STATE OF MINNESOTA
IN COURT OF APPEALS
A10-889

Ronald Benson,
Appellant,

vs.

Cal Ludeman, Commissioner,
Minnesota Department
of Human Services,
Respondent.

Filed January 18, 2011
Affirmed
Crippen, Judge[*]

Mower County District Court
File No. 50-CV-09-2486

Charles H. Thomas, Southern Minnesota Regional Legal Services, Inc., Mankato, Minnesota (for appellant)

Lori Swanson, Attorney General, Corrie Alexis Baer Oberg, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen, Judge.

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

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

CRIPPEN, Judge

Upon concluding that appellant Ronald Benson had committed maltreatment of a vulnerable adult in September 2007, the Minnesota Department of Human Services (DHS) disqualified him from direct-contact employment with licensed facilities for seven years. Appellant challenges the findings of respondent commissioner of human services that (1) his actions in 2007 did not constitute therapeutic conduct and (2) his disqualification should not be set aside because he poses a risk of harm to persons served by licensed facilities. Because substantial evidence supports the maltreatment determination and because appellant has not shown the continuing-risk analysis to be arbitrary, we affirm.

FACTS

From May 2005 to September 2007, appellant was employed by Cenneidigh Inc., a licensed provider of direct-care services to physically and mentally disabled persons. E.W., a vulnerable adult, was one of appellant's clients.

On September 25, 2007, Cenneidigh staff discovered several abrasions on E.W.'s abdomen. These abrasions, the largest of which was approximately four inches in diameter, evidently were sustained on September 21, 2007. That evening, appellant had accompanied E.W. to a social event for disabled persons at a community center. In the course of leaving the event, E.W. intentionally slid from his wheelchair. He lay prone on the carpeted floor, blocking an inside doorway where others would soon be walking. When E.W. did not cooperate with appellant's requests for him to climb back into the

wheelchair, appellant dragged E.W. from the doorway. Appellant asserts that he dragged E.W. a distance of approximately five feet. Other evidence shows that appellant dragged E.W. as far as 15 feet, from the inside doorway to a location near the building's exit. After an internal investigation, Cenneidigh terminated appellant's employment. Appellant then accepted employment at Gerard Academy, a residential facility for children and teenagers with emotional, behavioral, and chemical-dependency problems.

DHS conducted an investigation of E.W.'s injuries. In January 2008, DHS found that appellant had committed maltreatment of a vulnerable adult by dragging E.W. and injuring him. DHS disqualified appellant from direct-contact employment for seven years and appellant requested reconsideration. In June 2008, DHS affirmed the maltreatment determination and declined to set aside appellant's disqualification. Appellant challenged this determination.

A hearing took place before a human services judge (HSJ) in January 2009. The HSJ found that appellant's conduct on September 21, 2007 was maltreatment because E.W. was seriously injured when appellant dragged him "further than necessary to get him out of harm's way." The HSJ also determined that appellant had failed to demonstrate that he did not pose a risk of harm to persons served by licensed facilities. In making this determination, the HSJ took into account the nature and severity of the maltreatment and fully considered appellant's arguments related to his present ability to serve in direct-contact employment. The HSJ recommended that the maltreatment determination and disqualification be affirmed, and the commissioner adopted those recommendations.

Appellant requested reconsideration of the commissioner's decision; the commissioner affirmed its decision. Appellant then sought review of the matter in district court. After a hearing, the district court affirmed the commissioner's decision.

D E C I S I O N

The commissioner shall disqualify an individual from direct-contact employment for seven years when a DHS investigation results in a determination of serious maltreatment of a vulnerable adult. Minn. Stat. §§ 245C.14, subd. 1(a)(3), .15, subd. 4(b)(2) (Supp. 2007).[1] Maltreatment includes abuse. Minn. Stat. § 626.5572, subd. 15 (2006). Abuse is conduct that produces or could reasonably be expected to produce physical pain or injury or emotional distress. *Id.*, subd. 2(b) (2006). But abuse does not include therapeutic conduct, which is the provision of services "done in good faith in the interests of the vulnerable adult by . . . a caregiver." *Id.*, subds. 2(b), 20 (2006). On properly determined facts, the question of whether conduct constitutes maltreatment is one of law, which we review de novo. *In re Appeal of Staley*, 730 N.W.2d 289, 297-300 (Minn. App. 2007).

The commissioner may set aside a disqualification if the individual submits sufficient information to demonstrate that he does not pose a risk of harm to the persons served by direct-contact programs. Minn. Stat. § 245C.22, subd. 4(a) (Supp. 2007). In making this determination, the commissioner must consider:

> (1) the nature, severity, and consequences of the event or events that led to the disqualification;

[1] This court applies the law in effect at the time of the disqualifying incident. *In re Appeal of O'Boyle*, 655 N.W.2d 331, 334 n.1 (Minn. App. 2002).

> (2) whether there is more than one disqualifying event;
>
> (3) the age and vulnerability of the victim at the time of the event;
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> (4) the harm suffered by the victim;
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> (5) vulnerability of persons served by the program;
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> (6) the similarity between the victim and persons served by the program;
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> (7) the time elapsed without a repeat of the same or similar event;
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> (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., subd. 4(b) (Supp. 2007). In completing this analysis, "preeminent weight" is given to the safety of each person served by the license holder, and "any single factor . . . may be determinative." *Id.*, subd. 3 (2006).

This court may reverse or modify the commissioner's decision if the petitioner's substantial rights may have been prejudiced because the findings are unsupported by substantial evidence or the conclusions are arbitrary or capricious. Minn. Stat. § 14.69 (2006). Substantial evidence is: (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. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997). An agency's decision is arbitrary and capricious if there is no rational connection between the facts and the decision. *Sweet v. Comm'r of Human Servs.*, 702 N.W.2d 314, 318 (Minn. App. 2005), *review denied* (Minn. Nov. 15, 2005). On appeal from a district court order regarding an appeal from a final agency

decision, we independently review the agency decision and give no deference to the decision of the district court. *Zahler v. Minn. Dep't of Human Servs.*, 624 N.W.2d 297, 301 (Minn. App. 2001), *review denied* (Minn. June 19, 2001). The commissioner's decision enjoys a presumption of correctness, and we defer to the agency's expertise and conclusions regarding conflicts in testimony and the inferences to be drawn from testimony. *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001); *see also O'Boyle*, 655 N.W.2d at 334. This court will affirm if the commissioner engaged in "reasoned decisionmaking," even if this court would have reached a different conclusion. *White*, 567 N.W.2d at 730 (quotation omitted). Appellant has the burden to establish that the agency decision was improperly reached. *See City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 846, 849 (Minn. 1984) (concluding that appellants failed to show that agency decision was incorrect).

1.

Appellant argues that his actions on September 21, 2007 constituted therapeutic conduct done in good faith and in E.W.'s interests and, therefore, were not maltreatment. *See* Minn. Stat. § 626.5572, subd. 2(b) (excluding therapeutic conduct from definition of maltreatment).

It is undisputed that E.W. is a vulnerable adult, that appellant was a caregiver, and that E.W. suffered injury to his skin as a result of being dragged. Appellant contends that he dragged E.W. only as far as necessary to remove him from the danger of being trod upon or of tripping other persons—that is, from the threshold of the inside doorway to a

coat-rack area approximately five feet away. But substantial evidence supports the commissioner's findings that appellant dragged E.W. to a location close to the building's exit and that this was farther than necessary to remove E.W. from danger. The director of the event held at the community center testified that: (1) a coat rack is located next to the inside doorway; (2) a hallway leading from this doorway intersects with a second hallway, which, if followed to the right, leads to the building's exit; and (3) there are several benches near the exit. Appellant's September 21, 2007 entry in E.W.'s "nurse's notes," written on the night of the incident and before any allegations of maltreatment were made, states that E.W. "had to be dragged to the door."

During Cenneidigh's internal investigation, appellant stated that he dragged E.W. to "the bench near the exit." Appellant's own sketch of the situation, made on September 26, 2007, shows that he was referring to the building's exit and not the inside doorway. During the DHS investigation, a Cenneidigh employee stated that she saw E.W. lying prone near the building's exit—not the inside doorway—with his shirt pushed up to his armpits and appellant holding his feet. This employee also testified that E.W. had been moved approximately 15 feet from his original position at the threshold of the inside doorway. And appellant dragged E.W. far enough to seriously hurt him. *See* Minn. Stat. § 245C.02, subd. 18(c) (2006) (stating that "serious maltreatment" includes skin laceration or tissue damage). Although the commissioner did not make findings as to an exact minimum distance that would have removed E.W. from danger, there is substantial evidence that appellant dragged E.W. some distance past the coat rack to a point near the

building's exit and that doing so exceeded what was necessary to remove E.W. from harm's way.

Appellant argues that the therapeutic-conduct exception applies to his actions on September 21. But his argument is premised on E.W. being dragged only as far as necessary to remove him from danger. Because substantial evidence supports the finding that appellant was dragged farther than necessary, and because it was not in E.W.'s interests to be dragged farther than necessary, the therapeutic-conduct exception does not apply. *See J.R.B. v. Dep't of Human Servs.*, 633 N.W.2d 33, 38 (Minn. App. 2001) (concluding that therapeutic-conduct exception did not apply where appellant acted in good faith in moving a vulnerable adult from her room to a lobby but did not act in the vulnerable adult's interests because appellant failed to monitor her physical condition), *review denied* (Minn. Oct. 24, 2001).

2.

Appellant challenges the commissioner's decision not to set aside his disqualification, arguing that the commissioner's risk-of-harm analysis was arbitrary and capricious.

The commissioner openly took into account the considerations favoring appellant, including that appellant had no intent to harm E.W., that appellant dragged E.W. in an attempt to remove him from danger, that this was a single event, and that appellant's employment record was otherwise good. Still, the commissioner determined that there were more weighty considerations, colored by an overall concern for safe care. *See* Minn. Stat. § 245C.22, subd. 3 (compelling the commissioner to give "preeminent weight

to the safety of each person served by the license holder, applicant, or other entities . . . over the interests of the disqualified individual" and stating that any single statutory factor may be determinative of the commissioner's decision whether to set aside a disqualification). These considerations included: the findings on maltreatment, including the serious harm to E.W.; a weighing of the similarity between E.W. and those persons appellant might care for at Gerard Academy; the time elapsed since the disqualifying incident; and the absence of any rehabilitation efforts since the disqualifying incident.

Appellant argues that more than three years have passed since the disqualifying incident and that there is no explanation in the record as to how the commissioner calculates a risk of harm based on the passage of time. But the standard DHS risk-of-harm assessment form states that where, as here, fewer than four years have passed since the incident, this translates to a "higher" risk. We defer to the agency's judgment on this matter. *See Fish v. Comm'r of Minn. Dep't of Human Servs.*, 748 N.W.2d 360, 363 (Minn. App. 2008) (cautioning courts against substituting their judgment for that of the agency); *O'Boyle*, 655 N.W.2d at 334 (stating that courts defer to agency expertise).

Appellant challenges the commissioner's determination that his failure to document the successful completion of pertinent training or rehabilitation poses a "higher" risk of harm. *See* Minn. Stat. § 245C.22, subd. 4(b)(8) (including completion of training or rehabilitation as factor to consider). Appellant concedes that he has produced no evidence of the completion of related training or rehabilitation. Instead, he argues that it is unfair to resolve this factor against him because (1) he had no opportunity to complete training through Cenneidigh because he was discharged immediately after the

internal investigation; and (2) he was removed by DHS order from his employment at Gerard Academy before he could participate in any training there. But the statute addressing risk-of-harm determination is to be interpreted in favor of protecting vulnerable adults. *J.R.B.*, 633 N.W.2d at 39. It is therefore not unreasonable that this factor be resolved against appellant.

Finally, appellant challenges the commissioner's finding that he dragged E.W. an excessive distance "likely due to frustration" on the grounds that the finding is speculative and inconsistent with the finding that appellant sincerely believed E.W. needed to be moved. But the finding of frustration is not an unreasonable inference from the evidence, including that E.W. often slid from his wheelchair intentionally, that appellant was attempting to "beat the crowd," and that no one was available to assist appellant. And the commissioner could reasonably have found that appellant acted in good faith by moving E.W. from the threshold but acted out of frustration when he dragged E.W. farther than necessary.

We conclude that the commissioner's decision to deny appellant's set-aside request was not arbitrary and capricious.

Affirmed.