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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1646**

Fatoumata Kaba,
Relator,

vs.

Commissioner of Health,
Respondent.

**Filed May 30, 2017
Affirmed
Hooten, Judge**

Minnesota Department of Health
File Nos. 24090855, 24057575

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Considered and decided by Smith, Tracy M., Presiding Judge; Hooten, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this certiorari appeal, relator challenges respondent Commissioner of Health's decision denying her request to set aside her disqualification from holding a position that allows direct contact with persons who receive services from facilities licensed by the Minnesota Department of Health (DOH) or the Minnesota Department of Human Services

(DHS). Relator argues that because she does not pose a risk of harm to persons served by DOH or DHS programs, respondent's refusal to set aside her disqualification was both arbitrary and capricious and not supported by substantial evidence. We affirm.

FACTS

Relator Fatoumata Kaba is a certified nursing assistant who has worked in nursing home settings providing residents with basic care for several years. At the request of an employer, DHS performed a background study of Kaba pursuant to Minn. Stat. § 245C.03 (2016). The background study revealed that Kaba pleaded guilty in October 2015 to misdemeanor theft in violation of Minn. Stat. § 609.52, subd. 2 (a)(1) (2014). DHS notified Kaba by letter in late July 2016 that her misdemeanor conviction disqualifies her from any position involving direct contact or access to persons receiving services from facilities licensed by DOH or DHS. *See* Minn. Stat. § 245C.14, subd. 1(a)(1) (2016).

Kaba sought reconsideration of her disqualification with respondent Commissioner of Health. She claimed that she did not pose any risk of harm to the persons receiving services from DOH or DHS licensed facilities. Kaba stated that her theft conviction was the result of shoplifting at Walmart and she was unsure how Walmart was harmed by her theft. And, she alleged that the persons who receive services from DOH or DHS are “not the same” as the victim of her theft. Kaba also submitted a letter from another employer, which stated that Kaba had been a “trusted and respected employee” for over 16 years and that her disqualification would result in a “notable loss.”

In August 2016, the commissioner denied Kaba's request to set aside her disqualification. The commissioner evaluated Kaba's request using the multifactor risk-

of-harm analysis under Minn. Stat. § 245C.22, subd. 4(b) (2016), and determined that she had not satisfied her burden of demonstrating that she does not pose a risk of harm. This certiorari appeal followed.

D E C I S I O N

Kaba contends that the commissioner’s refusal to set aside her disqualification is arbitrary and capricious and without evidentiary support. The commissioner’s denial of Kaba’s request constitutes a quasi-judicial agency decision that is subject to certiorari review under Minn. Stat. § 480A.06, subd. 3 (2016). On certiorari appeal from a quasi-judicial agency decision, we inspect the record to “review questions affecting the jurisdiction of the agency, the regularity of its proceedings, and, as to merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Rodne v. Comm’r of Human Servs.*, 547 N.W.2d 440, 444–45 (Minn. App. 1996) (alteration omitted) (quotation omitted). Kaba has the burden of proving that the commissioner exceeded his or her statutory authority or jurisdiction. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn. 1996).

We may reverse the commissioner’s decision if it is unsupported by substantial evidence or is arbitrary and capricious. *Sweet v. Comm’r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005). 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.” *Dourney v. CMAK Corp.*,

796 N.W.2d 537, 539 (Minn. App. 2011) (quotation omitted). “An agency’s conclusion is arbitrary and capricious if there is no rational connection between the facts and the agency’s decision.” *Sweet*, 702 N.W.2d at 318. We defer to an administrative agency’s conclusions that are within its area of expertise. *Cable Commc’ns Bd. v. Nor-West Cable Commc’ns P’ship*, 356 N.W.2d 658, 668 (Minn. 1984). And we presume that agency decisions are correct. *J.R.B. v. Dep’t. of Human Servs.*, 633 N.W.2d 33, 38 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001).

Upon reconsideration, the commissioner may rescind the disqualification if the disqualified individual submits information demonstrating that she does not pose a risk of harm to any person served by a licensed facility. Minn. Stat. § 245C.22, subd. 4(a) (2016). In determining whether the individual poses a risk of harm, the commissioner must consider the following nine factors:

- (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.

Minn. Stat. § 245C.22, subd. 4(b)(1)–(9). In evaluating these factors, the commissioner must “give preeminent weight to the safety of each person served by” the licensed facilities.

Id., subd. 3 (2016). And, “any single factor under subdivision 4, paragraph (b), may be determinative of the commissioner’s decision whether to set aside the individual’s disqualification.” *Id.*

In August 2016, the commissioner sent Kaba a letter stating that she failed to show that she did not pose a risk of harm to the persons receiving services from DOH and DHS licensed facilities. In denying Kaba’s petition to set aside her disqualification, the commissioner applied and weighed each of these nine statutory factors.

On appeal, Kaba contests several of the commissioner’s findings in arguing that she does not pose a risk of harm. She first asserts that her misdemeanor theft conviction was relatively minor compared to other cases in which individuals were disqualified for “patterned theft behavior” or other “serious crimes.”¹ But, in evaluating the risk of harm to persons in DOH and DHS facilities, the commissioner took into account Kaba’s job duties and the effect of her irresponsible decision-making in caring for persons who were cognitively and/or physically impaired. As a certified nursing assistant, Kaba was involved in the care of such vulnerable persons on a regular basis and often in intimate settings, where she would likely have unsupervised or minimally supervised access to the persons’ personal belongings and effects. The commissioner observed that responsible decision-making is critical in caring for vulnerable persons, who are dependent upon the assistance

¹ Kaba’s argument relies significantly on drawing similarities to several unpublished opinions from this court. Her reliance on these opinions is misplaced, however, because this court’s unpublished opinions do not have precedential value. Minn. Stat. § 480A.08, subd. 3 (2016).

of a nursing assistant for their daily activities and are highly susceptible to theft-related offenses.

While Kaba acknowledges that her misdemeanor theft conviction triggered the seven-year disqualification period under Minn. Stat. § 245C.15, subd. 4(a) (2016), she claims that because she only committed a single minor offense against Walmart, her disqualification should be set aside. The commissioner acknowledged that Walmart, as a business entity, was not a vulnerable victim and did not suffer lasting financial harm as a result of Kaba's shoplifting. But the commissioner found that Kaba showed little remorse for the theft and did not appear to realize the harm that was caused by her action or understand how such behavior could harm vulnerable persons. In consideration of other factors weighing against setting aside Kaba's disqualification, the commissioner noted how little time had expired since her guilty plea to the theft offense, that she was still on probation for the offense, and that she had not undergone any treatment, training, or rehabilitation as a result of her offense. The commissioner explained that under these circumstances, "the department is not convinced that [Kaba] no longer pose[s] a risk of harm to vulnerable adults and minors."

Based on this record, we conclude that the commissioner's decision that the safety of vulnerable persons outweighed Kaba's interests in setting aside her disqualification was supported by substantial evidence and was not arbitrary and capricious.

Affirmed.