STATE OF MINNESOTA
IN COURT OF APPEALS
A10-163

Melissa Ann Merten,
Relator,

vs.

Commissioner of Health,
Respondent

Filed September 7, 2010
Affirmed
Wright, Judge

Minnesota Department of Health

Melissa Ann Merten, Grey Eagle, Minnesota (pro se relator)

Lori Swanson, Attorney General, Gina Jensen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Lansing, Judge; and Collins, Judge.*

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

WRIGHT, Judge

Relator challenges the decision of respondent Commissioner of Health denying relator's request to set aside her disqualification from having direct contact with, or

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

access to, persons who receive services from programs licensed by the Minnesota Department of Health. We affirm.

FACTS

In 2009, Oakridge Homes requested a background study on relator Melissa Merten from the Minnesota Department of Human Services (DHS). DHS discovered that Merten was convicted of misdemeanor fifth-degree assault as a result of an incident on December 1, 2008, in which Merten punched a minor in the face. Based on that information, DHS was required to disqualify Merten for seven years from any position allowing direct contact with, or access to, persons receiving services from programs licensed by the Minnesota Department of Health or DHS. *See* Minn. Stat. §§ 245C.14, subd. 1(a)(1), .15, subd. 4(a) (2008). DHS advised Oakridge Homes of the disqualification on July 2, 2009. By separate letter, DHS also advised Merten of her disqualification and explained that she was disqualified because of the assault conviction.

Merten requested reconsideration of the disqualification decision pursuant to Minn. Stat. § 245C.22, subd. 4 (2008), arguing that the disqualification should be set aside because she does not pose a risk of harm to any person served by Oakridge Homes. The Commissioner of Health denied Merten's request to set aside the disqualification, and this certiorari appeal followed.

D E C I S I O N

The denial of a request for reconsideration of a disqualification is a final administrative-agency action subject to certiorari review under Minn. Stat. § 480A.06, subd. 3 (2008). *Rodne v. Comm'r of Human Servs.*, 547 N.W.2d 440, 444 (Minn. App.

1996). On certiorari review, we examine the record to determine whether the commissioner's decision was made using an unlawful procedure, affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 14.69 (2008). We will sustain an agency's decision if it is supported by substantial evidence. Minn. Stat. § 14.69(e) (2008); *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006). Substantial evidence means: "1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than 'some evidence'; 4) more than 'any evidence'; and 5) evidence considered in its entirety." *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977).

When considering an individual's request for reconsideration of a disqualification, the commissioner is statutorily required to weigh nine factors to determine whether the individual poses a risk of harm to any person served by the particular position the individual seeks to continue. Minn. Stat. § 245C.22, subd. 4(b) (2008). These factors include

> (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) the 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.

Id. Any one of these factors may be determinative of the commissioner's decision, and the preeminent consideration is the safety of the persons served by the program from which the applicant was disqualified. *Id.*, subd. 3 (2008).

The commissioner considered each of the statutory factors and determined that several factors weigh against setting aside Merten's disqualification. The commissioner first determined that the nature of the disqualifying event demonstrates a risk of harm because it was intentionally harmful conduct. The commissioner found that Merten intentionally punched a girl in the face, thereby rejecting Merten's claim that she only "placed" her hand on the girl's forehead because the girl was being belligerent toward her daughter. The commissioner also weighed the age and vulnerability of the victim against Merten because the victim was a minor at the time of the incident. The commissioner found that those served by the program in which Merten worked also are vulnerable, albeit because of physical or cognitive impairments, which places them at risk of harm. Finally, the commissioner found that the recency of the disqualifying event suggests a risk of harm that makes the effect of rehabilitative efforts uncertain. At the time of the commissioner's decision, Merten was in compliance with the terms of her probation and had been attending chemical-dependency programs, but she had not yet completed the anger-management program in which she was enrolled. The commissioner, therefore, determined that it was "too soon to know" if Merten had made "any enduring changes to prevent this from occurring again." Merten does not directly challenge the validity of any of these findings, all of which have substantial support in the record.

Rather, Merten argues that she was falsely accused of the assault and that her disqualification is based on misinformation and DHS's "preconceived opinion" that she was guilty of the offense. But Merten's disqualification was based on a *conviction* resulting from the assault, not merely an accusation or a preconceived opinion of her guilt. *See* Minn. Stat. § 245C.14, subd. 1(a)(1) (requiring disqualification when background study reveals "a conviction of . . . one or more crimes listed in section 245C.15"), (2) (requiring disqualification when "a preponderance of the evidence indicates the individual has committed an act or acts that meet the definition of any of the crimes listed in section 245C.15") (2008). We observe that Merten's argument on appeal differs from that presented to the commissioner in support of rescinding the disqualification. There, Merten argued that she did not present a risk of harm—not that DHS relied on incorrect information. *See* Minn. Stat. § 245C.21, subd. 3(a) (2008) (permitting reconsideration request on either basis); *see also* Minn. Stat. § 245C.22, subds. 2 (requiring rescission of disqualification if underlying information is incorrect), 4 (permitting disqualification to be set aside based on risk-of-harm analysis) (2008). The commissioner did not err by relying on Merten's unchallenged conviction.

Because the commissioner's decision has substantial record support and is not arbitrary or capricious, Merten's challenge to the denial of her request to set aside her disqualification fails.

Affirmed.