STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0286

Steven Michael Krause,
Relator,

vs.

Minnesota Department of Corrections,
Respondent.

Filed September 16, 2019
Affirmed
Hooten, Judge

Minnesota Department of Corrections
File No. 1607106

John E. Mack, New London Law, P.A., New London, Minnesota (for relator)

Keith Ellison, Attorney General, Steven R. Forrest, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Klaphake, Judge.*

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

HOOTEN, Judge

Relator appeals from a final agency decision from the Department of Corrections (DOC) refusing to set aside his disqualification from working in a position that involves

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

direct contact with persons receiving services from state-licensed programs. He argues that the decision was not supported by sufficient evidence and that his due-process rights were violated. We affirm.

FACTS

In September 2015, police found marijuana plants being grown outside of relator Steven Michael Krause's residence. They also found drug paraphernalia and marijuana inside of the residence. As a result, Krause was charged with fifth-degree felony drug possession, possession of drug paraphernalia, and possession of a small amount of marijuana. He pleaded guilty to the fifth-degree drug possession charge, in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2014), and was sentenced to a stay of adjudication and five years of probation in July 2016. The following July, the district court found that Krause had violated his probation, but did not revoke his stay of adjudication. Krause then entered and completed inpatient treatment, but in March 2018, admitted to relapsing after several months of sobriety by using methadone. He then successfully completed an outpatient program in early May 2018. Krause has apparently remained sober and compliant with probation since completing this program.

Krause began working with Prairie Lakes Youth Programs (PLYP), through the Prairie Lakes Juvenile Detention Center, as a fill-in corrections counselor in late June 2018. He was then promoted to a position as a full-time corrections counselor in early October. Because PLYP is a state-licensed program under Minn. Stat. § 245A.03 (2018), and Krause was working in a position that involved direct contact with persons served by such a program, the Background Studies Division of the Minnesota Department of Human

Services (DHS) was required to conduct a background study of Krause. Minn. Stat. § 245C.03, subd. 1(a)(3) (2018). In early November 2018, DHS informed Krause that the background study had been completed and that he was disqualified from his position as a corrections counselor because of his guilty plea to fifth-degree possession of drugs in 2016.

Krause subsequently requested that DOC, which oversees PLYP, set aside his disqualification. The basis for his request was that he did not believe he posed any risk of harm to the people receiving services. At the heart of Krause's argument was his claim that the crime he pleaded guilty to was victimless. He also asserted that through treatment, he has been able to change his lifestyle and thinking and stay away from drugs. Krause submitted letters from the PLYP detention program director, HR manager, and executive director all supporting his request to have his disqualification set aside. A letter from Krause's probation officer was also submitted, detailing the timeline of Krause's criminal case and explaining that although Krause had a drug relapse in March 2018, he had subsequently been successful in treatment and the numerous random drug tests he has been subjected to have all come back negative.

DOC reviewed Krause's request and in early January 2019 decided to not set aside his disqualification, determining that he had "failed to demonstrate that [he does] not pose a risk of harm." This certiorari appeal follows.

D E C I S I O N

Krause's appeal deals extensively with the Department of Human Services Background Studies Act (the act), Minn. Stat. §§ 245C.01–.34 (2018). Some explanation of the act is useful in order to understand Krause's arguments. The act requires the

commissioner of human services to conduct background studies on employees working in certain commissioner-approved programs if those employees have direct contact with persons served by the program. Minn. Stat. § 245C.03, subd. 1(a)(3). If the background study reveals that certain statutory requirements are met, then the employee is disqualified from working in that position. Minn. Stat. § 245C.14, subd. 1. Relevant to this case, one of the requirements for disqualification is that the subject of the background study has been convicted of, admitted to, or submitted an *Alford* plea for an enumerated felony-level offense. Minn. Stat. §§ 245C.14, subd. 1(a)(1), .15, subd. 2(a). Felony-level offenses under Minnesota Statutes Chapter 152—such as fifth-degree possession of drugs—are included on the list of applicable offenses. Minn. Stat. § 245C.15, subd. 2(a). A person subject to a background study can only be disqualified under Minn. Stat. § 245C.15, subd. 2, if the statutorily relevant 15-year window has not expired.[1] In this case, there is no dispute that Krause works in a position involving direct contact with persons served by a commissioner-approved program, that he pleaded guilty to an applicable offense, or that he is within the 15-year window.

A person who is disqualified under the act may request that the commissioner reconsider the disqualification. Minn. Stat. § 245C.21, subd. 1. A disqualified individual may argue that the commissioner relied upon incorrect information in determining that he

[1] When the 15-year window begins to run depends on the specifics of the case. *See* Minn. Stat. § 245C.15, subd. 2(a), (f) (distinguishing between disqualifications based on convictions and disqualifications based on "judicial determination[s] other than a conviction"); *see also Gustafson v. Comm'r of Human Servs.*, 884 N.W.2d 674, 680–82 (Minn. App. 2016) (analyzing an identical distinction in Minn. Stat. § 245C.15, subd. 3).

is disqualified. *Id.*, subd. 3(a)(1). Or he may argue that the disqualification should be set aside because he "does not pose a risk of harm to any person served by" the program for which he works. *Id.*, subd. 3(a)(3). To determine whether the disqualified individual has met his burden of showing that he does not pose a risk of harm, the commissioner is to consider 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 the 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). If the individual meets his burden of showing that he does not pose a risk of harm, then the commissioner may set aside the disqualification. Minn. Stat. § 245C.22, subd. 4(a). In his request for reconsideration, Krause did not dispute the underlying disqualification, but instead argued that the disqualification should be set aside because he does not pose a risk of harm to the juveniles served by PLYP.

The act also provides that in certain circumstances a disqualified individual may seek a "fair hearing" following an unsuccessful request for reconsideration. Minn. Stat. § 245C.27. If the disqualified individual was disqualified on the basis of an administrative determination that a preponderance of the evidence shows that he had committed an act

meeting the definition of an applicable crime, he may request a fair hearing. *Id.*, subd. 1(a). But if the individual was disqualified on the basis of a conviction of, admission to, or *Alford* plea to an applicable crime, then the reconsideration decision is the final agency determination and he may not request an evidentiary hearing. *Id.*, subd. 1(c). Because Krause's disqualification was based on his admission (guilty plea) to fifth-degree drug possession, he was not allowed to request a hearing on the question of whether he posed a risk of harm. We now turn to Krause's arguments.

I. Support for the Agency Decision

Krause argues that there was insufficient evidence to support DOC's refusal to set aside his disqualification. "An appellate court may reverse an administrative decision if it is not supported 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 defined "in part as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 274 (Minn. 2001) (quotation omitted). An agency determination is arbitrary and capricious if there is no rational connection between the agency's decision and the facts of the case. *Sweet*, 702 N.W.2d at 318.

Krause is essentially asserting that DOC did not actually take a look at the question of harm and failed to establish any sort of nexus between his disqualifying behavior (growing marijuana) and the risk of harm to the people served by PLYP. The applicable statute only requires that DOC consider the nine factors that it lays out and then determine

whether the disqualified individual has met his burden. Minn. Stat. § 245C.22, subd. 4. In this case, the letter to Krause informing him that his disqualification would not be set aside was rather conclusory, stating in relevant part:

> The Commissioner has applied and weighed all of the above eight[2] factors with respect to your disqualification record, and has given preeminent weight to the safety of each person to be served by the program over the interest of the license holder, applicant or registrant, as is required by Minnesota Statutes, section 245C.22, subd. 3. While some of the factors may indicate a lesser risk of harm, based on all of the foregoing, the Commissioner has determined that you have failed to demonstrate that you do not pose a risk of harm.

If this were the only information before us regarding the agency's decision, then we might be inclined to agree with Krause that the decision was arbitrary due to the lack of analysis or explanation for the decision. But the record gives us a more complete view of DOC's decision. Included in the record is a document titled "Risk of Harm Assessment" that includes a checklist of factors to assess Krause's risk of harm. This checklist includes all nine statutory factors with the first factor listed as two separate considerations—"the nature/severity of events(s)" and "consequences of events(s) to victim." In addition to these specifically listed factors, DOC considered the employee's "length of employment in health/human services" and "insight since event." Next to each factor, there is the option to check a box for lower risk, medium risk, or higher risk. Six factors—consequences of

[2] The letter indicates that eight factors were considered. This is consistent with the old version of the statute. Minn. Stat. § 245C.22, subd. 4(b) (2006). In 2007, however, the statute was updated to include a ninth factor—vulnerability of persons served by the program. Minn. Stat. § 245C.22, subd. 4(b) (Supp. 2007). While the letter does not indicate that this factor was considered, as discussed below, other documents in the record indicate that all nine factors were considered.

event(s) to victim, number of disqualifiers, age/vulnerability of victim(s), harm suffered by victims, similarity of victim(s) to program clients, and documentation of completion of rehabilitation—were marked as lower risk. Three factors—nature/severity of event(s), vulnerability of program clients, and insight since event—were marked as medium risk. Two factors—time elapsed without a repeat of the same or similar event and length of employment in health/human services—were marked as higher risk. And under "other pertinent information," it was noted that Krause "is currently on probation. Not enough time has passed since this offense occurred."

While many of the factors considered indicated a low risk of harm, "any single factor . . . may be determinative" when deciding whether to set aside a disqualification. Minn. Stat. § 245C.22, subd. 3. And in this case there were five factors that indicated either medium or high risk. Moreover, DOC clearly had concerns about the fact that the disqualifying offense had occurred so recently and that Krause was still on probation. It is also relevant that only eight months before he requested the disqualification be set aside, Krause admitted that he relapsed and had completed treatment only six and a half months before the request. In light of these considerations, we cannot say that the agency decision was arbitrary or capricious, nor can we say that it was not supported by sufficient evidence. Therefore, we conclude that Krause's first argument fails.[3]

[3] We note that Krause is free to seek work as a corrections counselor at a later date within his disqualification period and upon disqualification again assert that he does not pose a risk of harm, citing to a longer period of sobriety and success on probation, thus alleviating some of DOC's underlying concerns.

II. Due Process

Krause also argues that his constitutional rights were violated. Specifically, he argues that the act's failure to afford him a hearing on the question of whether he posed a risk of harm violated his due-process rights. Appellate courts review the constitutionality of a statute de novo. *Sweet*, 702 N.W.2d at 319. Statutes are presumed to be constitutional, and the burden is on the party challenging the statute to prove beyond a reasonable doubt that it is unconstitutional. *Id.*

As explained above, the act provides that in certain situations a disqualified individual may request a fair hearing. Minn. Stat. § 245C.27. But Krause was not eligible for a hearing because his disqualification was based on his guilty plea to fifth-degree drug possession. He asserts that he should nonetheless have been permitted to have a fair hearing to demonstrate that he does not pose a risk of harm.

"Procedural due process protections restrain government action which deprives individuals of 'liberty' or 'property' interests within the meaning of the due process clause of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 7 of the Minnesota Constitution." *Sweet*, 702 N.W.2d at 319 (quotation omitted). The United States Constitution and the Minnesota Constitution provide identical due-process protection. *Id.* Courts conduct a two-step inquiry to determine whether a person's procedural-due-process rights have been violated. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012). The first step is to determine whether the person has been deprived of a protected life, liberty, or property interest. *Id.* Our court has previously held that a disqualified individual providing counseling services to incarcerated persons has a

protected property interest in pursuing employment as a counselor. *Sweet*, 702 N.W.2d at 320. Krause therefore passes the first step of the procedural-due-process inquiry.

The second step of the inquiry is to apply the three-factor balancing test articulated by the United States Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). *Sawh*, 823 N.W.2d at 632. The first factor is the private interest affected. *Id*. The second factor is "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." *Id.* (quotation omitted). And the third factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* (quotation omitted). Our court has previously undertaken this inquiry in *Sweet*. Sweet was disqualified from working as a counselor because of his criminal record. *Sweet*, 702 N.W.2d at 315–16. And he argued that he was unconstitutionally deprived of procedural due process because he was not entitled to a hearing. *Id.* at 319. We disagreed with that argument, *id.* at 322, and our reasoning in *Sweet* is useful to our analysis of Krause's claim.

We turn to the *Mathews* balancing test. For the first factor, the private interest is Krause's ability to work as a counselor. In *Sweet*, we explained that "[e]mployment in an individual's chosen field is significant and weighs heavily in the individual's favor." *Id.* at 320. Krause's interest in working as a counselor also weighs heavily in his favor.

Since Krause is specifically arguing that he should be granted a hearing on the question of whether he poses a risk of harm, the second factor is the risk that the commissioner will erroneously determine that he poses a risk of harm to the people he

works with. Relevant to this factor, and at the heart of the procedural-due-process inquiry, is the question of whether "[t]he procedures afforded by the government . . . provide an individual with notice and an opportunity to be heard at a meaningful time and in a meaningful manner." *Sawh*, 823 N.W.2d at 632 (quotation omitted). We conclude that they do. Krause was given the opportunity to fill out a questionnaire to demonstrate that he does not pose a risk of harm. He does not explain in his brief what more he would have been able to present or argue in his favor if he had been granted a hearing. Moreover, looking at some of the documents associated with the refusal to set aside Krause's disqualification, it seems that the risk-of-harm determination hinged greatly on the fact that Krause was still on probation and not enough time had passed since the offense occurred. It is unclear what Krause could have presented at a hearing that he could not have presented in written form that would have alleviated these concerns.

In *Sweet*, we analyzed the second factor similarly. Our court explained that Sweet "had the unfettered right to present all evidence, including letters of support, that he thought the commissioner should consider in his written submission." *Sweet*, 702 N.W.2d at 321. And we concluded that because Sweet "had the right to submit his case in writing to the commissioner, we see no prejudice to [his] due-process right to be heard." *Id.* The same applies here, so we conclude that the second factor cuts against Krause.

The third factor is the government's interest in not having to grant Krause a hearing on the question of risk of harm. *See id.* Providing a hearing is a burden on the government. Because Krause admitted to the underlying offense—meaning he has gone through the criminal justice system and already been afforded due process on the question of whether

he committed the underlying offense—and because he has not shown that he could have brought forth other evidence in his favor on the question of risk of harm, we conclude that the third factor weighs against Krause.

While Krause does have a strong interest in working as a counselor, we conclude that the opportunity to make written submissions regarding his risk of harm, as opposed to having a fair hearing, adequately protects his procedural-due-process rights. Accordingly, Krause's constitutional argument fails.

Affirmed.