STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0024

A. A. F.,
Relator,

vs.

Minnesota Department of Health,
Respondent.

Filed August 23, 2021
Affirmed
Worke, Judge

Minnesota Department of Health
Background Study No. 2365024

Mark E. Berglund, Berglund & Berglund, Ltd., Anoka, Minnesota (for relator)

Keith Ellison, Attorney General, Megan J. McKenzie, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Cochran, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Relator argues that respondent Minnesota Department of Health (MDH) acted arbitrarily, capriciously, and without the support of substantial evidence when it declined to set aside his disqualification from providing services to persons in licensed facilities.

He also asserts that the statute that allows MDH to reconsider disqualification decisions that it made violates the constitutional guarantee of due process. We affirm.

FACTS

Relator A.A.F. worked as a medical lab technician. In January 2020, the state charged A.A.F. with threats of violence. A.A.F. pleaded guilty and received a stay of adjudication with a three-year probation period.

After A.A.F. pleaded guilty, the Minnesota Department of Human Services (DHS) conducted a background study on A.A.F. for MDH. As a result of the background study, DHS informed A.A.F. that he was disqualified from providing services to persons in certain licensed facilities. *See* Minn. Stat. § 245C.14, subd. 1 (2020) (requiring the commissioner to disqualify an individual from any position allowing direct contact with persons receiving services if the individual is convicted of, or admits to, certain crimes). A.A.F. sought reconsideration of the disqualification, asserting that he did not pose a risk of harm to those he served. He indicated that he only pleaded guilty based on his understanding that the charge would be dismissed if he successfully completed probation, and that his guilty plea would have no impact on his employment. Shortly after submitting his request for reconsideration, A.A.F. retained an attorney, who submitted a supplemental letter in support of the request.

MDH reviewed A.A.F.'s request for reconsideration to determine if he posed a risk of harm by considering the nine risk-of-harm factors established by statute. MDH found that each factor weighed against setting aside the disqualification and ultimately concluded

that A.A.F. had not shown that he did not pose a risk of harm to persons receiving services. Accordingly, MDH denied the request for reconsideration. This appeal follows.

DECISION

The Department of Human Services Background Studies Act, Minn. Stat. §§ 245C.01-.34 (2020), requires DHS to conduct a background study on individuals employed by certain facilities or programs who have direct contact with persons served by the facility or program. Minn. Stat. § 245C.03, subd. 1. If the background study shows an "admission to" threats of violence, DHS "shall" disqualify the individual from any position that allows him or her direct contact with persons receiving services. Minn. Stat. § 245C.14, subd. 1(1); *see also* Minn. Stat. § 245C.15, subd. 2 (indicating that threats-of-violence admission requires disqualification).

A disqualification may be set aside upon a finding 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 facility or program that the individual works for. Minn. Stat. § 245C.22, subd. 4(a). A disqualified individual seeking to set aside a disqualification has the burden of submitting information that shows that he or she does not pose a risk of harm. Minn. Stat. § 245C.21, subd. 3(a)(3); *see also* Minn. Stat. § 245C.22, subd. 4(a). For facilities licensed by MDH, the commissioner of health decides whether a disqualification should be set aside. Minn. Stat. § 144.057, subd. 3 (2020).

In determining whether to set aside disqualification on this basis, the commissioner must 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 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). In considering these risk-of-harm factors, the commissioner must give "preeminent weight" to the safety of persons served by the facility or program. *Id.*, subd. 3.

A decision whether to grant a request for reconsideration is a quasi-judicial decision not subject to the Minnesota Administrative Procedure Act. *Anderson v. Comm'r of Health*, 811 N.W.2d 162, 165 (Minn. App. 2012), *review denied* (Minn. Apr. 17, 2012). Our review of such a decision is limited:

> [W]e examine the record to review questions affecting the jurisdiction of the agency, the regularity of its proceedings, and, as to the 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.

Id. (quotations omitted); *see also Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005) (indicating that decision to deny a request to set aside disqualification is subject to substantial-evidence standard of review), *review denied* (Minn. Nov. 15, 2005).

In this case, A.A.F. sought reconsideration of his disqualification, asserting that he did not pose a risk of harm. MDH made findings on the nine relevant factors and concluded that A.A.F. had not demonstrated that he did not pose a risk of harm. Thus, MDH decided not to set aside the disqualification.

A.A.F. argues that we must reverse MDH's decision for three reasons: (1) because the decision was not supported by substantial evidence, and (2) because the decision was arbitrary and capricious,[1] and (3) because the procedure of having MDH make the initial disqualification determination and also consider any request for reconsideration is contrary to the constitutional guarantee of due process. A.A.F.'s arguments are substantively identical, so we address them together.

A.A.F. argues that MDH's decision to not set aside his disqualification was not supported by substantial evidence—and for that reason, was arbitrary and capricious. Substantial evidence means "evidence that a reasonable mind might accept as adequate to support a conclusion, and more than a scintilla, some, or any evidence." *In re Northmet Project Permit to Mine Application*, 959 N.W.2d 731, 749 (Minn. 2021) (quotations

[1] A.A.F. also argues that Minnesota Statutes section 245C.22 is facially unconstitutional because it allows MDH to consider a request for reconsideration of a decision that it made, violating the constitutional guarantee of due process. The claim is factually inaccurate. DHS made the initial disqualification decision. The claim is also inadequately briefed. A.A.F. cites to no legal authority to support his position on this issue—he merely asserts that agency employees are unable to independently review a request for reconsideration. Because A.A.F. failed to adequately support his assertion that the reconsideration procedure is unconstitutional, we conclude that this argument is waived. *See Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.").

omitted). A.A.F. challenges MDH's findings on four risk-of-harm factors: the harm suffered by the victim, the vulnerability of persons served by the program, the similarity between the victim and persons served by the program, and the catchall factor regarding any other relevant information.

Harm suffered by the victim

Regarding the fourth risk-of-harm factor—the harm suffered by the victim—MDH found that the victim of A.A.F.'s offense (his wife) was fearful. A.A.F. argues that the finding is not supported by substantial evidence because he indicated in his request for reconsideration that his wife was still with him and that she recanted her allegations. But because the intent to terrorize the victim is an element of threats of violence, and because A.A.F. admitted that the victim called the police for help during the incident, we conclude that substantial evidence supports MDH's finding that the victim was fearful. *See* Minn. Stat. § 609.713, subd. 1 (2020) (defining threats of violence).

Vulnerability of persons served by the program

Regarding the fifth risk-of-harm factor—the vulnerability of persons served by the program—MDH found that people whom A.A.F. served were vulnerable because of cognitive or physical impairments. A.A.F. argues that there is no evidence in the record suggesting that he serves vulnerable persons. MDH asserts that because the programs that employ A.A.F. are hospitals and clinics, and because hospitals and clinics necessarily serve vulnerable people, it was reasonable to infer that A.A.F. served vulnerable persons, including patients with cognitive and/or physical impairments. We conclude that there was

substantial evidence to support that A.A.F., through his work in hospitals and clinics, necessarily serves vulnerable persons.

Similarity between the victim and persons served by the program

Regarding the sixth risk-of-harm factor—the similarity between the victim and persons served by the program—MDH made unclear findings. MDH found that there were "obvious differences" between the victim and the people that A.A.F. served, but also found that there was a "key similarity" among them, that the people whom A.A.F. would serve would depend on him making wise decisions. A.A.F. argues that MDH's findings are flawed because there is no evidence that he is charged with the care of any patients because he simply performs blood draws. MDH argues that it was reasonable to observe that the victim and A.A.F.'s patients rely on his ability to make sound decisions.

We agree that the only information in the record regarding this factor (the information that A.A.F. submitted in support of his request for reconsideration) suggests that A.A.F. has minimal patient contact. We also observe that MDH's findings on the similarities between the victim and A.A.F.'s patients are vague. But ultimately, it does not appear to us that MDH based its decision on this finding or placed significant weight on it. Moreover, any one of the nine risk-of-harm factors "may be determinative of the commissioner's decision." *See* Minn. Stat. § 245C.22, subd. 3. Here, MDH found that each of the eight other factors weighed against setting aside the disqualification. Thus, we conclude that even if MDH's findings on this factor are not supported by substantial evidence, any error in this finding is immaterial and did not prejudice A.A.F.

Other relevant information

Finally, regarding the ninth risk-of-harm factor—any other relevant information—MDH found that A.A.F.'s offense was "serious" and without the passage of more time to demonstrate that A.A.F. could avoid making bad choices, MDH was not convinced that A.A.F. did not pose a risk of harm to vulnerable persons. A.A.F. concedes that the allegations against him were serious, but he argues that the fact that he received a stay of adjudication shows that he is "entitled to the benefit of this matter being dismissed when he successfully completes probation." MDH argues that his admission to a felony offense demonstrates that the incident was serious. Although we are mindful that the stay of adjudication might suggest that A.A.F.'s criminal history was limited or that the underlying incident was not particularly severe compared to other threats-of-violence offenses, we agree that it is reasonable to infer that A.A.F.'s admission to a felony-level offense demonstrates the severity of the incident.

Because substantial evidence in the record supports MDH's decision, and because any erroneous finding is immaterial to the decision, we conclude that A.A.F. has not demonstrated that a lack of evidentiary support warrants reversing MDH's decision not to set aside his disqualification. Consequently, we conclude that A.A.F.'s argument that MDH's decision was arbitrary and capricious (based solely on the lack of sufficient evidentiary support) fails for the same reasons.

Affirmed.