STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2206

In the Matter of the Revocation of the
Family Child Care License of Wendy J. Melby.

Filed December 14, 2010
Affirmed
Worke, Judge

Minnesota Department of Human Services
File No. 46-1800-20321-2

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for relator Wendy J. Melby)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James E. O'Neill, Pipestone County Attorney, Damain D. Sandy, Assistant County Attorney, Pipestone, Minnesota (for Minnesota Commissioner of Human Services)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

WORKE, Judge

Relator challenges the commissioner of human services' revocation of her day-care license, arguing that (1) the commissioner's findings are not supported by substantial evidence; (2) revocation is an extreme sanction that is arbitrary and capricious; and (3) the administrative-law judge (ALJ) who conducted a hearing and issued a recommendation to the commissioner was biased. We affirm.

FACTS

In February 2009, respondent Minnesota Department of Human Services revoked relator Wendy J. Melby's day-care license for failing to provide adequate supervision, being overcapacity, and knowingly withholding capacity and enrollment information. Relator appealed the revocation, and a hearing was held before an ALJ.

Danette Smit, a licensing social worker from the Pipestone County Family Service Agency (PCFS), who recommended revocation of relator's license, testified regarding relator's violations. In June 2007, relator was issued a correction order for two supervision violations that occurred when relator was at a swimming pool with ten day-care children. Relator was holding her own infant when two preschool-aged children jumped into water over their heads. Lifeguards assisted the children before relator could reach the children. In January 2008, relator was issued a correction order for a supervision violation after PCFS received a complaint that relator was not providing supervision over a child who used a day-care taxi service. During PCFS's investigation, relator initially stated that she did not provide care for a child who rode the taxi, but then stated that a child named Avery used the taxi and that she did not watch Avery board the taxi. Smit assumed that Avery was relator's 13-year-old son. Relator failed to correct Smit's assumption, but Smit later discovered that Avery is a preschool-aged child in relator's day care.

In March 2008, relator was issued a correction order for withholding relevant information, giving false information, and being overcapacity. During a home visit, Smit noticed that two children were not reported on relator's variance request. Relator stated

that she did not report the children because she did not expect them to be in her care prior to variance approval. The children's parents were contacted and denied intentions of removing their children from relator's care. Smit also became aware of two "drop-ins" in relator's care. Relator explained that if she has an opening, she calls families to let them know of her availability. But PCFS received confirmation that relator was paid a full-time fee for two of the children that she identified as "drop-ins." Relator reported having a third "drop-in" during the home visit, but PCFS contacted the child's family and discovered that the family had two children enrolled full-time in relator's day care, one being an infant whom relator failed to report being in her care.

PCFS interviewed relator's helper, Jamie Dethmers, who admitted being dishonest with PCFS regarding her child's day-care hours because relator instructed her to provide misleading information. She also admitted caring for more infants and toddlers than relator's variance allowed. Relator's other helper, Michelle Fritz, reported that relator frequently left Fritz, who is not CPR or first-aid trained, alone with the children. On one particular occasion, a young child awoke from her nap with wet pants. Fritz sent relator a text message asking the location of a cleaning product. Relator initially replied with the location of the cleaning product. A second message sent from relator's phone read, "smack that dumb f***ing b***h [] across the f***ing face a coupla [sic] times for me." Fritz also stated that relator instructed her to lie to PCFS regarding relator's whereabouts when they called so that she could avoid them. Relator testified that the information supporting the violations was inaccurate.

The ALJ issued findings of fact, conclusions of law, and a recommendation that the commissioner revoke relator's license. The ALJ found that Smit was credible, but found that relator's credibility was "dubious." The ALJ found that relator committed the violations and concluded that revocation was the only sanction available based on the evidence, particularly the deliberate withholding of information and giving false or misleading information. On November 5, 2009, the commissioner determined that the ALJ's credibility determinations and recommendation were supported by the record and revoked relator's license. Relator sought reconsideration, alleging that the ALJ was not fair because of various conflicts stemming from her legal practice. The commissioner denied relator's request for reconsideration. This certiorari appeal follows.

D E C I S I O N

Revocation

Relator challenges the revocation of her day-care license. "Judicial review presumes the correctness of an agency decision." *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006). Relator bears the burden of proving that the decision was improperly reached. *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984). We will sustain the agency's decision if it is supported by substantial evidence and is not arbitrary or capricious. Minn. Stat. § 14.69(e), (f) (2008); *Meuleners*, 725 N.W.2d at 123.

Relator argues that revocation is not supported by substantial evidence, claiming that the evidence does not show that she failed to render proper supervision. Under Minn. R. 9502.0315, subp. 29a (2009), supervision means that a caregiver is within sight

or hearing of the child at all times so that the caregiver is capable of intervening to protect the child. The ALJ determined that relator failed to have two children at the pool within her sight or hearing so that she was capable of intervening. This determination is supported by the record.

Additionally, the record supports the finding that relator had a child in her day care who arrived or left by taxi, and that relator was not in the vicinity of the child when the child left or arrived. When Smit investigated, there was some confusion regarding the identity of the child who used the taxi. Smit stated her assumption to relator that "Avery" referred to relator's teenage son. While Avery is the name of relator's son, it is also the name of a preschool-aged child enrolled in relator's day care who used the taxi. Thus, although relator claims that she did not mislead Smit regarding whether a child in her care rode the taxi, she failed to correct Smit's assumption regarding the child's identity.

The record also supports the finding that relator was overcapacity. The ALJ found that relator did not include "drop-ins" as having regular attendance, but Smit contacted the families who assumed that their children were enrolled full-time in relator's day care. Additionally, relator stated that she did not count two children because they would be leaving the day care before her variance approval, but when contacted, the families asserted that they had no plans to remove their children from relator's day care. Smit also received several reports, one from relator's helper, that relator was overcapacity. Pursuant to rule 9502.0335, a day-care provider who is granted a variance must comply with capacity limits. Minn. R. 9502.0335, subp. 8 (2009). Relator was allowed to have 14 children. But the record shows that at times relator had more that 14 children in her

care. The record supports the findings and the conclusions of law that support revocation of relator's day-care license. Therefore, the commissioner's decision to revoke relator's license is supported by the evidence.

Sanction

Relator next argues that revocation is an extreme sanction that is arbitrary and capricious. When issuing a sanction for noncompliance with applicable laws or rules, 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) (Supp. 2009). Possible sanctions include license suspension, imposition of a fine, or license revocation. *Id.*, subd. 3(a) (Supp. 2009). An agency's decision is arbitrary and capricious if the agency: (1) relied on factors not intended by the legislature; (2) failed to consider an important aspect of the problem; (3) offered an explanation counter to the evidence; or (4) issued a decision so implausible that it could not be explained as a difference in view or based on expertise. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Oct. 31, 1997). "Although a reviewing court might reach a contrary conclusion to that arrived at by an administrative body, the court cannot substitute its judgment for that of the administrative body when the finding is properly supported by the evidence." *Vicker v. Starkey*, 265 Minn. 464, 470, 122 N.W.2d 169, 173 (1963).

The commissioner considered the nature of the violations and determined that "[c]ompliance with supervision rules and capacity limits are central to preserving the

health and safety of children" and that "the requirement to be candid and truthful with licensing authorities is critical." The commissioner concluded that "[s]evere or recurring capacity violations and false statements each provide sufficient grounds for recommending license revocation." *See* Minn. R. 9543.0100, subp. 3 (2009). Regarding the chronicity, the commissioner concluded that the record established multiple violations of supervision requirements. The commissioner noted that "[t]he more troubling evidence of chronic noncompliance arises from the reports of repeated overcapacity or age distribution violations. . . . the reports are too numerous to dismiss and are supported by attendance records [relator] relied on for billing purposes." The commissioner determined that relator "minimize[d] or distort[ed] facts," which revealed her disregard for the rules and the licensing authority administering those rules.

The commissioner considered the severity of the violations and determined that relator's lax supervision and apparent defiance of the capacity limits were severe violations that placed the children at risk of harm. Additionally, the commissioner considered the effect of the violations on the health, safety, or rights of persons served by the program. The commissioner determined that while no children suffered harm or injury, waiting for such an outcome is not required before action may be taken. The commissioner stated that the violations placed the children at risk and that relator repeatedly failed to be candid with licensing authorities, which "significantly damaged any trust relationship" between relator and the agency. Finally, the commissioner considered relator's claim that no parent has removed his or her child from relator's day care, but the commissioner determined that the record is void of any parental input; thus,

there is no evidence to substantiate relator's claim. The commissioner determined that relator failed to demonstrate a willingness or commitment to comply with the rules, which showed that a conditional license would not succeed.

Relator cites to cases that she claims support her argument that revocation is a harsh consequence, but none are applicable. Relator cites to *In re Revocation of Family Child Care License of Burke*, 666 N.W.2d 724, 728 (Minn. App. 2003), in which this court reversed a revocation and remanded for consideration of less-severe sanctions. But in *Burke*, there was no evidence of deliberate disregard for the children, no evidence of near injury to the children, and parents came to the defense of the day-care provider. 666 N.W.2d at 728. Conversely, relator disregarded the rules that are established to ensure the children's safety, two children were nearly injured before being rescued by lifeguards, and no parents have come to relator's defense.

Relator cites to *In re Temporary Immediate Suspension of Family Child Care License of Strecker*, 777 N.W.2d 41, 47-48 (Minn. App. 2010), in which this court reversed a temporary suspension after concluding that the evidence did not support a reasonable belief that the day-care provider posed an imminent risk of harm to the health or safety of the children in her care. In *Strecker*, a child exhibited signs of a seizure when in the day care and medical testing showed the existence of a subdural hematoma. 777 N.W.2d at 42. This court reversed the temporary suspension because the evidence showed that the child's injury could have occurred on the day signs were exhibited or sometime prior to that date, and there was no evidence eliminating the child's parents as the possible source of the injury. *Id.* at 46-47. This case is not similar because the

evidence here supports the findings that relator failed to supervise the children at the pool and the child who rode the taxi, provided false or misleading information to Smit, was overcapacity, and failed to abide by the child-adult ratio.

The record supports the findings that relator was required to abide by certain standards of care that were established under the issuing of her license. She failed to abide by those standards. Revocation is not arbitrary or capricious because the commissioner considered the necessary factors and determined that revocation was appropriate.

ALJ

Finally, relator argues that the ALJ had "various conflicts of interest" and that she was denied her right to an independent decision-maker. The alleged conflicts include: (1) relator consulted with the ALJ in 1999 regarding potential litigation that never occurred; (2) relator paid the ALJ's law partner a retainer in 2004 to represent her in a marriage dissolution that never occurred; and (3) the ALJ represented Scott Dethmers against his wife Jamie Dethmers, relator's helper who made a negative report against relator. But there is no record of these alleged conflicts. And none of these alleged conflicts indicate that the ALJ was biased against relator. Further, the ALJ was not the decision-maker; the ALJ made a recommendation to the commissioner and the commissioner reviewed the record and made a determination. There is no support for relator's allegations of bias.

Affirmed.