**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-254**

Charles Evans,
Appellant,

vs.

Cal Ludeman, Commissioner of Human Services,
Respondent.

**Filed November 16, 2010**
**Affirmed**
**Connolly, Judge**

Ramsey County District Court
File No. 62-CV-08-11601

Peter B. Knapp, Mark J. Brandenburger (certified student attorney), William Mitchell Law Clinic, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Cara M. Hawkinson, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

**CONNOLLY**, Judge

Appellant challenges respondent's order permanently disqualifying him from providing direct-contact services as a personal-care assistant at licensed facilities and

other organizations requiring a background study under Minn. Stat. § 245C.03 (2008). Appellant argues that the conduct for which he previously had received a seven-year disqualification could not be used as the basis for a permanent disqualification from a new position; that respondent's decision impermissibly was based solely on hearsay evidence; and that the evidence was insufficient to conclude that appellant had acted with sexual intent. Because we conclude that respondent neither exceeded his statutory authority nor based his decision exclusively on hearsay evidence, and because the evidence was sufficient to support the determination that appellant acted with sexual intent, we affirm.

## FACTS

In January 2000, appellant Charles Evans began work as a personal-care assistant at Restart, Inc. (Restart), a residential facility licensed by respondent Minnesota Commissioner of Human Services. M.H. was an adult female resident of Restart. M.H.'s disabilities cause her to require assistance with intimate personal care, including dressing, showering, and personal hygiene. M.H. had frequent incontinence, after which personal-care staff wiped her genital area. Appellant provided such personal-care services to M.H. as part of his employment.

On August 22, 2000, M.H. told her bus driver that appellant had fondled her breasts while putting on her bra that morning. An investigation took place and M.H. was interviewed by several different people, including a police officer, a special investigator for the Minnesota Department of Health (DH), and the site supervisor of Restart. M.H. reported to the site supervisor that appellant had performed her morning cares in a sexual

manner, including wiping her vaginal area "in a rough manner" and fixing her bra by "grabbing her breasts and snapping her bra." The site supervisor subsequently spoke with appellant, who denied any inappropriate contact. The site supervisor concluded there were "[t]wo different stories of how care was given and how the care was interpreted," and that it was a "he said/she said" situation.

One week after the incident, M.H. told the police officer that appellant told her that he needed to wipe her genital area before she showered. M.H. consented, but then asked appellant to stop because it was painful. Appellant refused and persisted on wiping M.H., telling her that she had "white stuff" in her genital area that he needed to remove before M.H. went to work. Appellant then assisted M.H. into the shower, where she showered by herself while appellant assisted another resident. M.H. wheeled herself back to her room, dried off, and waited for appellant to assist her in getting dressed. M.H. did not mention having a bowel movement in the shower that morning.

When appellant arrived, he assisted M.H. onto her bed and asked her to roll over so that he would wipe some soap off of her body. Appellant began wiping M.H.'s genital area; he persisted when M.H. complained that it hurt, stating that M.H. still had soap on her. At some point while he was wiping M.H. off, appellant allegedly inserted his finger into M.H's vagina.

Appellant continued dressing M.H. and told her that he needed to wipe off "the top part," including M.H.'s breasts. M.H. told appellant that she was already dry, but he insisted. Appellant then helped M.H. with her bra. M.H. stated that "it was like he was fondling." When she asked him to stop, appellant told M.H. that he was trying to make

sure everything was straight. M.H. told appellant everything was fine and appellant stopped.

M.H. also told the police officer that, prior to the incident on August 22, appellant had made sexually suggestive comments to her. Specifically, M.H. said appellant had asked her why she was taking birth control pills if she was not having sex; teased her about a mark on her stomach, calling it "another tittie"; made comments about her breasts; and once said that he would "make it worth [her] while" if she stayed home from work that day.

Appellant told the police officer that, on the morning of August 22, he helped M.H. with her range-of-motion exercises, assisted her into her shower chair, and wheeled her into the shower. Appellant stated that M.H. had a bowel movement in the shower and needed to be cleaned off. Appellant placed M.H. on the bed and cleaned up the bowel movement by wiping off M.H.'s genital area. Appellant denied wiping M.H.'s vagina prior to her shower and denied placing his finger inside M.H.'s vagina when he was cleaning her genital area. Appellant said that M.H. did tell him that it hurt, but that he apologized and explained he was just trying to clean her. Appellant also denied touching M.H.'s breasts inappropriately, stating he was only helping to put on her bra. Appellant stated that he did ask M.H. why she was taking birth control pills after she told him she had run out. Appellant admitted teasing M.H. about her scar resembling a third nipple, but said that M.H. had laughed along.

Approximately one month later, M.H. told the DH special investigator that she had witnessed appellant make inappropriate comments to other female residents in the past.

M.H. also told the investigator that appellant had wiped her hard in the genital area both before and after her shower on the day in question, and had digitally penetrated her. M.H. also said that appellant made a comment about her taking birth control pills. M.H. did not mention having a bowel movement.

On October 17, 2000, the DH completed a maltreatment investigation and concluded that appellant sexually abused M.H. Appellant administratively appealed the DH's determination, but did not appear at the hearing, consequently defaulting. A summary of appellant's maltreatment of M.H. was entered into the Nursing Assistant Registry and appellant's name was added to the list of "substantiated perpetrators of maltreatment" maintained by respondent. The DH forwarded its findings to the Minnesota Department of Human Services (DHS), which disqualified appellant from having direct contact with children or vulnerable adults served in programs licensed by respondent for a period of seven years after the maltreatment determination, as required by the Human Services Licensing Act, Minn. Stat. §§ 245A.01-.65 (2000).

In 2003, the legislature passed the Department of Human Services Background Studies Act (Background Studies Act). 2003 Minn. Laws, ch. 15, art. 1, §§ 1-34, at 181-209) (codified as amended at Minn. Stat. §§ 245C.01-.34). It provides that an individual shall be permanently disqualified from any position involving direct contact with persons receiving services from a licensed entity if "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." Minn. Stat. § 245C.14, subd. 1(a)(2) (2008). One of the listed

crimes is fifth-degree criminal sexual conduct. Minn. Stat. § 245C.15, subd. 1(a) (Supp. 2009) (listing crimes warranting permanent disqualification).

Appellant's initial disqualification period expired on October 17, 2007. He subsequently sought employment with Progressive Individual Resources Inc. (Progressive) as a personal-care assistant aiding vulnerable adults with physical and mental disabilities. Appellant received a letter from the DHS stating that he "committed an act which meets the definition of a disqualifying characteristic (609.3451 – felony fifth degree criminal sexual conduct)."

Appellant sought reconsideration, contending that respondent had exceeded his statutory authority by permanently disqualifying appellant after the initial, seven-year disqualification ended and had acted arbitrarily and capriciously by making a new permanent disqualification based on a preponderance of the evidence using the same set of facts underlying the prior conclusive determination of maltreatment. Appellant's disqualification was affirmed, and he appealed by requesting a fair hearing under Minn. Stat. § 256.045 (2008).

A human services judge (HSJ) conducted a hearing to determine whether a preponderance of the evidence showed that appellant had committed acts constituting fifth-degree criminal sexual conduct. The police officer, the DH investigator, the DHS's licensing attorney, Restart's site supervisor, and appellant all testified; M.H. did not testify. At the hearing, the police officer and the DH investigator testified that M.H.'s story was believable, credible, and accurate. The site supervisor testified that "there wasn't really a conclusion"; there was no evidence; "and that's all I came to was she said

that the cares are done this way, he said he did them this way and that's all." The police report, which included transcripts of M.H.'s and appellant's taped statements, was admitted as part of the evidence.

The HSJ found that

> [t]he inappropriate sexual comments made by [a]ppellant showed extremely poor judgment about sexual boundaries that does undermine [a]ppellant's credibility to some degree. Since [a]ppellant admitted to engaging [in] a milder form of sexual self-indulgence at the expense of MH, it does make it somewhat more likely that he would have engaged in a more severe form such as sexual touch.

The HSJ found that "it [was] more likely than not" that M.H.'s account of what happened on August 22, 2000, as relayed to the police officer, was more accurate than appellant's. The HSJ concluded that respondent showed by a preponderance of the evidence that appellant committed fifth-degree criminal sexual conduct:

> By inserting his fingers into MH's vaginal canal, [a]ppellant committed an act that could not have been necessitated by hygienic requirements, and therefore could not have been a part of his job function. This act clearly establishes sexual intent. It follows that [a]ppellant's rubbing of MH's genital area and touching of her breasts were more likely than not done with sexual intent as well. Since these were clearly done without MH's consent and in spite of her protests, these acts meet the relevant definition of "sexual contact."

As for appellant's argument that he could not receive a permanent disqualification based on the same conduct for which he had already completed a seven-year disqualification, the HSJ observed that "[n]othing in the statutory purpose or language evinces legislative concern for any kind of administrative double jeopardy in cases where

potentially dangerous individuals had previously been given a limited-term disqualification." The HSJ concluded that

> [t]he statutory authority for the present disqualification (preponderance of the evidence of acts that would meet the definition of a listed offense) is separate from the statutory basis of the previous disqualification (administrative determination of serious maltreatment), so [respondent] is not precluded by the principle of *res judicata* from imposing the second disqualification. . . . [and that] the limited-term disqualification does not *bar* a permanent disqualification based on a separate statutory mandate to which *res judicata* does not apply.

Likewise, the HSJ concluded that "[a]lthough both disqualifications are based on the same factual allegations, *collateral estoppel* cannot apply to preclude any factual issues since the record shows that the previous factual findings were made by default and not after an evidentiary hearing on the merits."

The HSJ also concluded that appellant's argument that the findings were based solely on hearsay that would be inadmissible in a judicial proceeding was without merit. The HSJ observed that Minnesota law provided that all probative evidence, except that privileged by law, was admissible and that appellant "could have subpoenaed the victim and any other witnesses and elicited testimony from them."

The HSJ recommended that respondent affirm appellant's permanent disqualification. Respondent adopted the recommendation and appellant appealed to the district court. The district court concluded that the HSJ "carefully and succinctly analyze[d] each of the issues" and sustained appellant's disqualification, adopting the HSJ's analysis. This appeal follows.

## D E C I S I O N

### I. Respondent was not precluded from disqualifying appellant from a new position based on the same conduct for which appellant had previously completed a seven-year disqualification.

Appellant asserts that respondent exceeded his statutory authority and was collaterally estopped from permanently disqualifying appellant under Minn. Stat. § 245C.14, subd. 1(a)(2), when he had previously been disqualified for the same underlying conduct under a prior statutory scheme. We disagree.

Whether an administrative agency has acted within its statutory authority is a question of law which this court reviews de novo. *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010). Collateral estoppel prevents the relitigation of an issue if:

> (1) the issues are identical, (2) the issue was necessary to the administrative agency's decision, (3) the decision was a final determination subject to judicial review, (4) the estopped party was a party or in privity with a party to the prior determination, and (5) the estopped party was given a full and fair opportunity to be heard on the adjudicated issues.

*State by Friends of Riverfront v. City of Minneapolis*, 751 N.W.2d 586, 589 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. Sept. 23, 2008). As respondent correctly points out, appellant is not able to satisfy the first prong because the issues in appellant's maltreatment matter are not identical to the issues in the permanent-disqualification matter. The prior issue involved whether appellant had committed maltreatment against M.H. at Restart. The current issue involves respondent permanently disqualifying appellant from providing direct-contact services at Progressive.

Furthermore, the Minnesota legislature amended the statutory scheme governing individuals who provide direct-contact services between appellant's maltreatment and permanent-disqualification proceedings and now requires respondent to permanently disqualify those individuals whose actions, by a preponderance of the evidence, amount to fifth-degree criminal sexual conduct. *See* Minn. Stat. §§ 245C.14, subd. 1(a)(2), .15, subd. 1(a). In 2001, it was conclusively determined that appellant had maltreated M.H., a vulnerable adult; he was therefore disqualified from providing direct-contact services for seven years. *See* Minn. Stat. § 245A.04, subd. 3d(4) (2000) (stating an individual is disqualified "if less than seven years have passed since the . . . substantiated serious or recurring maltreatment . . . of a vulnerable adult under section 626.557 for which there is a preponderance of evidence that the maltreatment occurred and that the subject was responsible for the maltreatment"). In 2003, the legislature amended the statute to require respondent to permanently disqualify an individual from any position involving direct contact 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." 2003 Minn. Laws, ch. 15, art. 1, § 14, at 191. Respondent was required to permanently disqualify appellant under Minn. Stat. § 245C.14, subd. 1(a)(2), because a preponderance of the evidence showed that appellant had committed fifth-degree criminal sexual conduct, a crime listed in section 245C.15. Minn. Stat. § 245C.15, subd. 1(a). "An individual is disqualified under section 245C.14 . . . regardless of how much time has passed since the discharge of the sentence imposed, if any, for the offense[,] and . . . regardless of the level of the offense." *Id.*

Because the legislature now requires respondent to permanently disqualify individuals whose actions amount to fifth-degree criminal sexual conduct, respondent did not exceed its statutory authority. Additionally, because the issue in appellant's previous maltreatment matter was not identical to the issue in appellant's permanent-disqualification matter, appellant's estoppel claim is without merit.

## II. Respondent did not rely solely on hearsay information in determining that a preponderance of the evidence showed appellant had committed fifth-degree criminal sexual conduct.

"[W]hen judicial review is authorized by Minn. Stat. § 256.045, the scope of review is governed by Minn. Stat. § 14.69." *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). "[T]his court reviews the [DHS] commissioner's order independently, giving no deference to the district court's review." *Id.* This court may affirm the agency's decision, remand the case for further proceedings, or

> reverse or modify the decision if the substantial rights of the petitioner[] may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (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 (2008).

### A. Burden of Proof

First, it is necessary to describe how the burden of proof shifts during disqualification proceedings as appellant and respondent each claim that the other party had the burden of proof at the fair hearing. As discussed above, respondent is required to disqualify an individual after a background check reveals that the individual has committed, or a preponderance of the evidence shows that the individual committed, one of the specified offenses. *See* Minn. Stat. §§ 245C.14, .15 (2008 & Supp. 2009). The disqualified individual may request reconsideration under Minn. Stat. § 245C.21, subd. 1 (2008). When requesting reconsideration, the disqualified individual must show that:

> (1) the information the commissioner relied upon in determining the underlying conduct that gave rise to the disqualification is incorrect;
>
> (2) for maltreatment, the information the commissioner relied upon in determining that maltreatment was serious or recurring is incorrect; or
>
> (3) the subject of the study does not pose a risk of harm to any person served by the applicant, license holder, or other entities as provided in this chapter.

*Id.*, subd. 3(a) (2008). Thus, at the reconsideration stage, the burden is on the disqualified individual.

If respondent does not set aside the disqualification on reconsideration, "the individual may request a fair hearing under section 256.045." Minn. Stat. § 245C.27, subd. 1(a) (2008). "The fair hearing is the only administrative appeal of the final agency determination for purposes of appeal by the disqualified individual." *Id.*, subd. 1(b) (2008). An HSJ conducts the hearing and makes a recommendation to respondent, who may accept or reject it. Minn. Stat. § 256.045, subd. 5. At the hearing, "[t]he burden of

persuasion is governed by specific state or federal law and regulations that apply to the subject of the hearing[,] . . . [but] [i]f there is no specific law, then the participant in the hearing who asserts the truth of a claim is under the burden to persuade the [HSJ] that the claim is true." Minn. Stat. § 256.0451, subd. 17 (2008). No specific state or federal law applies to the burden of proof at a fair hearing when the disqualification is based solely on a preponderance of the evidence that the individual has committed acts that meet the definition of one of the crimes listed in section 245C.15. Therefore, the burden shifts back to respondent, as the party asserting the truth of the claim, to demonstrate that a preponderance of the evidence indicates that the individual has committed one of the listed offenses. *See* Minn. Stat. §§ 245C.14, subd. 1(a)(2), 256.0451, subd. 17; *cf.* Minn. Stat. § 256.045, subd. 3b(a) (providing an evidentiary standard in disqualification proceedings when the individual was determined to have maltreated a minor). Accordingly, respondent had the burden of proof at the fair hearing to show by a preponderance of the evidence that appellant's actions constituted fifth-degree criminal sexual conduct.

**B. Hearsay**

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). Generally, hearsay is not admissible unless it falls into one of several exceptions. Minn. R. Evid. 802. But in fair hearings, "[a]ll evidence, except that privileged by law, commonly accepted by reasonable people in the conduct of their affairs as having probative value with respect to the issues shall be submitted at the

hearing . . . ." Minn. Stat. § 256.045, subd. 4(b). The parties agree that hearsay is admissible at a fair hearing.

"The general rule is that in the absence of a special statute, an administrative agency cannot, at least over objection, rest its findings of fact solely upon hearsay evidence which is inadmissible in a judicial proceeding." *State ex rel. Ind. Sch. Dist. No. 276 v. Dep't of Ed.*, 256 N.W.2d 619, 627 (Minn. 1977) (quotation omitted); *but see id.* ("Only where it appears that the Department clearly abused its discretion in relying upon inherently unreliable evidence, under the hearsay rule or otherwise, should the courts intervene."). Similarly,

> neither pure hearsay nor hearsay corroborated by a mere scintilla of competent evidence is sufficient. While administrative bodies are not held to the same strict rules as judicial tribunals, and incompetent evidence will not in itself be grounds for reversal, there must be some substantial evidence introduced to sustain their findings.

*Sabes v. City of Minneapolis*, 265 Minn. 166, 176, 120 N.W.2d 871, 876 (1963).

We most recently addressed the administrative-law principle barring exclusive reliance on hearsay in *In re Expulsion of E.J.W.* 632 N.W.2d 775 (Minn. App. 2001). *E.J.W.* involved a bomb threat written on the mirror of a school bathroom. *Id.* at 777. While investigating the incident, police officers questioned several students, including E.J.W. *Id.* The first boy admitted his involvement and told the officers that he and E.J.W. tried to talk a second boy into writing the threat and that E.J.W. offered a pack of cigarettes to the second boy in return. *Id.* The second boy admitted writing the threat on the mirror; "told police officers the names of the boys who induced him to write the

threat"; and said E.J.W. was standing guard outside the door while he wrote the threat. *Id.* The second boy did not say anything about a bribe. *Id.* A third boy first told police that he overheard E.J.W. and two other students talking about the threat, but later said that when he approached them, "the boys became quiet" and "he 'later found out what was going on.'" *Id.* E.J.W. said other boys were trying to induce the second boy into writing the threat, denied encouraging the second boy, and denied standing guard at the door. *Id.*

Prior to the disciplinary hearing, the school district provided E.J.W. with a list of witnesses who would testify (two police officers and the principal) "and copies of the police reports with the names of all the other students redacted." *Id.* at 778. E.J.W. requested an unredacted copy, but the district did not provide it, citing confidentiality and private student data. *Id.*

At the hearing, the statements of all three boys "were admitted at the hearing as hearsay testimony through the police officers." *Id.* at 777. When E.J.W. objected that no names were used, the names of the student witnesses were given to E.J.W. *Id.* at 778. The boys did not testify. *Id.* at 777. E.J.W. was able to cross-examine only the police officers and the principal "about what the student witnesses had told them. No direct evidence linking E.J.W. with the bomb threat was provided at the hearing." *Id.* at 778. The hearing officer recommended that E.J.W. be expelled, but, on appeal to the commissioner of the Minnesota Department of Children, Families, and Learning (DCFL), "[t]he commissioner [of the DCFL] found that E.J.W. was denied his statutory and constitutional due-process rights by not being allowed to confront and cross-examine the

student witnesses—the only witnesses—to his alleged involvement in the bomb threat." *Id.*

We agreed with the commissioner of the DCFL that the "district's failure to call the student witnesses deprived E.J.W. of the opportunity for cross-examination and precluded the hearing officer from personally observing the demeanor of the witnesses in order to determine their credibility, thereby violating E.J.W.'s constitutional rights." *Id.* at 780. Observing that "the student has the right to compel attendance of anyone who may have evidence upon which the proposed action may be based" under the Pupil Fair Dismissal Act, we stated that it was the district's responsibility to compel the attendance of the student witnesses because the district had the burden of proof. *Id.* at 781 (quotation omitted).

Additionally, citing the general rule that absent "'a special statute, an administrative agency cannot, at least over objection, rest its findings of fact solely upon hearsay evidence which is inadmissible in a judicial proceeding,'" we agreed that, without the additional testimony of the student witnesses, the hearing officer lacked sufficient evidence to expel E.J.W. *Id.* at 782 (quoting *Ind. Sch. Dist. No. 276*, 256 N.W.2d at 627). "The statements of the student witnesses came through the police officers' testimony, which is hearsay (and in some instances, double hearsay)." *Id.* "The only people who supposedly had firsthand knowledge of E.J.W.'s involvement were the students who gave statements to the police and *did not testify at the hearing*." *Id.* With no direct evidence supporting the hearing officer's conclusion, we affirmed the commissioner's order. *Id.* at 782.

Here, appellant could subpoena witnesses to appear at the hearing and, unlike E.J.W., appellant knows the identity of his accuser. *See* Minn. Stat. § 256.0451, subd. 8 (2008) (allowing a person or agency involved in a fair hearing to request a subpoena and providing that "[a] reasonable number of subpoenas shall be issued to require the attendance and the testimony of witnesses, and the production of evidence relating to any issue of fact in the appeal hearing"). But, as in *E.J.W.*, the burden of proof was not on the accused party. It was respondent's burden to show that appellant committed actions that constituted fifth-degree criminal sexual conduct. *See* Minn. Stat. §§ 245C.14, subd. 1(a)(2), 256.0451, subd. 17.

The common-law rule prohibits only an agency's *sole* reliance on hearsay that otherwise would not be admissible in a judicial proceeding. While appellant argues that the HSJ's conclusion was based exclusively on hearsay, we disagree. The police officer testified that M.H. told him that, on one occasion, appellant had asked M.H. to stay home from work, stating that appellant would "make it worth [her] while."

Although this statement was made by someone other than the person testifying to it at the hearing, it is not hearsay under Minn. R. Evid. 801(d)(2)(A) (providing that a prior statement by a party in an individual capacity offered against that party is not hearsay). This is because

> [t]he requirements of trustworthiness, firsthand knowledge, or rules against opinion which may be applicable in determining whether or not a hearsay statement should be admissible do not apply when dealing with party admissions . . . [and] the rationale for their admissibility is based more on the nature of the adversary system than in principles of trustworthiness or necessity.

*Id.*, 1989 comm. cmt. This statement was offered against appellant to show that it was more likely than not that he committed fifth-degree criminal sexual conduct against M.H. *See* Minn. R. Evid. 801 2006 advisory comm. note (providing that "the statement by a party opponent need not be an 'admission' of guilt or liability in order to be excluded from the definition of hearsay"). The HSJ considered this statement and others[1] in evaluating appellant's credibility:

> The inappropriate sexual comments made by [a]ppellant showed extremely poor judgment about sexual boundaries that does undermine [a]ppellant's credibility to some degree. Since [a]ppellant admitted to engaging [in] a milder form of sexual self-indulgence at the expense of MH, it does make it somewhat more likely that he would have engaged in a more severe form such as sexual touch. Thus, it is a relevant circumstance that corroborates MH's account to some degree.

Because this statement is specifically categorized as non-hearsay, respondent's decision was not based exclusively on hearsay and we therefore affirm appellant's permanent disqualification.

In reaching this decision, we are mindful that "[t]he public purpose of Chapter 245C is to protect the health and safety of individuals who are vulnerable due to their age or their physical, mental, cognitive, or other disabilities." *Obara v. Minn. Dep't of Health*, 758 N.W.2d 873, 879 (Minn. App. 2008); *see also* Minn. Stat. §§ 245C.22, subd. 3 (providing that "the commissioner shall give preeminent weight to the safety of each *person served* by the license holder" when reconsidering a disqualification (emphasis added)), 626.557, subd. 1 (2008) ("The legislature declares that the public policy of this

[1] We focus on the one statement because it is the most probative.

state is to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to maltreatment; to assist in providing safe environments for vulnerable adults; and to provide safe institutional or residential services, community-based services, or living environments for vulnerable adults who have been maltreated."). In *E.J.W.*, a student subject to disciplinary proceedings was a protected party because education is a fundamental right. 632 N.W.2d at 780. Here, the protected party was M.H., the vulnerable adult. *See Obara*, 758 N.W.2d at 879. It is likely that vulnerable adults will often not be available to testify in these types of proceedings. *See* Minn. Stat. § 245A.02, subd. 2(1) (2008) (defining vulnerable adult as a person who is 18 years of age or older and has a mental illness, developmental disability, physical disability, or functional disability); Minn. R. Evid. 804(a)(4) (including the inability to be present or testify at a hearing because of an "existing physical or mental illness or infirmity" in the definitions of "unavailability as a witness").

Because respondent's decision did not solely rely on hearsay evidence, we need not address whether Minn. Stat. § 256.045, subd. 4(b), is a "special" statute allowing an agency to make its findings of fact exclusively on hearsay evidence that otherwise would be inadmissible in a judicial proceeding. *See Ind. Sch. Dist. No. 276*, 256 N.W.2d at 627.

## III. The evidence was sufficient to support a determination that appellant acted with sexual intent.

"With respect to factual findings made by the agency in its judicial capacity, if the record contains substantial evidence supporting a factual finding, the agency's decision must be affirmed." *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843,

846 (Minn. 1984). Substantial evidence is defined as: "(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; or (5) the evidence considered in its entirety." *Minn. Ctr. For Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002).

For appellant to be permanently disqualified from providing direct-contact services, a preponderance of the evidence must show that he committed acts that meet the definition of fifth-degree criminal sexual conduct. Minn. Stat. §§ 245C.14, subd. 1(a)(2), .15, subd. 1(a). A person commits fifth-degree criminal sexual conduct if he engages in nonconsensual sexual contact. Minn. Stat. § 609.3451, subd. 1(1) (2008).[2] "Sexual contact" means the intentional touching of the complainant's intimate parts without the complainant's consent and with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(a)(i) (2008). "Intimate parts" is defined as "the primary genital area, groin, inner thigh, buttocks, or breast of a human being." *Id.*, subd. 5 (2008).

The HSJ concluded:

> By inserting his fingers into MH's vaginal canal, [a]ppellant committed an act that could not have been necessitated by hygienic requirements, and therefore could not have been a part of his job function. This act clearly establishes sexual intent. It follows that [a]ppellant's rubbing of MH's genital area and touching of her breasts were more likely than not done with sexual intent as well. Since these were clearly done without MH's consent and in spite of her protests, these acts meet the relevant definition of "sexual contact." Thus, the Department has shown by a preponderance of the

[2] Because Minn. Stat. § 609.3451 has not been amended since 1998, we cite the current version.

> evidence that [a]ppellant committed acts that meet the definition of criminal sexual conduct in the fifth degree.

Appellant argues that there are numerous inconsistencies in the record and, when viewed as a whole, the evidence in the record does not substantially support the HSJ's finding that he acted with sexual intent. We disagree.

Inconsistencies in a victim's story do not necessarily render it false, particularly when the "victim is recounting a traumatic or stressful event." *State v. Bakken*, 604 N.W.2d 106, 111 (Minn. App. 2000), *review denied* (Minn. Feb. 24, 2000). While the details that M.H. reported to various individuals over the course of the investigation varied in their level of depth, M.H. consistently reported that appellant repeatedly touched her in her genital area in a rough manner and fondled her breasts. Respondent needed to show only that appellant had nonconsensual sexual contact with M.H. *See* Minn. Stat. § 609.3451, subd. 1(1). Even accepting appellant's argument that penetration was not established by substantial evidence, respondent was not required to prove penetration—only contact. *Compare* Minn. Stat. §§ 609.342, .344 (2008) (requiring penetration as an element of specified sex offense) *with* Minn. Stat. § 609.3451, subd. 1(1) (requiring nonconsensual sexual contact).

A person's sexual or aggressive intent "can be established through repeated attempts to accomplish sexual contact." *In re Welfare of T.J.C.*, 670 N.W.2d 629, 633 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004). As found by the HSJ, appellant wiped M.H.'s genital area both before and after she showered to the point that M.H. was in pain, yet refused to stop. At some point after M.H. finished her shower, appellant

"was rubbing MH's genital area with one finger and inserted it into her vagina." Later, appellant "touched or fondled MH's breasts more than necessary." M.H.'s genital area and breasts are intimate parts as described by statute and appellant's continued contact, despite M.H.'s protests, shows that his actions were not consensual. The repeated contact of M.H.'s intimate parts by appellant outside the scope of his duties as M.H.'s personal-care assistant demonstrates that such contact was sexual in nature. Therefore, we conclude that there was substantial evidence to support the HSJ's conclusion that appellant acted with sexual intent.

**Affirmed.**