STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0380

Dwayne Eugene Jackson,
Relator,

vs.

Commissioner of Human Services,
Respondent.

Filed December 10, 2018
Affirmed
Larkin, Judge

Minnesota Department of Human Services
License Nos. 1003334, 801783

Cody M. Zustiak, Winthrop & Weinstine, P.A., Minneapolis, Minnesota (for relator)

Lori Swanson, Attorney General, Gail Feichtinger, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

LARKIN, Judge

Relator challenges a decision of respondent Minnesota Commissioner of Human Services (commissioner) permanently disqualifying him from providing direct-contact services for facilities licensed by the Minnesota Department of Human Services (DHS),

arguing that Minn. Stat. § 245C.24, subd. 2 (2016), violates his due-process and equal-protection rights. We affirm.

FACTS

In May 2017, RS Eden Residential and Nuway House, Inc. submitted a background-study request to DHS regarding relator Dwayne Eugene Jackson, who had worked at DHS-licensed facilities for approximately 12 years. As part of the background study, DHS received Jackson's criminal-history record from Ohio, which indicated that he had been convicted of attempted abduction and aggravated robbery in 1992, and simple robbery in 2000. The commissioner determined that, because those offenses are substantially similar to disqualifying offenses under Minnesota law, Jackson's convictions disqualify him from working in positions allowing direct contact with persons receiving services from DHS-licensed programs. The commissioner also determined that Jackson's attempted abduction and aggravated-robbery convictions permanently disqualify him and that the commissioner could not set aside the disqualification or grant a variance.

In November 2017, DHS notified Jackson, RS Eden, and Nuway of Jackson's disqualification. Jackson wrote the commissioner, acknowledging his Ohio convictions. But he pointed out that he had worked without incident in DHS-licensed programs for nearly a decade. Jackson wrote that he was "not sure if [he was making] a reconsideration request; or simply a request to reinstate the permission [he] was given since there was no intervening criminal behavior." Jackson included a copy of a 2011 background-study clearance he had received from DHS, which did not refer to the Ohio convictions. Later,

Jackson submitted nine letters of recommendation in support of his request that the commissioner reverse the disqualification.

The commissioner treated Jackson's letter as a request for reconsideration and affirmed Jackson's disqualification. The commissioner informed Jackson that "under Minnesota Statutes, section 245C.24, subdivision 2, [she] may not set aside this disqualification, regardless of how much time has passed, and regardless of whether it is determined that you pose a risk of harm." Jackson responded that he had received a total of five set-asides in the past, including one in 2005, and that his understanding was that "crimes resulting in permanent [disqualification] were created by the 2005 Minnesota legislature and went into effect in 2006, and that those [individuals who were] granted a set aside prior to the change could continue to operate under a set aside provid[ed] they had no further disqualifying incidents." The commissioner informed Jackson that after a review of DHS records and databases, she could not find any records indicating that Jackson had received a set-aside prior to July 1, 2005, and that he therefore was ineligible for a variance. This certiorari appeal follows.

D E C I S I O N

Under Minnesota's Background Studies Act, Minn. Stat. §§ 245C.01-.34 (2016 & Supp. 2017), DHS must conduct a background study on current or prospective employees or contractors of a DHS-licensed facility, agency, or program who will have direct contact with persons served by the facility, agency, or program. Minn. Stat. § 245C.03, subd. 1(a)(3) (2016). A person is permanently disqualified, under Minn. Stat. § 245C.14, subd. 1 (2016), from providing direct-contact services at a DHS-licensed facility, agency, or

program if the person has committed an "offense in any other state or country, where the elements of the offense are substantially similar to any of the offenses listed in [Minn. Stat. § 245C.15, subd. 1(a) (2016)]." Minn. Stat. § 245C.15, subd. 1(c) (2016). Jackson does not dispute that his 1992 Ohio convictions of attempted abduction and aggravated robbery are permanently disqualifying offenses under Minn. Stat. § 245C.15, subd. 1(a).

If a person is disqualified for reasons other than commission of a permanently disqualifying offense, the commissioner may "set aside the [person's] disqualification if the commissioner finds that the individual has submitted sufficient information to demonstrate that the individual does not pose a risk of harm to any person served by the applicant, license holder, or other entities [specified in statute]." Minn. Stat. §§ 245C.22, subd. 4, .24, subd. 2(a) (2016). Such a determination is based on a risk-of-harm assessment that involves consideration of nine factors. Minn. Stat. § 245C.22, subd. 4(b) (2016). The commissioner may also grant a time-limited variance that allows a person who has not committed a permanently disqualifying offense to provide direct-contact services "when the commissioner has not set aside a background study subject's disqualification, and there are conditions under which the disqualified individual may provide direct contact services . . . that minimize the risk of harm to people receiving services." Minn. Stat. § 245C.30, subd. 1(a) (2016).

However, the commissioner generally may not grant a set-aside or variance for a disqualification that resulted from a person's commission of a permanently disqualifying offense. Minn. Stat. §§ 245C.24, subd. 2(a), .30, subd. 1(a). But there is a limited statutory exception as follows.

> For an individual in the chemical dependency or corrections field who was disqualified for a crime or conduct listed under section 245C.15, subdivision 1, and whose disqualification was set aside prior to July 1, 2005, the commissioner must consider granting a variance pursuant to section 245C.30 for the license holder for a program dealing primarily with adults.

Minn. Stat. § 245C.24, subd. 2(b).

Jackson contends that the commissioner's application of Minn. Stat. § 245C.24, subd. 2, violated his constitutional rights to due-process and equal-protection. Although he frames his challenge as an assertion that the commissioner violated his constitutional rights, there is no dispute that the commissioner's actions were consistent with and mandated by Minn. Stat. § 245C.24, subd. 2. We therefore treat Jackson's challenge as a challenge to the constitutionality of Minn. Stat. § 245C.24, subd. 2, itself.

The constitutionality of a statute is a question of law that an appellate court reviews de novo. *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 633 (Minn. 2017). An appellate court presumes statutes are constitutional and will use its power to declare a statute unconstitutional "only when absolutely necessary." *In re Welfare of B.A.H.*, 845 N.W.2d 158, 162 (Minn. 2014). "The party challenging the constitutionality of the statute bears the burden of establishing beyond a reasonable doubt that the statute violates a constitutional right." *Gluba ex rel. Gluba v. Bitzan & Ohren Masonry*, 735 N.W.2d 713, 719 (Minn. 2007) (quotation omitted). We address Jackson's due-process and equal-protection challenges in turn.

I.

The United States and Minnesota Constitutions provide that a person may not be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. "The due process protection provided under the Minnesota Constitution is identical to the due proces[s] guaranteed under the Constitution of the United States." *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 453 (Minn. 1988). Jackson contends that Minn. Stat. § 245C.24, subd. 2, violates his procedural and substantive due-process rights by prohibiting the commissioner from conducting a risk-of-harm assessment or granting a variance regarding his permanent disqualification.

Procedural Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 901 (1976). When assessing a procedural due-process challenge, a court first determines whether the government has deprived an individual of a protected liberty or property interest. *Id.* at 332, 96 S. Ct. at 901. If so, the court next considers the minimum procedures the government must provide before deprivation of that interest. *Id.* at 334-35, 96 S. Ct. at 903. When determining the required minimum procedures, a court balances the following factors: (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, 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 that the additional or substitute procedural requirement would entail." *Id.* at 335, 96 S. Ct. at 903.

An individual "has a protected property interest in holding direct-care positions in state-licensed facilities." *Anderson v. Comm'r of Health*, 811 N.W.2d 162, 167 (Minn. App. 2012), *review denied* (Minn. Apr. 17, 2012). As to the minimum-procedures factors, Jackson argues that "the risk of erroneous deprivation and value of additional safeguards weighs in [his] favor" because "DHS is restricted from even reviewing the essential facts that determine whether [he] poses a risk of harm to those he seeks to serve." Jackson further argues that "[b]arring DHS from considering facts such as [his] letters of recommendation eliminates the possibility of a full consideration of whether [he] can safely treat patients and work for his employer" and that "[w]hether someone received a set aside in 2004 or applied for the first time last week has no bearing on whether that individual can safely work in the chemical dependency field, primarily with adults."

Jackson relies on *Fosselman v. Comm'r of Human Servs.*, 612 N.W.2d 456 (Minn. App. 2000). In *Fosselman*, the relators argued that procedural due process required the commissioner to provide an agency hearing regarding their disqualifications, which were based on their failures to report maltreatment. 612 N.W.2d at 459-60. This court balanced the three *Mathews* factors and held that due process required that the relators receive an agency hearing. *Id.* at 462-65. This court reasoned, "Preventing an individual from challenging an essential fact on which the government bases an adverse action" violates the individual's due-process rights and that a statutory provision that prevented the relators

from challenging the underlying maltreatment determinations therefore denied them due process. *Id.* at 463-64.

Unlike the relators in *Fosselman*, Jackson does not challenge the essential facts on which the government based the adverse action in this case: Jackson's commission of permanently disqualifying offenses. In fact, Jackson does not contest his commission of those offenses or argue that they are not substantially similar to the offenses listed in Minn. Stat. § 245C.15, subd. 1. Nor does Jackson request a hearing regarding the basis for his disqualification. Instead, Jackson's procedural-due-process challenge focuses on his inability to obtain a risk-of-harm assessment as a means of avoiding permanent disqualification from providing direct-contact services. That challenge appears to be a substantive challenge to the statute itself, and not a challenge to the procedures attendant to its application.

This court's decision in *Anderson* is instructive on this point. 811 N.W.2d at 162. In that case, the commissioner of health permanently disqualified the relator from working in a direct-contact position based on the relator's conviction of fifth-degree criminal sexual conduct, a permanently disqualifying offense under Minn. Stat. § 245C.15, subd. 1. *Id.* at 163-64. The relator appealed the disqualification, arguing in part that he was denied procedural due process because the commissioner failed to conduct a risk-of-harm analysis. *Id.* at 166.

This court described the relator's argument as asking this court to "hold the statute unconstitutional because it fails to require the commissioner to analyze a substantive element (specifically, proof of risk of harm) that the disqualification statute does not, but

constitutionally must, require" and noted that this requested remedy was a "substantive rather than [a] procedural remedy." *Id.* at 166-67. Because the relator in *Anderson* was notified of the basis for the disqualification and submitted two written reconsideration arguments that were denied on the merits with a full explanation, this court held that the relator was afforded process that "gave him a full and fair opportunity to challenge any factual and legal issue made relevant by the terms of the disqualification statute." *Id.* at 167. And because the relator did "not claim that the process afforded him prohibited him from developing any statutorily relevant position and . . . expressly [made] no claim of right to an evidentiary hearing," this court rejected his procedural-due-process argument. *Id.*

The circumstances of this case are similar to those in *Anderson*. Jackson purports to raise a procedural-due-process challenge, but like the relator in *Anderson*, the constitutional deficiency that Jackson alleges goes to the substance of the statute: permanent disqualification based on convictions of certain offenses without a risk-of-harm analysis. Jackson does not suggest that additional procedures are necessary to avoid an erroneous deprivation when applying Minn. Stat. § 245C.24, subd. 2, *as written*. He "merely requests that DHS consider whether he poses a risk of harm to adults in chemical dependency settings." Because the legislature has concluded that an individual who commits a permanently disqualifying offense poses a risk of harm to adults in chemical dependency settings and that an individualized risk-of-harm assessment cannot refute that conclusion, Jackson requests a substantive rather than a procedural remedy.

Also like the circumstances in *Anderson*, here, the commissioner notified Jackson of the basis for the disqualification, considered Jackson's arguments against disqualification on the merits, and rejected them with a full explanation. Jackson does not claim that this process prevented him from developing any statutorily relevant position, and Jackson does not claim a right to an evidentiary hearing. On this record, Jackson has not met his burden to show that Minn. Stat. § 245C.24, subd. 2, violates procedural due process.

Substantive Due Process

Substantive due process protects individuals from "certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990) (quotation omitted); *see also In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999).

The standard used to evaluate a claim that a statute violates substantive due process depends on whether the statute implicates a fundamental right. *Boutin v. LaFleur*, 591 N.W.2d 711, 716 (Minn. 1999). If a fundamental right is at issue, courts apply a strict-scrutiny standard, under which a law "must advance a compelling state interest and must be narrowly tailored to further that interest." *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). If a statute does not implicate a fundamental right, courts apply rational-basis review, which requires "that the statute not be arbitrary or capricious; in other words, the statute must provide a reasonable means to a permissible objective." *Boutin*, 591 N.W.2d at 716. Jackson agrees that a fundamental right is not at issue here and that his statutory challenge should be reviewed under the rational-basis standard.

In *Anderson*, this court described the state's purpose in permanently disqualifying a person with a prior criminal-sexual-conduct conviction as "safeguard[ing] patients in licensed health-care facilities from assault" and concluded that this was a legitimate interest. 811 N.W.2d at 167. This court further concluded that there was a "reasonable relationship between this legitimate interest and disqualifying those convicted of criminal sexual conduct from having direct access to those patients." *Id*.

Jackson agrees that protecting "vulnerable adults and minors in state-licensed facilities" is a permissible objective. However, Jackson contends that Minn. Stat. § 245C.24, subd. 2(b), violates his "constitutional right to substantive due process" because its July 1, 2005 set-aside deadline is "arbitrary" and "not reasonably related to the public purpose for the Background Studies Act." He argues that the "plain language of Minn. Stat. § 245C.24, subd. 2(b) makes it clear that the Legislature also placed an emphasis on employing willing and able workers in the chemical dependency field." He further argues that there is "no rational basis to prove that someone who was able to receive a set aside on June 30, 2005, is safer or more qualified than an individual whose permanently disqualifying offense occurred after that date, or who simply entered the chemical dependency field at a later time" and that "[s]etting an arbitrary deadline does not achieve the Legislature's goal of protecting the public while also ensuring that individuals seeking treatment receive the best care possible."

Government action is arbitrary if it is "so egregious and irrational that the action exceeds standards of inadvertence and mere errors of law." *See Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (quotation omitted) (discussing standard

for unconstitutionally arbitrary action in zoning context). The history of Minn. Stat. § 245C.24 demonstrates that the July 1, 2005 prior set-aside deadline in Minn. Stat. § 245C.24, subd. 2(b), is not arbitrary. Prior to 2005, the commissioner could not set aside disqualifications based on permanently disqualifying offenses in connection with certain licenses, specifically, licenses "to provide family child care for children, foster care for children in the provider's home, or foster care or day care services for adults in the provider's home." Minn. Stat. § 245C.24, subd. 2 (2004). In 2005, the legislature amended Minn. Stat. § 245C.24, subd. 2, to provide that the commissioner could not set aside disqualifications based on permanently disqualifying offenses in connection with *any* DHS license. 2005 Minn. Laws ch. 136, art. 6, § 7, at 985. That amendment was effective July 1, 2005. S*ee* Minn. Stat. § 645.02 (2016) ("An appropriation act or an act having appropriation items enacted finally at any session of the legislature takes effect at the beginning of the first day of July next following its final enactment, unless a different date is specified in the act."); 2005 Minn. Laws ch. 136, art. 6, § 7, at 985 (providing no specific effective date).

In 2006, the legislature created the exception in Minn. Stat. § 245C.24, subd. 2, for persons working in chemical-dependency or corrections fields who had received set-asides before July 1, 2005. 2006 Minn. Laws ch. 264, § 10, at 891. The exception allows individuals who obtained set-asides before the law changed on July 1, 2005, to seek a variance that would allow them to continue working in the chemical-dependency or corrections fields. The commissioner has already determined that such individuals do not

pose a risk of harm.[1] Thus, the set-aside deadline limits the risk of harm from direct contact between patients and persons who have committed permanently disqualifying offenses to those persons who demonstrated—before the law changed on July 1, 2005—that they do not pose a risk of harm in the chemical-dependency and corrections fields.

In sum, providing a limited exception for individuals who obtained set-asides under the earlier, less restrictive version of the DHS-licensing statute, while otherwise prohibiting persons who have committed a permanently disqualifying offense from working in direct-contact positions in DHS-licensed programs, is a reasonable means to safeguard patients in DHS-licensed facilities from harm. Jackson has not met his burden to show that the set-aside deadline in Minn. Stat. § 245C.24, subd. 2(b), violates substantive due process.

II.

The Fourteenth Amendment to the U.S. Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Minnesota Constitution similarly guarantees that "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const.

[1] A person may only obtain a set-aside if the commissioner determines that the person does not pose a risk of harm to any person served by the applicant, license holder, or other entities specified in statute. Minn. Stat. § 245C.22, subd. 4(a). In 2004, the legislature amended Minn. Stat. § 245C.22, subd. 4, to expressly provide that the person requesting a set-aside has the burden of submitting sufficient information to establish that the person does not pose a risk of harm. 2004 Minn. Laws ch. 288, art. 1, § 62, at 1341. The risk-of-harm assessment requirement for a set-aside has otherwise not substantively changed. *Compare* Minn. Stat. § 245C.22, subd. 4(a) (Supp. 2003), *with* Minn. Stat. § 245C.22, subd. 4(a) (2016).

art. I, § 2. "Both clauses have been analyzed under the same principles and begin with the mandate that all similarly situated individuals shall be treated alike, but only invidious discrimination is deemed constitutionally offensive." *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 74 (Minn. 2000) (quotation omitted). Jackson contends that "[t]he Legislature's arbitrary July 1, 2005, deadline to receive a set aside under Minn. Stat. § 245C.24, subd. 2(b) . . . violates the Equal Protection Clause."

An equal-protection challenge requires an initial showing that "similarly situated persons have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (quotation omitted). The focus in determining whether two groups are similarly situated is "whether they are alike in all relevant respects." *Id.* at 522. The parties dispute whether Jackson is similarly situated to persons who qualify for the exception in Minn. Stat. § 245C.24, subd. 2(b). For the purpose of our analysis, we assume, without deciding, that Jackson is similarly situated.

If a statute treats similarly situated individuals differently, a court reviews the merits of the equal-protection challenge under the appropriate standard of scrutiny. *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012). "If a constitutional challenge involves neither a suspect classification nor a fundamental right, [appellate courts] review the challenge using a rational basis standard under both the state and federal constitutions." *Gluba*, 735 N.W.2d at 719. Jackson does not assert that this case involves a suspect classification or a fundamental right. We therefore apply the rational-basis standard.

Rational-Basis Standard Under the U.S. Constitution

When reviewing an equal-protection challenge using the rational-basis standard under the U.S. Constitution, Minnesota courts "determine[] whether the challenged classification has a legitimate purpose and whether it was reasonable to believe that use of the challenged classification would promote that purpose." *Kolton v. Cty. of Anoka*, 645 N.W.2d 403, 411 (Minn. 2002).

As noted above, a legitimate purpose of permanent disqualification is to safeguard patients in DHS-licensed facilities from harm. *See Anderson*, 811 N.W.2d at 167. The challenged classification—the July 1, 2005 set-aside deadline—limits the possibility of a variance to those individuals who received a set-aside before the deadline. Because the classification limits the number of people who may seek a variance and thereby reduces the amount of direct contact between patients and individuals who have committed a permanently disqualifying offense, the classification reflects a legitimate patient-safety purpose and it is reasonable to believe that use of the classification promotes that purpose. Thus, the set-aside deadline in Minn. Stat. § 245C.24, subd. 2(b), satisfies the rational-basis standard under the U.S. Constitution.

Rational-Basis Standard Under the Minnesota Constitution

When reviewing an equal-protection challenge under the Minnesota Constitution, Minnesota courts have sometimes applied the following rational-basis standard, which requires that:

> (1) The distinctions which separate those included within the classification from those excluded must not be manifestly arbitrary or fanciful but must be genuine and substantial,

> thereby providing a natural and reasonable basis to justify legislation adapted to peculiar conditions and needs; (2) the classification must be genuine or relevant to the purpose of the law; that is there must be an evident connection between the distinctive needs peculiar to the class and the prescribed remedy; and (3) the purpose of the statute must be one that the state can legitimately attempt to achieve.

Gluba, 735 N.W.2d at 721 (quotation omitted).

The key distinction between the federal and Minnesota standards is that under the Minnesota standard "[appellate courts] have been unwilling to hypothesize a rational basis to justify a classification, as the more deferential federal standard requires. Instead, [appellate courts] have required a reasonable connection between the actual, and not just the theoretical, effect of the challenged classification and the statutory goals." *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004) (quotation omitted).

As explained above, the distinction that separates those who qualify for a potential variance under Minn. Stat. § 245C.24, subd. 2(b), from those who do not is genuine and provides a natural and reasonable basis to justify the July 1, 2005 set-aside deadline. Again, the purpose of permanent disqualification and the set-aside deadline is patient safety. The set-aside deadline limits the number of people who may seek a variance and thereby have direct contact with patients, despite their commission of a permanently disqualifying offense. Thus, the set-aside deadline is relevant to the patient-safety purpose of the law. Lastly, the patient-safety purpose of the July 1, 2005 set-aside deadline is one that the state can legitimately attempt to achieve.

In sum, the classification created by the set-aside deadline in Minn. Stat. § 245C.24, subd. 2(b), satisfies the rational-basis standard under the Minnesota Constitution.

Conclusion

We acknowledge that the outcome in this case seems unfair. The record indicates that Jackson has worked in the chemical-dependency field for approximately 12 years without incident. Indeed, Jackson's letters of recommendation suggest that he has been a successful chemical-dependency technician at DHS-licensed facilities. But under Minnesota law, Jackson is permanently disqualified from working in positions allowing direct contact with persons receiving services from DHS-licensed programs, based on his 1992 Ohio convictions. And Minn. Stat. § 245C.24, subd. 2, does not require the commissioner to consider granting Jackson a variance. The only way for this court to grant relief in this case is to declare that statute unconstitutional. Jackson has not established a basis for this court to do so.

Affirmed.