STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2054

K.A.J.,
Relator,

vs.

Emily Piper, Commissioner of Human Services,
Respondent.

Filed August 13, 2018
Affirmed; motion to strike granted in part and denied in part;
motion to supplement denied
Smith, Tracy M., Judge

Minnesota Department of Human Services
Background Study No. 1150482

Nancy Hylden, Hylden Advocacy & Law, Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, R.J. Detrick, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Bratvold, Judge; and Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

SMITH, TRACY M., Judge

In this certiorari appeal, relator K.A.J. challenges a decision by respondent Minnesota Commissioner of Human Services disqualifying him from any position allowing direct contact with, or access to, people receiving services from facilities licensed by the Minnesota Department of Human Services or the Minnesota Department of Health, from facilities licensed by the Minnesota Department of Corrections that serve children or youth, and from personal care provider organizations (collectively "protected individuals"). K.A.J. also challenges the commissioner's refusal to set aside his disqualification, arguing that he does not pose a risk of harm to protected individuals. He argues that there was not substantial evidence for these decisions, that they were arbitrary and capricious, and that the process by which they were made violated his procedural-due-process rights. We affirm.

FACTS

K.A.J. is a licensed alcohol and drug counselor. From October 2016 to January 2017, K.A.J. was in a romantic relationship with V.A.N., while K.A.J. was married and V.A.N. was living with her boyfriend. After the relationship ended, K.A.J. began threatening to send nude photos of V.A.N. (which he had received from V.A.N. during the course of their relationship) to the male contacts in V.A.N.'s phone and to V.A.N.'s boyfriend. On February 2, 2017, according to police reports, K.A.J. told V.A.N. "he was going to destroy her life and was just getting started with Phase 1. . . . He told her to keep checking her mailbox and the next planned event was for her graduation [on] May 1st."

On February 14, K.A.J. dropped off an envelope containing nude photos of V.A.N., printouts of text messages and emails between K.A.J. and V.A.N., and a letter from K.A.J. to V.A.N.'s boyfriend, at the front desk of the boyfriend's workplace. According to K.A.J., he did so "because [V.A.N.] threatened to go to his wife's work and tell her about the affair." The next day, V.A.N.'s boyfriend brought the envelope home and showed it to V.A.N., and, the day after that, V.A.N. reported K.A.J.'s actions to the police. She also told police that K.A.J. had "threatened to contact [her] ex-husband to help him get full custody of her eight-year-old son" and had driven past her residence twice in the previous week. V.A.N. reported that she was scared for her and her son's safety.

Police arrested K.A.J. for stalking and nonconsensual dissemination of private sexual images. But he was ultimately charged only with nonconsensual dissemination of private sexual images. He pleaded guilty to that charge.

Before K.A.J. pleaded guilty to the criminal charge, the police department forwarded the information it received from V.A.N. to the Background Studies Division of the Minnesota Department of Human Services (DHS). Based on that information, DHS decided that a preponderance of the evidence supported the conclusion that K.A.J. had committed gross-misdemeanor stalking. As a result, DHS notified K.A.J. that he was disqualified from working with protected individuals. K.A.J. submitted a "request for reconsideration of disqualification due to a criminal offense." In that request, he admitted that "[t]he information about [his] disqualification is correct," but requested "reconsideration of [his] disqualification because [he did not] think [he] pose[d] any risk of harm to the people receiving services." Without holding a hearing, the commissioner

affirmed DHS's decision to disqualify K.A.J. and denied his request to set aside the disqualification based on the risk of harm to people receiving services.

K.A.J. petitioned for certiorari review. In the appendix of his appellate brief, K.A.J. included materials not presented to the commissioner. The commissioner filed a motion to strike the extra-record materials and an accompanying memorandum. K.A.J. filed a memorandum opposing the motion, and then also filed a motion to supplement the record with a consent order issued by the Board of Behavioral Health and Therapy (BBHT) that arose out of the incident here at issue. A special term order of this court deferred ruling on these motions to this panel.

D E C I S I O N

The Background Studies Act requires DHS to perform a background study on any person who has direct contact with protected individuals. Minn. Stat. § 245C.03, subd. 1(a) (Supp. 2017).[1] If "a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15," the individual shall be disqualified from any position allowing direct contact with protected individuals. Minn. Stat. § 245C.14, subd. 1(a)(2) (2016).

"An individual who is the subject of a disqualification may request a reconsideration of the disqualification . . . ." Minn. Stat. § 245C.21, subd. 1 (Supp. 2017). In making such a request, the individual may challenge the disqualification on the ground that "the

[1] Minn. Stat. § 245C.03 was amended in 2018. 2018 Minn. Laws ch. 166 § 6. The 2017 version of the statute was in effect at the time the commissioner's decision was made, and the amendment does not change the substance of the section as it relates to this case.

information the commissioner relied upon in determining the underlying conduct that gave rise to the disqualification is incorrect." *Id.*, subd. 3(a)(1) (2016). The individual may also, in their request, seek that the disqualification be set aside on the ground that "the subject of the study does not pose a risk of harm to any person served by the applicant," based on certain statutory factors. *Id.*, subd. 3(a)(3) (2016) (referencing Minn. Stat. § 245C.22, subd. 4 (2016)). Those factors are:

> (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) (2016). The commissioner must consider all nine factors in making her risk-of-harm assessment. *See Johnson v. Comm'r of Health*, 671 N.W.2d 921, 924 (Minn. App. 2003).

I. K.A.J. forfeited his challenge to the commissioner's disqualification decision, and, in any event, the record supports that decision.

K.A.J. argues that the decision to disqualify him from working with protected individuals was arbitrary, capricious, and unsupported by substantial evidence. The

commissioner argues that K.A.J. forfeited this issue by failing to challenge the factual basis of his disqualification in his request for reconsideration. We begin with the forfeiture issue.

A. K.A.J. forfeited his challenge to the disqualification decision.

Whether a party may raise an argument on appeal presents a question of law this court considers de novo. *See Smith v. Minn. Dep't of Human Servs.*, 764 N.W.2d 388, 391 (Minn. App. 2009). "A reviewing court must generally consider only those issues that the record shows were presented and considered by the [decision-maker] in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted); *see also In re A.D.*, 883 N.W.2d 251, 261 (Minn. 2016) (applying forfeiture-by-failure-to-raise analysis to the certiorari-appeal context).

The commissioner argues that K.A.J. forfeited review of the disqualification decision because "[i]n his request for reconsideration, [K.A.J.] admitted that the information about his disqualification was correct and did not request reconsideration on that basis." We agree. Neither the reconsideration form submitted by K.A.J. nor the accompanying letter gave any indication that K.A.J. contested any of the facts that DHS relied upon or that he contested DHS's conclusion, based on those facts, that he met the statutory criteria (discussed below) for disqualification. Instead, the form and the letter argue that K.A.J. should be permitted to continue working with protected individuals because he does not pose a risk of harm to them. Because K.A.J. did not argue before the commissioner that he did not meet the criteria for disqualification, he cannot challenge that determination on appeal.

B. Even if K.A.J. could challenge the disqualification decision, that decision is not based on an erroneous theory of law, arbitrary, or capricious, and it is supported by substantial evidence.

Assuming, for purposes of argument, that K.A.J. did not forfeit the issue, we turn to his challenge to the disqualification decision. K.A.J. argues that the commissioner incorrectly decided that he should be disqualified. "This court reviews the commissioner's [disqualification] decision, a quasi-judicial agency decision not subject to the Minnesota Administrative Procedure Act, to determine whether the decision is arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Gustafson v. Comm'r of Human Servs.*, 884 N.W.2d 674, 685 (Minn. App. 2016) (quotation omitted).

An individual is disqualified from working with protected individuals if they commit any crime listed in Minn. Stat. § 245C.15. Minn. Stat. § 245C.14, subd. 1(a)(2). Public dissemination of private images is not listed in section 245C.15, but stalking is. Minn. Stat. § 245C.15, subd. 3(a) (2016). As relevant to this case, stalking includes engaging in conduct "which the actor knows or has reason to know would cause the victim under the circumstances to feel frightened, threatened, oppressed, persecuted, or intimidated, and causes this reaction on the part of the victim" by "directly or indirectly, or through third parties, manifest[ing] a purpose or intent to injure the person, property, or rights of another by the commission of an unlawful act." Minn. Stat. § 609.749, subds. 1, 2(1) (2016).

1. Erroneous Theory of Law

K.A.J. first argues the commissioner reached her decision under an erroneous theory of law because "[t]he Commissioner improperly applied a preponderance of evidence standard to conclude that K.A.J. committed a disqualifying offense for the same act for which he had been criminally adjudicated for a nondisqualifying offense." This argument presents a question of law, which we review de novo. *Smith*, 764 N.W.2d at 391.

In support of his argument, K.A.J. cites to the Background Studies Act's provision regarding disqualification based on a judicial determination other than a conviction. It reads:

> When a disqualification is based on a judicial determination other than a conviction, the disqualification period begins from the date of the court order. When a disqualification is based on an admission, the disqualification period begins from the date of an admission in court. When a disqualification is based on an *Alford* Plea, the disqualification period begins from the date the *Alford* Plea is entered in court. When a disqualification is based on a preponderance of evidence of a disqualifying act, the disqualification date begins from the date of the dismissal, the date of discharge of the sentence imposed for a conviction for a disqualifying crime of similar elements, or the date of the incident, whichever occurs last.

Minn. Stat. § 245C.15, subd. 3(e) (2016). Based on this statute, K.A.J. argues that, when there has been a criminal conviction of a *non*disqualifying offense, the commissioner may not disqualify an individual based upon a preponderance of the evidence that a disqualifying crime also occurred as part of the same series of events; instead, a higher burden of proof must be applied.

We disagree. Nothing in the text of the statute suggests a higher burden of proof should be applied in such circumstances. Rather, the language of Minn. Stat. § 245C.14, subd. 1(a)(2), is clear: "The commissioner shall disqualify an individual . . . upon receipt of information showing [that] . . . a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15." The commissioner's disqualification decision was not made under an erroneous theory of law.

2. Substantial Evidence

K.A.J. next argues that there was not substantial evidence to support the commissioner's disqualification decision. "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." *Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. Nov. 15, 2005).

In arguing that substantial evidence does not support the disqualification decision, K.A.J. points to several pieces of evidence that he believes the commissioner should have looked at, but did not, in deciding whether he engaged in stalking. Specifically, K.A.J. points to evidence that, as recently as two weeks before he delivered the envelope, V.A.N. was still sending him erotic photos, "that [V.A.N.] had initiated a call to K.A.J. on February 13 and threatened him," and "that K.A.J. and [V.A.N.] lived less than a mile apart" (and that is why he was seen near her home). K.A.J. also argues that, because the Dakota County Attorney did not charge him with stalking, there could not have been

probable cause to believe that he had committed stalking, which means that there could not be a preponderance of the evidence that he committed stalking, because a preponderance of the evidence is a higher burden of proof.

We are unpersuaded. First, the additional evidence K.A.J. points to, although it may provide additional context, does not impact whether K.A.J. caused V.A.N. to feel frightened, threatened, oppressed, persecuted, or intimidated by manifesting a purpose to injure her rights through the commission of an unlawful act (namely, disseminating private sexual images). Second, the Dakota County Attorney's charging decision is not dispositive on whether stalking occurred. Nothing in the Background Studies Act requires the commissioner to defer to a prosecutor's evaluation of the evidence; rather, she is free to make her own assessment. She did so and concluded that the evidence established that K.A.J. committed stalking. Our own review of the record leads us to conclude that this was a reasonable conclusion. Substantial evidence supports the commissioner's disqualification decision.

3. Arbitrary and Capricious

Finally, K.A.J. argues that the commissioner's disqualification decision was arbitrary and capricious. An agency decision is arbitrary and capricious

> if [the] agency (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

In re Review of the 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils., 768 N.W.2d 112, 118 (Minn. 2009).

K.A.J. argues that the disqualification decision was arbitrary and capricious because the initial letter informing him of his disqualification misled him into admitting to disqualifying circumstances that he meant to contest. K.A.J.'s argument is unavailing. DHS's letter clearly stated that he was disqualified due to "gross misdemeanor stalking," and the criminal complaint against K.A.J. was equally clear in stating that he was charged only with "Nonconsensual Dissemination of Private Sexual Images." And we see no statements by DHS in the letter that would render the commissioner's decision arbitrary or capricious.

II. The decision to deny K.A.J. a set-aside is supported by substantial evidence and is not arbitrary or capricious.

K.A.J. also challenges the commissioner's decision not to set aside his disqualification, arguing that he does not pose a risk to protected individuals. He argues that the decision is unsupported by substantial evidence, arbitrary, and capricious.

A. The set-aside denial is supported by substantial evidence.

K.A.J. argues that the commissioner's set-aside denial is not based on substantial evidence because the "risk of harm analysis fails to [marshal] significant facts favorable to K.A.J." K.A.J. points to (1) his lack of a prior criminal record, (2) the decision to grant a downward durational departure by the court that sentenced him on his image-dissemination charge, and (3) multiple supporting letters indicating that K.A.J. poses no risk to the

individuals he serves. K.A.J. argues that, had the commissioner considered this evidence, the evidence as a whole would not have supported the decision to refuse a set-aside.

We disagree. A substantial basis to support an agency determination exists "where, considering the evidence in its entirety, there is relevant evidence that a reasonable person would accept as adequate to support a conclusion." *A.D.*, 883 N.W.2d at 259. Such a basis exists here. The factors identified as significant by the commissioner—that K.A.J.'s conduct "played out over multiple weeks" and involved "making multiple threats"; that V.A.N. "likely suffered emotional harm"; that people K.A.J. seeks to work with "are vulnerable as a result of their chemical dependency"; that (at the time the commissioner's decision was made) less than a year had elapsed since K.A.J.'s conduct; and that, due to the recent nature of the offense, "there is not yet enough information to conclude [that K.A.J. had] undergone changes that would make it unlikely the disqualifying offense would reoccur"—make the commissioner's conclusion reasonable, even in light of the evidence K.A.J. argues the commissioner failed to consider. This is particularly true because the commissioner is required to "give preeminent weight to the safety of each person served." Minn. Stat. § 245C.22, subd. 3 (2016). We conclude that the commissioner's set-aside denial is supported by substantial evidence.

B. The set-aside denial is not arbitrary or capricious.

K.A.J. argues the commissioner's set-aside denial was arbitrary and capricious because she failed to consider important evidence—specifically, the decision of the court that sentenced K.A.J. on his image-dissemination offense to grant him a downward durational departure and the BBHT's decision to stay suspension of K.A.J.'s counseling

license. K.A.J. concedes that this information was not available at the time the commissioner made her decision, but he argues that she should have waited until it was available before deciding.

We reject this "waiting" suggestion. First, at no point prior to this appeal did K.A.J. ask the commissioner to delay making a decision. Second, K.A.J. provides no persuasive reason why the commissioner could or should have delayed on her own, since the Background Studies Act imposed a 15-working-day deadline for responding to K.A.J.'s request for a set-aside. *See* Minn. Stat. § 245C.22, subd. 1(b) (2016) ("If the basis for a disqualified individual's reconsideration request is that the individual does not pose a risk of harm, the commissioner shall respond to the request within 15 working days after receiving a complete request for reconsideration and all required relevant information."). We conclude that it was not arbitrary or capricious for the commissioner to deny a set-aside without waiting for the results of K.A.J.'s sentencing or the BBHT's decision.

III. The disqualification and set-aside decision-making process did not violate K.A.J.'s procedural-due-process rights.

K.A.J. argues that the commissioner's decision-making process violated his procedural-due-process rights by failing to provide him with a hearing. "Whether procedural due process has been violated is a question of law that [appellate courts] review de novo." *Gams v. Houghton*, 884 N.W.2d 611, 618 (Minn. 2016).

No person shall be deprived of liberty or property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. This due-process requirement applies to

disqualification proceedings. *See Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456, 461 (Minn. App. 2000). In determining what process is due, courts balance:

> (1) the significance of the private interest affected by the official action; (2) the risk of an erroneous deprivation of that interest under current procedures, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens any additional requirements would entail.

Thompson v. Comm'r of Health, 778 N.W.2d 401, 406 (Minn. App. 2010). In *Thompson*, we analyzed our past cases applying this test in the disqualification and set-aside context to conclude that an "in-person hearing requirement" is triggered in circumstances when a hearing would be the "first factual contest of the criminal allegations." *Id.* at 408.

Such circumstances are not present here. As discussed above, at no point did K.A.J. challenge the facts giving rise to the commissioner's conclusion that he committed the disqualifying act of stalking. This is not a case "where credibility and veracity are at issue." *Id.* (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021 (1970)). K.A.J. suggests that there was a factual contest because, in the exchange of letters between him and DHS, (1) DHS failed to adequately explain that stalking was the basis for the disqualification and (2) he admitted to the information about the disqualification only to take responsibility for his actions. Neither argument is persuasive. Although DHS's letter did not inform K.A.J. that he would not receive a hearing if he admitted the information about his disqualification, the letter clearly explained that the basis for disqualification was gross-misdemeanor stalking. And K.A.J.'s motivation for admitting the information does not create a due-process right to a hearing.

Although K.A.J.'s "private interest affected by the official action" is significant, there is little risk that the failure to provide a hearing resulted in "an erroneous deprivation of that interest," and thus the government's interest in reducing fiscal and administrative burdens outweighs what little benefit that providing a hearing would give. We conclude that the commissioner did not violate K.A.J.'s procedural-due-process rights in making her disqualification and set-aside decisions.

IV. The commissioner's motion to strike is granted in part and denied in part; K.A.J.'s motion to supplement is denied.

The addendum to K.A.J.'s appellate brief contains materials that are not part of the agency record. The commissioner moves to strike these materials. K.A.J. opposes the commissioner's motion and, in addition, moves to supplement the record with the results of the BBHT investigation into this incident.

"The record on certiorari review includes the documents filed with the agency," and documents not contained in the record should be struck from a party's brief. *Fosselman*, 612 N.W.2d at 467. A party is not allowed to expand the record for the purpose of reversing a judgment. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 584 (Minn. 1977).

K.A.J. does not dispute that all but three of the documents the commissioner seeks to strike are outside the record on appeal. Instead, K.A.J. argues that the extra-record documents are relevant and should be considered in the interest of providing a complete record of the related criminal proceedings. Applying the same reasoning, K.A.J. argues the record should be expanded to include the BBHT investigation results. We disagree. *Plowman* is clear: K.A.J. cannot add evidence to the record to reverse the commissioner's

decision. We therefore grant the commissioner's motion to strike the documents that K.A.J. concedes are outside the record and deny K.A.J.'s motion to supplement the record.

The three remaining documents are two pages of a letter that is in the record (but is missing the two pages in question) and two letters of support. K.A.J. contends that the letters of support and the two pages were submitted to the commissioner as part of his request for reconsideration. We note that the commissioner's October 27, 2017 decision refers to K.A.J.'s positive letters of support. We conclude that K.A.J. has shown that the two letter pages and the letters of support were submitted to the commissioner and are part of the record for the appeal. The commissioner's motion to strike these three documents is denied. *See* Minn. R. Civ. App. P. 110.05 (providing that an appellate court may direct that an omission of materials from the record be corrected).

Affirmed; motion to strike granted in part and denied in part; motion to supplement denied.