STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2253

In the Matter of the
Revocation of the Adult Foster Care Licenses of
Leon Hanson-GaMacann, Inc. - The View II
and McHaven, Inc. - The View III.

Filed October 7, 2013
Affirmed
Johnson, Chief Judge

Department of Human Services
No. 16-1800-22739-2

Samuel D. Orbovich, Fredrikson & Byron, P.A., Minneapolis, Minnesota; and

Lisa P. Bayley, Bayley Law, LLC, Red Wing, Minnesota (for relators Leon Hanson-GaMacann, Inc. – The View II and McHaven, Inc. – The View III)

Stephen N. Betcher, Goodhue County Attorney, Carol K. Lee, Assistant County Attorney, Red Wing, Minnesota (for respondents Commissioner, Minnesota Department of Human Services and Goodhue County Health and Human Services)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge; and Kirk, Judge.

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

JOHNSON, Chief Judge

The commissioner of human services revoked the licenses of two adult foster-care homes. The license holders appeal, arguing that the commissioner did not have reasonable cause to revoke the licenses. We affirm.

FACTS

The relators in this appeal are Leon Hanson and two companies that operated adult foster-care facilities in the city of Cannon Falls. In 2007, Hanson, through a corporation, began operating an adult foster-care home known as The View. In 2008, Hanson, through a different corporation, began operating a second adult foster-care home known as The View II. And in 2009, Hanson, through another corporation, began operating a third adult foster-care home known as The View III. Each facility is a single-family residence with five bedroom suites designed for elderly residents in need of support and services. The View II and The View III are the two facilities at issue in this appeal.

In February 2008, Dayle Charnecki, an employee of Goodhue County with responsibility for licensing foster-care homes, became aware that Hanson was planning to open a second adult foster-care facility. Hanson began operating The View II in March 2008 before obtaining the license required by statute. *See* Minn. Stat. § 245A.03, subd. 1 (2008). This led to several interactions between Charnecki and Hanson that were designed to induce Hanson into compliance with the licensure statute. Two years later, in May 2010, Charnecki scheduled a meeting with Hanson to discuss the non-compliance of

The View II and The View III. Hanson, however, did not show up for the meeting. The only staff member present when Charnecki arrived was unaware of the meeting.

In June 2010, Charnecki conducted annual licensing visits at The View II and The View III. Using a 19-page checklist, she found 59 rule violations at The View II and 40 rule violations at The View III. Charnecki issued a corrective order for both facilities, which outlined the violations and set July 2010 deadlines for each facility to achieve compliance. In July 2010, Charnecki returned to The View II and The View III and found that almost none of the violations had been corrected. She also discovered more violations at both facilities. Charnecki extended the deadlines somewhat, but relators failed to correct the violations.

In September 2010, Charnecki recommended that the department of human services (DHS) issue conditional licenses to The View II and The View III. In March 2011, DHS issued a one-year conditional license to The View II. DHS also imposed a $200 fine because an employee had provided services to residents at The View II for ten months without having undergone a background study. In April 2011, DHS issued a one-year conditional license to The View III. DHS found more than a dozen violations at both facilities, including the failure to provide abuse-prevention plans, to specify the level of overnight supervision needed, to store Schedule II controlled substances in a locked storage area, and to properly document residents' medical information. Both conditional licenses included seven identical conditions that were to be satisfied and documented by specific deadlines. The deadlines were between April 15, 2011, and May 1, 2011, for The View II, and between April 29, 2011, and May 13, 2011, for The View III.

In April 2011, Charnecki returned for annual licensing visits at The View II and at The View III and discovered that none of the conditions had been satisfied. Charnecki also discovered additional violations at both facilities. In May 2011, Charnecki recommended that the commissioner revoke both licenses. In March 2012, the commissioner issued an order of revocation for both facilities.

Relators sought review of the revocations in a contested-case hearing before an administrative law judge (ALJ). At a hearing in May 2012, Hanson testified that a former employee, who had since resigned, was responsible for failing to satisfy the conditions of the licenses by the specified deadlines. Hanson testified that he subsequently hired Yvonne Salmonson, a registered nurse, to serve as operations manager and to bring the facilities into compliance. Over the commissioner's objection, Hanson and Salmonson testified to their efforts to bring the facilities into compliance after the March 2012 order for revocation. Salmonson testified that, although she has implemented multiple changes, work still needs to be done.

In June 2012, the ALJ issued an order with findings of fact and conclusions of law. The ALJ concluded that relators' violations "were chronic and severe" and recommended that the commissioner affirm the license revocations. The ALJ noted that Hanson had made efforts to bring the facilities into compliance and had achieved partial compliance, but that neither The View II or The View III was fully compliant at the time of the May 2012 hearing, nearly one year after the recommended revocation.

In October 2012, the commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed the license revocations. After Hanson requested

reconsideration, the commissioner allowed the parties to submit additional comments. Charnecki visited the facilities in early November 2012 and discovered several items of non-compliance. In mid-November 2012, the commissioner affirmed the original order. The commissioner noted: "More than 2 years after receiving specific and detailed notice of violations, the facilities are still not fully compliant. While [Hanson] has made recent progress, the record as a whole fails to demonstrate the necessary commitment to compliance." Relators appeal by way of a writ of certiorari.

D E C I S I O N

Relators argue that the commissioner erred by revoking their licenses to operate two adult foster-care facilities. Relators contend that revocation is too harsh a penalty for mere "paperwork deficiencies," that a fine would have "been a more measured and prudent regulatory response to induce paperwork compliance," and that the commissioner did not have reasonable cause to revoke the licenses.

The commissioner's authority to revoke a license to operate an adult foster-care facility is based on the following statute: "The commissioner may suspend or revoke a license, or impose a fine if . . . a license holder fails to comply fully with applicable laws or rules." Minn. Stat. § 245A.07, subd. 3(a)(1) (2012). When considering such a sanction, the commissioner "shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program." Minn. Stat. § 245A.07, subd. 1(a).

This court may reverse or modify the commissioner's decision if a relator's substantial rights have been prejudiced because the decision is

(a) in violation of constitutional provisions; or

(b) in excess of the statutory authority or jurisdiction of the agency; or

(c) made upon unlawful procedure; or

(d) affected by other error of law; or

(e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.

Minn. Stat. § 14.69 (2012). The commissioner's decision enjoys a presumption of correctness. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). A relator has the burden of establishing that the commissioner's decision is improper. *See City of Moorhead v. Minnesota Pub. Utils. Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984).

A two-step analysis applies to a contested case hearing for a licensing sanction under section 245A.07. First, the commissioner has the burden to "demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule." Minn. Stat. § 245A.08, subd. 3(a) (2012). Second, if the commissioner demonstrates that reasonable cause existed, the burden shifts to the license holder "to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, *at the time* that the commissioner alleges the violations of law or rules occurred." *Id.* (emphasis added).

In this case, the ALJ first determined that the commissioner had demonstrated reasonable cause to revoke relators' licenses, thus shifting the burden to relators. The ALJ then determined that relators failed to establish by a preponderance of the evidence that they had complied with the relevant adult foster-care statutes and rules or that they satisfied the seven conditions of the conditional licenses. The commissioner approved the ALJ's analysis. On appeal, relators do not challenge the ALJ's decision at the second step; they do not dispute that they failed to comply with the conditions of the conditional licenses or that they committed additional violations. Rather, relators challenge the ALJ's decision at the first step; they argue that the commissioner failed to demonstrate that reasonable cause exists for the revocation.

The evidence supports the ALJ's and the commissioner's conclusion that there is reasonable cause because relators "failed to comply fully with applicable law or rule." Minn. Stat. § 245A.08, subd. 3(a). The county identified numerous violations in 2010, and these violations were unresolved two years later. The commissioner is required to consider "the nature, chronicity, or severity of the violation of law or rule." Minn. Stat. § 245A.07, subd. 1(a). In this case, the chronicity of relators' violations is apparent, and that factor lends strong support to the commissioner's decision to revoke relators' licenses.

Relators assert three reasons why the commissioner's decision is erroneous, despite the foregoing. First, relators contend that the commissioner erred by failing to consider the interests of the residents. When applying such a sanction, the commissioner "shall consider . . . the effect of the violation on the health, safety, or rights of persons

served by the program." Minn. Stat. § 245A.07, subd. 1(a). The commissioner's decision reflects an appropriate concern for the well-being of the residents of the homes, which is the underlying justification for the regulations that are being enforced. Relators counter that the commissioner failed to explain why the violations, which they describe as "mere paperwork deficiencies," present a risk to the health or safety of the residents. To the contrary, the absence of certain types of documentation may make it impossible to know whether residents are receiving proper care. It is not necessary that one or more residents actually suffers harm because of relators' non-compliance.

Second, relators contend that the commissioner erred by relying on stale evidence in light of the partial remediation of the violations between the time of the revocations and the time of the contested case hearing. The commissioner was required to show "that the license holder failed to comply fully with applicable law or rule." Minn. Stat. § 245A.08, subd. 3(a). If that burden was met, relators then were required "to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the commissioner alleges the license holder violated, *at the time* that the commissioner alleges the violations of law or rules occurred." *Id.* (emphasis added). Relators did not dispute at the contested case hearing that they were not in full compliance at the time of the alleged violations. Instead, relators introduced evidence of their attempts to bring The View II and The View III into compliance after the March 2012 orders for revocation. The evidence on which the commissioner relies is not "stale" because it conforms to the statute, which focuses on

whether a violation exists "*at the time* that the commissioner alleges the violations of law or rules occurred." *Id.* (emphasis added).

Third, relators contend that the commissioner should have imposed a lesser sanction, such as a fine. Relators compare this case to *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724 (Minn. App. 2003), in which this court reversed and remanded the case to the district court for reconsideration of a lesser sanction than revocation of a child day-care license. *Id.* at 728. But our opinion in *Burke* relied on an administrative rule that described in detail the factors that must be considered before imposing a negative licensing action against a day-care facility. *Id.* at 727 (citing Minn. R. 9543.1060). That rule applied only to day-care facilities, and it was repealed in 2004. *See* 2004 Minn. Laws ch. 288, art. I, § 83, at 1359. Accordingly, *Burke* does not support relators' argument. In addition, relators have not demonstrated that a lesser sanction would have induced them to become fully compliant. The record indicates that relators were non-compliant even after Charnecki recommended revocation and nearly two years after the county first identified compliance issues. The imposition of sanctions is within the discretion of an agency, *In re Real Estate Salesperson's License of Haugen*, 278 N.W.2d 75, 80 n.10 (Minn. 1979), and we defer to an agency's choice of sanction unless there has been a clear abuse of discretion, *Burke*, 666 N.W.2d at 728. We do not discern any abuse of discretion in this case, in which relators' conduct gave rise to multiple chronic violations of administrative rules governing adult foster-care homes.

In sum, the commissioner did not err by revoking relators' adult foster care licenses.

Affirmed.