statements. We have previously rejected a similar attempt to require the Tennessen warning for employee statements about an entity:

> We conclude that the circumstances of this investigation did not require a Tennessen warning. At the time the school district interviewed Gentling, it was not attempting to collect private or confidential information about her. Instead, it was attempting to gather factual information about an incident within the course and scope of her employment. As such, the data may have been government data, but it was not data on an employee as an individual.

Edina Educ. Ass'n v. Bd. of Educ. of Indep. Sch. Dist. No. 273 (Edina), 562 N.W.2d 306, 311 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). The statements gathered through the interviews did not concern the employees and therefore were not "data concerning the individual." We need not address whether an *entity* can rely on any

individual's statutory right to a Tennessen warning to avoid incriminating information provided by the individual about the entity, because it is clear that no Tennessen warning was required here.

We turn to a more detailed analysis of the citations that we reverse, either in full or in part, and two of the citations that we affirm but believe warrant explanation.

Citation 10c

The commissioner cited Douglas Place for providing services to Client 8 on November 13, 2014, November 26, 2014, and March 13, 2015, when records indicate that Client 8 was discharged from the program on October 6, 2014. Douglas Place requested reconsideration of Citation 10c, but it explained only the November 13 entry. The commissioner affirmed Citation 10c because Douglas Place did not explain why Client 8 received services on November 26, 2014, and March 13, 2015. This defeats Douglas Place's contention that "absolutely no evidence in the record" supports the citation. The commissioner has not identified which rule or statute Douglas Place violated by providing services to Client 8 after the reported discharge date, but Douglas Place argues that the citation fails as a matter of fact, not as a matter of law, so we limit our review accordingly.

Citation 11a

Citation 11a states that Douglas Place's medication-administration records for Clients 1 and 2 "contained blank spaces with no additional documentation to indicate why the medication was not administered." The citation rests on Minnesota Statutes section 245A.04, subdivision 14, which requires license holders to monitor the implementation of policies and procedures to maintain compliance with statutes and rules. One of those rules,

Minnesota Rule 9530.6435, subparts 3(B) and 4, bears on the administration and control of medication. Douglas Place challenged Citation 11a, asserting that not all of Client 1's and 2's medications are administered daily. The commissioner rejected the challenge, citing documents showing that Clients 1 and 2 were diagnosed with conditions requiring daily prescriptions.

On appeal, Douglas Place's argument focuses only on Client 1, but even addressing the argument as applied to both clients, the record again defeats Douglas Place's factual argument. It shows that Client 1 was prescribed Effexor and Naltrexone daily, and Clonidine and Hydroxyzine as needed. Client 2 was prescribed Mirtazapine, prenatal vitamins, Sertraline, Lisinopril-HCTZ, and Omeprazole—all daily. The record includes medication charts that track whether or not Clients 1 and 2 received their prescribed dosages. Douglas Place tracks clients' medicine ingestion by initialing the chart on those days when the client took the medicine, and apparently by not initialing those days when the client did not take the medicine. The record indeed supports the finding that Clients 1 and 2 did not always receive daily doses for certain medications that were prescribed for daily ingestion. We observe that the commissioner does not explain how this violates either section 245A.04, subdivision 14, or rule 9530.6435, subpart 3(B). The rule requires that the policies and procedures include "requirements for recording the client's use of medication, including staff signatures with date and time." Minn. R. 9530.6435, subp. 3(B)(7). It is not clear why the commissioner applies the rule to also require Douglas Place to complete additional documentation or rationale explaining *missed* dosages. But Douglas Place makes only the factual challenge, and that challenge fails.

Citation 17

The commissioner cited Douglas Place for failing to document whether Staff Persons 4 and 9 received proper training on Douglas Place's drug and alcohol policy, in violation of Minnesota Statutes section 245A.04, subdivision 1(c). That subdivision states, "The license holder must train employees, subcontractors, and volunteers about the program's drug and alcohol policy." Douglas Place submitted signed attendance forms to prove that Staff Persons 4 and 9 received the proper training. The commissioner nevertheless affirmed Citation 17, finding that there was no evidence that Staff Person 4 reviewed the policy and finding that Staff Person 9 did not receive training on the policy after being rehired in April 2013.

Douglas Place contends that Staff Person 4 signed an Intern Orientation Checklist, which includes review of the employee handbook, and it asserts that the handbook contains the drug and alcohol policy. The difficulty for Douglas Place on appeal is that we have no evidentiary basis on which we can validate its assertion. Douglas Place had the burden to introduce all relevant documents into the record. *See Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968). The record indicates that Douglas Place believed that DHS had a copy of the employee handbook, but it offered to provide one at DHS's request. The record does not establish, however, that Douglas Place ever provided the handbook, and it is not included in the appellate record. So while we might speculate that Douglas Place's drug and alcohol policies are included in its handbook, we cannot reverse the commissioner's finding as to Staff Person 4 on mere speculation.

As to the other staff person, however, the record includes signed documents acknowledging that Staff Person 9 reviewed the drug and alcohol policy in 2008 and 2011. The record suggests that Staff Person 9 was initially hired in 2008 and rehired in 2011, and then filled out an employment application in December 2013 to be promoted to a counselor's position. The commissioner is correct that, despite Staff Person 9 signing a site-specific orientation document that included review of "policies and procedures" in December 2013, the document does not specify that the staff person reviewed the drug and alcohol policy. But Staff Person 9 received the proper training in 2008 and 2011, and the commissioner does not explain why Douglas Place violated any rule by failing to retrain a staff person promoted to a new role.

We affirm Citation 17 as to Staff Person 4 and reverse it as to Staff Person 9.

Citation 18

The commissioner cited Douglas Place for failing to document whether Staff Persons 7 and 9 received proper annual training on six required topics, in violation of Minnesota Statutes section 245A.19, section 245A.65, subdivision 3, and Minnesota Rule 9530.6460, subpart 2(C). The six topics are: (1) vulnerable-adult reporting requirements; (2) Douglas Place's program abuse prevention program (PAPP); (3) policies and procedures on prevention and reporting of client maltreatment; (4) obtaining client releases of information; (5) reporting requirements for maltreatment of minors and exposure to controlled substances; and (6) HIV minimum standards. *See* Minn. Stat. §§ 245A.19, 245A.65, subd. 3; Minn. R. 9530.6460, subp. 2(C). Douglas Place submitted sign-in sheets to prove that Staff Persons 7 and 9 received the proper training in five of the six areas (all

but Douglas Place's PAPP). The commissioner then affirmed Citation 18, finding that Staff Persons 7 and 9 received annual training in only two of the six areas (vulnerable adult reporting requirements and obtaining client releases of information) and that Staff Person 9 had not completed other training areas in 2014.

Douglas Place contends that the sign-in sheets demonstrate that Staff Persons 7 and 9 were trained on all topics except maltreatment of minors and exposure to controlled substances, and HIV minimum standards. The sign-in sheets indicate that all but maltreatment of minors and HIV minimum standards were covered in a training that Staff Person 7 attended in December 2014, and that Staff Person 9 attended in January 2015. The record also shows that Staff Persons 7 and 9 were trained on HIV minimum standards in December 2013. The record does not show that Staff Person 9 received any of the six required trainings in 2014. And it does not show that either Staff Person 7 or 9 received training on HIV minimum standards in 2014. As to Staff Person 7, Citation 18 is reversed as to all but maltreatment of minors and HIV-minimum-standards training. As to Staff Person 9, Citation 18 is affirmed in full. (Citation 18b is not subject to our review because Douglas Place apparently did not request reconsideration on this point.)

Citation 21

The commissioner cited Douglas Place for violating Minnesota Rule 9530.6460, subpart 3(C), because the personnel file for Staff Person 9 did not document inquiries to former employers regarding substantiated sexual contact with clients. Douglas Place submitted sexual-contact inquiries made to Staff Person 9's former employers. The commissioner affirmed the citation, finding that Douglas Place failed to send an inquiry to

the employer at which Staff Person 9 worked as a guardian ad litem in 2009, after Douglas Place rehired Staff Person 9 in 2011. The commissioner also found that Douglas Place failed to send the required sexual-contact inquiries when it rehired Staff Person 9 in 2013.

Rule 9530.6460, subpart 3(C) requires a personnel file to contain specific information:

> For staff members who will be providing psychotherapy services, employer names and addresses for the past five years *for which the staff member provided psychotherapy services*, and documentation of an inquiry made to these former employers regarding substantiated sexual contact with a client as required by Minnesota Statutes, chapter 604[.]

(Emphasis added.) Douglas Place contends that the commissioner erred by requiring an inquiry to be sent to Staff Person 9's 2009 employer, because guardians ad litem do not provide psychotherapy services. The commissioner does not dispute Douglas Place's contention that guardians ad litem do not provide psychotherapy services generally or argue that Staff Person 9 provided those services as a guardian ad litem specifically. The position falls outside the rule's inquiry requirement.

Additionally, as we have already indicated, the record confirms Douglas Place's assertion that it did not rehire Staff Person 9 in December 2013, but rather promoted her to counselor. The commissioner's theory that this employee was rehired and not promoted depends on documents that, read together with the employee's December 2013 application, establish plainly that the employee's December 2013 "start date" was when she started in her new position, not when she started or restarted employment at Douglas Place. Her

December 2013 application for the counselor position expressly described her "current" position as social worker and identified Douglas Place as her "current" employer.

In any event, even if the commissioner were correct in contending that the staff person was rehired rather than promoted, the commissioner's failure to establish (or even argue) that the employee provided psychotherapy services as a guardian ad litem defeats the citation. The rule did not require Douglas Place to send sexual-contact inquiries to the guardian-ad-litem employer. And her only other employer within five years was Douglas Place. Citation 21 is therefore reversed.

Citation 27b(3)

The commissioner cited Douglas Place because its PAPP did not contain an evaluation of the program's staffing patterns, as required by Minnesota Statutes section 245A.65, subdivision 2(a)(3). Douglas Place asked the commissioner to reconsider, arguing that section 2.0108 of its PAPP contained an evaluation of staffing patterns. The commissioner rejected the argument because section 2.0108 "does not include the days of the week that each staff person works [and] does not include all staff persons." But the statute does not specify that staffing patterns must identify each staff member as opposed to including a daily employee schedule. The statute requires the agency to evaluate "the program's staffing patterns." Minn. Stat. § 245A.65, subd. 2(a)(3). Douglas Place's PAPP lists its residential-program staff in shifts and designates which employees usually work those shifts. It also identifies its outpatient-program staff and hours. The commissioner erred by adding requirements to the statute. Douglas Place has a PAPP that explains staffing patterns for its programs. Citation 27b(3) is therefore reversed.

Based on our careful review of the arguments and the record, we affirm the commissioner's decision upholding Citations 2, 3b, 7a, 7c, 8b, 10b, 10c, 10d, 10e, 11a, 11b, 11e, 11f, 14a, 15, 16, 20, 22, 26, 30, and 31. We reverse Citations 21 and 27b(3). And we affirm in part and reverse in part Citations 17 and 18.

III

Douglas Place argues that the conditional-license order fails to meet the statutory standard. It maintains that the order fails because it does not expressly analyze the "nature, chronicity, and severity" of the citations and their effect "on the health, safety, or rights of persons" whom Douglas Place serves. Douglas Place relies on the following statutory language:

> When issuing a conditional license, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program. The correction order or conditional license must state:
>
> (1) the conditions that constitute a violation of the law or rule;
> (2) the specific law or rule violated;
> (3) the time allowed to correct each violation; and
> (4) if a license is made conditional, the length and terms of the conditional license.

Minn. Stat. § 245A.06, subd. 1(a). We interpret the statute de novo. *See In re Staley*, 730 N.W.2d 289, 297 (Minn. App. 2007).

The commissioner argues that it is enough that the order states in conclusory fashion, "The Commissioner has considered the nature, chronicity, and severity of the licensing violations," and that the decision is "[b]ased on the number and nature of the licensing violations." Merely *stating* that the commissioner considered those factors

hampers any review of whether the commissioner actually considered the factors. But because we anticipate that, on remand, the commissioner must weigh the sustained citations and issue a new order announcing whether to sanction Douglas Place, we do not review the features or thoroughness of the currently challenged order any further.

IV

Douglas Place argues that a conditional license is too severe a sanction for its violations. It emphasizes that "[n]one of the violations was related to any patient deaths or drug diversion," and it identifies other conditional-license holders that it says committed "much more egregious violations." In light of our decision reversing some of the citations and our remanding to allow the commissioner to decide what, if any, sanction should apply to the remaining citations, we will not comment on the premature question of whether the violations are weighty enough as a matter of law to support the sanction.

We remand to the commissioner to determine what, if any, sanction to apply to the remaining citations.

Affirmed in part, reversed in part, and remanded.