STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0639

Luz Hernandez,
Appellant,

vs.

State of Minnesota,
Department of Human Services,
Respondent,
Southwest Health & Human Services,
Respondent.

Filed December 18, 2017
Reversed
Reyes, Judge
Cleary, Chief Judge, Concurring specially

Lyon County District Court
File No. 42-CV-16-600

Andrew L. Hodney, Stermer & Sellner, Chtd., Montevideo, Minnesota (for appellant)

Lori Swanson, Attorney General, Frederic J. Argir, Assistant Attorney General, St. Paul, Minnesota (for respondent Department of Human Services)

Richard R. Maes, Lyon County Attorney, Nicole A. Springstead, Assistant County Attorney, Marshall, Minnesota (for respondent Southwest Health & Human Services)

Considered and decided by Cleary, Chief Judge; Bjorkman, Judge; and Reyes, Judge.

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

REYES, Judge

Appellant Luz Hernandez challenges the district court order affirming respondent Southwest Health and Human Services' (SWHHS) determination that appellant maltreated two minors by neglect, because respondent Minnesota Department of Human Services (DHS) issued its decision after 24 months, rather than within 90 days of her appeal as set forth in Minn. Stat. § 256.0451, subd. 22(a) (2016).[1] We reverse.

FACTS

On December 18, 2013, respondent SWHHS notified appellant of its determination that she had maltreated two children in her care by neglect. SWHHS determined that the maltreatment was serious and recurring and disqualified appellant from any position allowing direct contact with, or access to, persons receiving services from, or served by a program or entity identified in Minn. Stat. § 245C.03 (2016). Appellant requested reconsideration of the determination. On February 3, 2014, SWHHS notified appellant that it had reconsidered and affirmed the determination.

On May 2, 2014, appellant filed an appeal with DHS and requested an evidentiary hearing before a human-services judge (HSJ) pursuant to Minn. Stat. § 256.045, subd. 3 (Supp. 2017). The HSJ scheduled the hearing for September 3 and 4, 2014, more than 120 days after the appeal was filed with DHS. At the prehearing conference on June 17, 2014,

[1] We cite the most recent version of Minn. Stat. § 256.0451 because it has not been amended in relevant part. *See Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000) (stating that, generally, "appellate courts apply the law as it exists at the time they rule on a case").

SWHHS moved to dismiss the appeal as untimely. On August 25, 2014, the parties mutually requested a continuance of the hearing because the HSJ had not yet ruled on SWHHS's motion to dismiss. After granting the continuance and denying the motion to dismiss, the HSJ rescheduled the hearing for December 17 and 18, 2014.

The HSJ finally conducted the evidentiary hearing on December 17, 2014, and allowed the parties until February 15, 2015, to close the record and also to submit closing statements, proposed findings of fact, and proposed conclusions of law. On May 10, 2016, more than 16 months after the evidentiary hearing and 24 months after appellant filed her appeal, the HSJ issued his recommended findings of fact, conclusions of law, and an order affirming SWHHS's determination of maltreatment and disqualification of appellant. On May 13, 2016, the commissioner of human services adopted the HSJ's recommended findings of fact, conclusions of law, and order. Appellant filed an appeal with the district court, which affirmed the Commissioner's order. This appeal follows.

D E C I S I O N

Appellant argues that the commissioner's decision should be reversed because DHS failed to issue its decision within the statutorily mandated time period. We agree.

Review of the commissioner's order is authorized under Minn. Stat. § 256.045, subds. 7, 9 (2016), and the scope of review is governed by Minn. Stat. § 14.69 (2016). *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). Under that standard, we may affirm or we may reverse, modify or remand the commissioner's order if the petitioner's substantial rights were prejudiced because the decision was made "in excess of the [agency's] statutory authority."

Minn. Stat. § 14.69(b) (2016). "[T]his court reviews the commissioner's order independently, giving no deference to the district court's review." *Zahler*, 624 N.W.2d at 301.

We review questions of statutory interpretation de novo. *Young v. Jesson*, 796 N.W.2d 158, 163 (Minn. App. 2011). When interpreting a statute, we first examine whether the language is clear or ambiguous. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). When the words of a statute are clear and free from all ambiguity, we apply the letter of the law and do not construe or interpret the statute's language. Minn. Stat. § 645.16 (2016); *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986).

DHS is required to issue a timely, written decision following every appeal hearing. Minn. Stat. § 256.0451, subd. 22 (2016). Its written decision "must be issued within 90 days of the date the person involved requested the appeal." *Id*., subd. 22(a).[2] Neither party argues that the statute is ambiguous, and we agree. Nonetheless, respondents argue that DHS may exceed the deadline because the statute provides no consequence for noncompliance and is directory. Here, it is undisputed that DHS issued its written decision two years after appellant filed her appeal. At issue is whether DHS exceeded its statutory authority by failing to comply with the statutory 90-day deadline.

The word "must" is defined as a mandatory provision when used in a statute. Minn. Stat. § 645.44, subd. 15a (2016). But under case law, "the words 'shall' and 'must,' while suggestive of a mandatory meaning, are not always to be construed in a statute as being

[2] Under some circumstances, the 90-day deadline does not begin until notice of a final licensing determination, *see id*., but no party argues that those circumstances apply here.

mandatory[,]" and may be construed as directory. *Wenger v. Wenger*, 200 Minn. 436, 440, 274 N.W. 517, 519 (1937). Generally, a statute containing a requirement but providing no consequence for noncompliance will be regarded as directory, not mandatory. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 541 (Minn. 2007) (citing *Lord v. Frisby*, 260 Minn. 70, 76, 108 N.W.2d 769, 773 (1961) ("[G]enerally[,] . . . where the provisions of the statute . . . are merely incidental or subsidiary to the chief purpose of the law . . . and do not declare the consequences of a failure of compliance, the statute will ordinarily be construed as directory and not as mandatory.")). Violation of a directory statute does not invalidate an agency decision. *Sullivan v. Credit River Twp.*, 299 Minn. 170, 177, 217 N.W.2d 502, 507 (1974). The statute at issue here provides no consequence for noncompliance. However, this does not end our analysis.

The Minnesota Supreme Court has recognized that a statute may impose a mandatory deadline on a government agency even if the statute provides no consequence for noncompliance. *Hans Hagen Homes, Inc.*, 728 N.W.2d at 541 (citing *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701-02 (Minn. 1996)). In *Beaulieu*, the Minnesota Department of Human Rights (MDHR) exceeded a 12-month statutory deadline by approximately 23 months. 552 N.W.2d at 699. The statute required that MDHR "shall" issue a probable-cause determination within 12 months of a complaint and provided no consequence for noncompliance. 552 N.W.2d at 701-702. The supreme court declined to construe the statute as directory, stating that there is no occasion to resort to statutory construction when the language is clear. *Id.* The supreme court held that probable-cause determinations made 31 months or more after a charge is filed are per se prejudicial and

require dismissal of the complaint. *Id.* at 703. In reaching its decision, the supreme court found both the substantial length of the agency's delay and its lack of justification or explanation for the delay troubling. *Id.* at 701, 703.

Here, DHS does not argue that its delay in issuing a written decision was justified, and the record evidence contains no explanation for the delay. DHS's delay gives rise to the same concerns as those expressed in *Beaulieu*, and the delay is far more substantial. In *Beaulieu*, MDHR exceeded its 12-month deadline by 23 months, a delay nearly three times longer than the prescribed statutory timeframe. In this case, DHS exceeded its three-month deadline by 24 months, a delay eight times longer than the prescribed timeframe. A delay of this magnitude effectively renders the statutory deadline meaningless.

In seeking a directory construction of the statute, respondents in this case "would have us conclude that the legislature intended for [DHS] to take as long as it wanted to [issue its decision]." *Id*. at 701. The legislature's purpose in enacting the hearing procedures contained in Minn. Stat. § 256.0451 (2016) is, in part, to provide a fair-hearing appeal to individuals challenging a decision of the county or state human-services agency. That purpose is frustrated when appeal decisions are delayed. As the court in *Beaulieu* noted, "evidence and witnesses may disappear, memories may fade, assets may be wasted, and damages may continue to accrue." 552 N.W.2d at 702. A directory construction of the statute diminishes DHS's incentive to issue "[a] timely, written decision . . . in every appeal." Minn. Stat. § 256.0451, subd. 22.

Moreover, we need not decide whether the statute is mandatory or directory. Even if we were to construe the statute as directory, an agency's failure to comply with a

directory statute may still warrant relief if the delay prejudices appellant's substantial rights. *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 876 (Minn. App. 2008) (citing *State ex rel. Indep. Sch. Dist. No. 276 v. Dep't of Ed.*, 256 N.W.2d 619, 626 (Minn. 1977)); Minn. Stat. § 14.69. Here, appellant waited two years to receive DHS's disposition of her appeal of the maltreatment determination and disqualification. During that time, appellant remained disqualified from any position allowing direct contact with, or access to, persons receiving services from, or served by a program or entity identified in Minn. Stat. § 245C.03. There is no indication that appellant could have mitigated the prejudice suffered by obtaining a stay of SWHHS's determination and disqualification during the delayed agency appeal. *See generally Riehm*, 745 N.W.2d at 876-877 (noting prejudice may be avoided during delayed hearing where statute provides petitioner right to request a stay of revocation). Furthermore, as recognized in *Beaulieu*, agency actions that exceed the statutory deadline without justification may be per se prejudicial. 552 N.W.2d at 703. We note that the best practice would be for DHS to adhere to the statutory 90-day deadline in order to provide petitioners with a fair-hearing appeal.

We conclude that DHS prejudiced appellant's substantial rights to a fair hearing appeal by exceeding its statutory authority in issuing its decision two years after she filed her appeal, in violation of the 90-day deadline set forth in Minn. Stat. § 256.0451, subd.

22(a). Therefore, we need not reach appellant's additional argument concerning a violation of her procedural-due-process rights.

Reversed.

CLEARY, Chief Judge (concurring specially)

While I agree with the majority that the delay was per se prejudicial and that as a consequence appellant is entitled to relief, I write separately to emphasize the fundamental unfairness that results when an individual is held to a statutory deadline while a state agency is allowed to exceed a deadline found in the same statute and extend its jurisdiction without justification.

The issue is whether the legislature created a mandatory deadline or codified a mere directory suggestion in Minn. Stat. § 256.0451, subd. 22 (2016). The statute reads, in part, "[a] timely, written decision *must* be issued in every appeal" and "[a] written decision *must* be issued within 90 days" of the individual's request for review. *Id.*, § 256.0451, subd. 22(a) (emphasis added). Our goal is to determine de novo what the legislature intended. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). The legislature's decision to use the verb "must" in subdivision 22(a) and elsewhere in the statute rules out the possibility that the legislature intended the deadline to be discretionary or aspirational. "Must" means "must" and the intent of the legislature was to have a written decision issued within 90 days.

As the majority notes, the commissioner delayed its decision for more than 16 months after the evidentiary hearing and 24 months after appellant filed her appeal. No reason or justification was offered for the delay. Instead, the commissioner contends that the phrase "a written decision must be issued within 90 days" in subdivision 22(a) amounts to nothing more than a legislative suggestion that the commissioner is free to adhere to, willfully ignore, or otherwise fail to comply with as it sees fit. Relying on *Wenger v.*

Wenger, 200 Minn. 436, 274 N.W. 517 (1937) and its progeny, the commissioner asserts that the absence of a codified penalty transforms the word "must" into a "may" and renders the deadline directory, rather than mandatory. Under this view, the commissioner is directed—but not required—to issue a decision at all, let alone within 90 days, as there is no statutory penalty for the failure or refusal to issue a decision. This cannot be the result intended by the legislature.

At the same time, if appellant had failed to comply with the deadlines prescribed by the statute, her appeal would be dismissed outright for lack of jurisdiction despite the fact that no such penalty appears in the statute. *See In re D.F.C. v. Minn. Comm'r of Health*, 693 N.W.2d 451, 453 (Minn. App. 2005). The statutory construction urged by the commissioner generates a fundamentally unfair result: an individual is held to the deadlines in Minn. Stat. § 256.0451, but the commissioner is not. Instead, the commissioner is afforded an unspecified amount of time to issue a decision and may choose not to issue one at all without forfeiting its jurisdiction.

The purpose of the 90-day deadline is to provide an individual with a decision on her administrative appeal in a timely manner. Once this decision has been issued, the individual is one step closer to an opportunity to challenge the decision to an authority outside the administrative agency. Delaying the issuance of a decision past 90 days—or refusing to issue a decision at all—prejudices individuals in a way that I believe the legislature did not intend. I respectfully submit that this manner of construction frustrates the purpose of the statute and can, as demonstrated here, result in fundamental unfairness and a denial of due process. The legislature should provide a consequence for the failure

of the agency to abide by the statutory directive found in Minn. Stat. § 256.0451, subd. 22(a) that a written decision "must be issued within 90 days . . . ."