

STATE OF MINNESOTA
COMMISSIONER OF HEALTHIn the Matter of the Appeal of [REDACTED]
[REDACTED]

ORDER

DHS Docket No. 140815

Human Services Judge Kulani R. Moti heard this consolidated case on August 27, 2013. Assistant Attorney General David Strohkirch appeared for the Minnesota Department of Health. Assistant Hennepin County Attorney Duane Bartz appeared for Hennepin County. Appellant [REDACTED] appeared and was represented by Ryan Garry, Law Offices of Ryan Garry, North Grain Exchange, 301 South 4th Avenue, Suite 285, Minneapolis, MN 55415. On October 23, 2013, Human Services Judge Moti issued her recommendation that the Commissioner of Health reverse the Department's disqualification of the Appellant for serious maltreatment and for committing an act meeting the definition of third degree assault. The Appellant filed comments dated November 5, 2013. The Department filed exceptions dated November 14, 2013. The Appellant responded to the Department's exceptions on November 20, 2013. The Department responded to Appellant's comments on December 2, 2013. The Appellant filed additional correspondence, with materials, dated January 24, 2014, to which the Department objected by correspondence dated February 6, 2014. The Department's February 6 objection is sustained, and the Appellant's correspondence dated January 24, 2014, and the accompanying supporting material, to the extent not already in the record, are not considered.

Based on all these proceedings and their records, THE COMMISSIONER ORDERS
THE FOLLOWING:

1. Wherever it appears in Human Services Judge Kulani R. Moti's recommended Decision of State Agency on Appeal dated October 23, 2013, including the caption, "[REDACTED]" is amended to "[REDACTED]"

2. The names in the list of appearances in Human Services Judge Kulani R. Moti's recommended Decision of State Agency on Appeal dated October 23, 2013, is amended by deleting "[REDACTED] Brooklyn Center Police Department."

3. Human Services Judge Kulani R. Moti's attached Statement of Issues dated October 23, 2013, are adopted with the following amendments:

A. The second issue no. 1 is deleted and the following substituted:

2. Whether the Minnesota Department of Health (MDH) properly disqualified the appellant for committing serious maltreatment.
3. Whether MDH properly disqualified the appellant, on a preponderance of the evidence, for committing an act meeting the definition of third degree assault.

B. Issue no. 2 is renumbered as issue no. 4.

4. Human Services Judge Kulani R. Moti's attached Findings of Fact dated October 23, 2013, are adopted with the following amendments:

A. Finding of Fact No. 1.b. is deleted and the following substituted:

On March 26, 2013, the Minnesota Department of Human Services (DHS) sent written notice to the appellant, disqualifying him from positions that have direct contact with, or access to, persons receiving services in programs licensed by DHS, MDH and other licensed and unlicensed programs. Exhibit MDH 3. On April 1, 2013, MDH received the appellant's request for reconsideration of the disqualification decision and request for a set-aside. Exhibit MDH 4. On May 15, 2013, MDH sent the appellant notice that it upheld the original disqualification decision and that it would not set aside the disqualification. Exhibit MDH 5. On May 31, 2013, the appellant requested a hearing. Exhibit MDH 6. There continuances granted for both the appellant and agencies from February 2013 until August 2013.

B. In Finding of Fact No. 4.a. the third and fourth sentences are deleted and the following substituted:

█ reported to the nurse that the appellant had thrown a belt at her; kicked her; flipped the mattress she was lying on, causing her to fall to the floor; and choked her with his foot. *Id.* The doctor noted that her neck was not tender, that she did not show symptoms of pain in her larynx or of pain in her knee, and that she appeared able to walk without pain or difficulty. *Id.*

C. In Finding of Fact No. 4.b. "Officer's" is amended to "Officers."

D. In Finding of Fact No. 5.b. the third sentence is deleted and the following substituted:

█ also stated that her father (appellant) flipped the mattress as she was lying on her bed in her room. She stated that she then fell to the floor, got up, went to the window, opened it, and yelled for help. *Id.*

E. In Finding of Fact No. 5.c. the second sentence is deleted and the following substituted:

█ told the property manager that she ran out of the apartment naked because her father (appellant) was going to kill her, had poured pepper in her face, whipped her with his belt (including hitting her thumb with the buckle-end of the belt), flipped the mattress she was lying on, causing her to fall to the floor, and stepped on her throat, trying to choke her. *Testimony of █ and Exhibit 5.*

F. The second Finding of Fact No. 5, Argument, is renumbered No. 6, and in the next-to-last sentence, "warms clothes" is amended to "warm clothes."

5. Human Services Judge Kulani R. Moti's attached Conclusions of Law dated October 23, 2013, are adopted with the following changes:

A. Conclusion of Law No. 1 is deleted and the following substituted:

This appeal is timely under Minn. Stat. §§ 256.045, subd. 3, and 626.556, subd. 10i. The Commissioner of Health has jurisdiction over this appeal under Minnesota Stat. § 256.045, subd. 3b(c).

B. In the eleventh sentence of Conclusion of Law No. 5.a., "was going to throw pepper" is amended to "threw pepper" and, in the thirteenth sentence, "denys" is amended to "denies."

3. The Department has failed to show by a preponderance of the evidence that the Appellant committed serious maltreatment or committed an act meeting the definition of assault in the third degree. Therefore, the Department's disqualifications of the Appellant for serious maltreatment and for committing an act meeting the definition of assault in the third degree are rescinded.

4. The memorandum below is incorporated in this order.

Dated: Feb 25, 2014

STATE OF MINNESOTA
DEPARTMENT OF HEALTH


PATRICIA WINGET
Adviser to the Commissioner

NOTICE

Right of Appeal to District Court or Reconsideration by the Commissioner

If you disagree with this decision you may do either of the following:

Start an appeal in the district court in the county where the maltreatment occurred. This is a separate legal proceeding that you must start within 33 days of the date of this decision. You start by 1) serving a notice of appeal upon the Commissioner; and 2) filing the original notice and proof of service with the district court administrator. The law that describes this appeal process is Minnesota Statutes, section 256.045, subdivision 7.

or

Ask the Commissioner to reconsider this decision. You must put your request in writing and state the reason(s) you believe the decision is incorrect. Send your request within 33 days of the date of this decision to:

Commissioner
Minnesota Department of Health
Orville L. Freeman Office Building

625 Robert Street North
P.O. Box 64975
St. Paul, Minnesota 55164-0975

Also, you must send a copy of everything that you submit to the Commissioner to the other participants. [They will then have ten (10) business days from the date of receiving your materials to respond.] The Commissioner will consider what you submit and make a decision. If you disagree with the Commissioner's decision after reconsideration, you may still appeal to district court by following the procedure explained above. The law that describes this reconsideration process is Minnesota Statutes, section 256.0451, subdivision 24.

MEMORANDUM

The alleged victim's initial, contemporaneous accounts of the incident to the property manager and to the police and medical care providers were highly inconsistent. Aside from the broken thumb, she had no injuries that were consistent with her reports. And in her testimony at the hearing, the alleged victim testified credibly about breaking her thumb by catching it on a metal stair railing while trying to break her fall. The Appellant has consistently denied the alleged conduct and, from what I can gather from the record, has never avoided giving his account of the incident and even waived his Miranda rights in his first contact with the police.

Certainly, both the Appellant and the alleged victim have incentives to be untruthful with the authorities. An alleged victim's later recantation, especially when other facts do not support the recantation, is not always persuasive. Likewise, an appellant's denials are not always persuasive either. But here the alleged victim's *initial* inconsistent reports, together with the Appellant's consistent reports, point the other way. If I am not persuaded that one version is more likely true than another, I must find against the party (here the Department) bearing the burden of proof. I am not persuaded, on this record, that the Department's version of the facts is more likely true than the Appellant's.

I cannot conclude that the Department has proved by a preponderance of the evidence that the Appellant committed serious maltreatment or committed an act meeting the definition of assault in the third degree.¹ Consequently, the disqualifications are rescinded.

My order above incorporates some of the Department's exceptions, as I have modified them, for the reasons stated in those exceptions.²

P.W.

¹ The Department concedes in its response to the Appellant's exceptions that with the Commissioner of Human Services's reversing the maltreatment finding there is no predicate for a determination of serious maltreatment. As the Department points out, the Commissioner of Health's determination of whether a preponderance of evidence supports disqualification for an act meeting the definition of assault in the third degree is independent, even though it is based on the same facts.

² I have not undertaken to locate and amend every grammatical error (real or perceived) or insert my own style in the recommendation. As general matter, I try to maintain focus on the merits.



Minnesota Department of **Human Services**

**DECISION OF
STATE AGENCY
ON APPEAL**

In the Appeal of: [REDACTED]
For: Maltreatment of a Minor, Disqualification from Direct Contact with
Persons Receiving Services in Licensed and Other Programs, and
Set Aside
Agency: Hennepin County and Minnesota Department of Health
Docket: 140815

On August 27, 2013, Human Services Judge Kulani R. Moti held an evidentiary hearing under Minn. Stat. § 256.045, subd. 3.

The following people appeared at the hearing:

[REDACTED] Appellant;
Ryan Garry, Appellant's Attorney
Duane Bartz, Assistant Hennepin
County Attorney;
David Stokirch, Assistant
Attorney General;
Terry Mahling, Child Protection
Investigator, Hennepin County;
Diana Kasa, Appeals, Minnesota
Department of Health;
[REDACTED] Brooklyn

Center Police Department;
[REDACTED]
Brooklyn Center Police
Department;
[REDACTED], Witness;
[REDACTED] Witness (minor);
[REDACTED], Witness (via
Telephone);
Jon Hall, Renee Ladd, Zemenay
Wondwossen; Human Service
Judges, Observers;



Minnesota Department of **Human Services**

The Human Services Judge, based on the evidence in the record and considering the arguments of the parties, recommends the following findings of fact, conclusions of law, and order.

STATEMENT OF ISSUES

The issues raised in this appeal are:

1. Whether the county agency correctly determined that appellant maltreated a child by physical abuse.
1. Whether the Minnesota Department of Health properly disqualified the appellant from positions licensed by the Department of Health (MDH).
2. Whether MDH correctly refuse to set aside the appellant's disqualification because he presents a risk of harm to people served in licensed and other programs.

FINDINGS OF FACT

1. *Procedural History.*

a. On December 12, 2012, Hennepin County ("Agency") sent [REDACTED] ("Appellant") written notice of maltreatment of a minor determination against the appellant. *Exhibit 13*. On December 19, 2012, the appellant requested reconsideration of the Agency's maltreatment determination. *Exhibit 16*. On December 20, 2012, the Agency sent the Appellant notice upholding the original maltreatment determination. *Exhibit 17*. On January 4, 2013, the appellant appealed this action. *Exhibit 4*.

b. On March 26, 2013, the Minnesota Department of Health (MDH), sent written notice to the appellant disqualifying him from positions that have direct contact with persons receiving services in licensed and other programs licensed by MDH. *Exhibit MDH 3*. On March 29, 2013, the appellant requested reconsideration of MDH's disqualification decision and requested a set aside. *Exhibit MDH 4*. On May 15, 2013,

DHS sent the appellant notice upholding the original disqualification decision and notice to not set aside the disqualification. *Exhibit MDH 5*. On May 29, 2013, she appealed this action. *Exhibit MDH 6*. There were continuances granted for both the appellant and the agencies from February 2013 until August 2013.

c. On August 27, 2013, Human Services Judge Kulani R. Moti held an evidentiary hearing at Minnesota Department of Human Services Lafayette offices in St. Paul, MN. On August 27, 2013, the record was closed consisting of thirty-eight exhibits.

2. **Minor child.** The minor child, [REDACTED], was 9 years old at the time of the incident. *Exhibit 1*. She has a brother, [REDACTED] (age 11 months). *Id.* The minor and her brother live with the appellant and their mother. *Id.*

3. **Responsible Person.** The minor lives with the appellant, her father, and her mother and her brother. *Exhibits 2 & 6*.

4. **Injury.**

a. On November 30, 2013, [REDACTED] was seen in the emergency department at North Memorial Medical Center. *Exhibit 3*. [REDACTED] had an acute fracture of her right thumb. *Id.* [REDACTED] reported to the nurse that the appellant had thrown a belt at her, kicked her, flipped the mattress she was lying on cause her to fall to the floor, and that he choked her on her throat with his foot. *Id.* The doctor noted that the minor's neck was not tender and no pain with passive movement of her larynx and that the minor had no knee pain and she has been able to walk without pain or difficulty. *Id.* The doctor also noted that there was some bruising on her thumb but there were no other signs of external bruising on the rest of her body. *Id.*

b. Officer's that responded to the 911 call did not observe any markings or injury on [REDACTED] besides the swelling on her thumb. *Exhibit 8*.

5. **Incident.**

a. On November 30, 2012, [REDACTED] came home from school and met her father let her in the apartment building. *Exhibits 5 and 6*.

b. [REDACTED] told Officer Sommers that her father (appellant) kicked her under the knee and she fell and hit her head. He then told her to go to her room and take her clothes off and lie down on the bed. *Exhibit 5*. [REDACTED] also stated that her father (appellant) flipped the mattress she was laying on her bed in her room and she fell on the floor, she got up and went to the window and opened it and yelled for help. *Id.* Her father then closed the window. She then states that her father (appellant) choked her by putting his foot on her throat and she could not breathe. *Exhibit 5 & 6*. [REDACTED] also stated that her father (the appellant) threw a belt with a belt buckle at her and the buckle hit her thumb. *Exhibit 5*. [REDACTED] stated that her ten month old brother was sitting and watching this. *Id.* [REDACTED] then ran out of the house. *Id.* [REDACTED] told [REDACTED] that her father (appellant) was going to whip her with a belt and that he had put his foot on her throat. *Exhibit 8*.

c. The property manager found [REDACTED] running outside without any clothes on. *Testimony of [REDACTED]* [REDACTED] told the property manager that she ran out of the

apartment naked because her father (appellant) was trying to kill her, he was going to pour pepper in her face, that he stepped on her throat and tried to choke her, he threw a belt at her, that he flipped the mattress she was lying on causing her to fall to the floor, and that he whipped her with a belt. *Testimony of ██████████ and Exhibit 5.*

d. On December 3, 2012, ██████ spoke with a social worker from Hennepin County and her mother was present for part of the interview. *Exhibit 6.* At first ██████ stated to the Social Worker, that on November 30, 2012, she had gotten in trouble at school and was suspended. *Id.* ██████ stated that when she got home her father (appellant) told her to take a shower and that he was going to discipline her. *Id.* ██████ thought her father (appellant) was going to whoop her so when she got out of the shower she went out of the house. *Id.* ██████ stated that when she ran out of the house she ran down the stairs fast and fell and she hit her thumb on the metal part of the stairs. *Id.* After her mother left the room, ██████ and the Social Worker told ██████ they were going to review her her previous statement line by line. *Id.* ██████ then confirmed her previous statement with one correction. *Id.*

e. At the hearing ██████ stated she had been suspended from school and that her father (appellant) was upset. *Testimony of ██████████.* The appellant told ██████ to go take a shower and that he was going to take her TV out of her room. *Id.* ██████ ran out of the house because she was afraid that she would be sent to Africa. *Id.* When she ran out of the house she fell on the stairs, she was running too fast. *Id.* ██████ was very afraid of being sent to Africa. *Id.*

5. *Argument.* On November 30, 2013, the appellant received a phone call from the Joy's school because she had been suspended for bullying. *Exhibit 5 and Testimony of Appellant.* When ██████ arrived home the appellant told her to go upstairs and take her clothes off and take a bath. *Id.* The appellant told her she was grounded and that he was taking her TV out of her room. *Id.* ██████ started screaming and opened the window, which the appellant closed. *Id.* The appellant told ██████ that he should send her to Africa with her grandfather when he returned next month. *Id.* ██████ then ran out of the apartment. *Id.* The appellant put warm clothes on the baby and then went out to look for ██████ *Id.* During this interaction in the apartment the appellant was holding his ten month old son. *Id.*

CONCLUSIONS OF LAW

1. *Jurisdiction.* This appeal is timely and the Commissioner of Human Services has jurisdiction over this appeal under Minn. Stat. § 256.045, subd. 3.

2. *Burden.* In maltreatment appeals, the judge is required to determine maltreatment has occurred if there is a preponderance of evidence to support the agency's final disposition. *Minn. Stat. § 256.045, subd. 3b.* The preponderance of the evidence standard simply means that it is more likely to be true than not be true that the evidence

supports the agency's final disposition. *Minn. Stat. § 256.0451, subd. 22.* If the evidence is in conflict on an issue which must be resolved, the findings of fact must state the reasoning used in resolving the conflict. *Id.* The judge's recommended order must be based on all relevant evidence. *Minn. Stat. § 256.045, subd. 5.*

3. ***Maltreatment of a Minor.***

a. Under Minn. Stat. § 626.556, agencies are required to investigate allegations of child maltreatment, including physical abuse, and make determinations that maltreatment occurred if supported by the evidence.

b. Minn. Stat. § 626.556, subd. 2(g) describes physical abuse as follows: "Physical abuse" means any physical injury, mental injury, or threatened injury, inflicted by a person responsible for the child's care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child's history of injuries, or any aversive or deprivation procedures, or regulated interventions, that have not been authorized under section 121A.67 or 245.825. Abuse does not include reasonable and moderate physical discipline of a child administered by a parent or legal guardian which does not result in an injury. Actions which are not reasonable and moderate include, but are not limited to, any of the following that are done in anger or without regard to the safety of the child:

- 1) throwing, kicking, burning, biting, or cutting a child;
- 2) striking a child with a closed fist;
- 3) shaking a child under age three;
- 4) striking or other actions which result in any nonaccidental injury to a child under 18 months of age;
- 5) unreasonable interference with a child's breathing;
- 6) threatening a child with a weapon, as defined in section 609.02, subdivision 6;
- 7) striking a child under age one on the face or head;
- 8) purposely giving a child poison, alcohol, or dangerous, harmful, or controlled substances which were not prescribed for the child by a practitioner, in order to control or punish the child; or other substances that substantially affect the child's behavior, motor coordination, or judgment or that results in sickness or internal injury, or subjects the child to medical procedures that would be unnecessary if the child were not exposed to the substances;
- 9) unreasonable physical confinement or restraint not permitted under section 609.379, including but not limited to tying, caging, or chaining; or
- 10) in a school facility or school zone, an act by a person responsible for the child's care that is a violation under section 121A.58.

c.

4. ***Responsible Person.*** A person responsible for the child's care is an individual functioning within the family unit and having responsibilities for the care of

the child such as a parent, guardian, or other person having similar care responsibilities, or (2) an individual functioning outside the family unit and having responsibilities for the care of the child such as a teacher, school administrator, other school employees or agents, or other lawful custodian of a child having either full-time or short-term care responsibilities including, but not limited to, day care, babysitting whether paid or unpaid, counseling, teaching, and coaching. *Minn. Stat. § 626.556, subd. 2(e)*

5. **Conclusion.**

a. The minor (■■■■) is a 9 year old girl living with the appellant, her mother and brother. The appellant is the minor's father and responsible person. On the day of the incident, ■■■■ had been suspended at school for bullying. When she arrived home her father was upset with her because she had gotten in trouble at school. ■■■■ gives conflicting information as to what happened after she arrived home. At one point she is found running outside without any clothes on and the police were called. Police officer observed bruising on ■■■■ right thumb but did not observe any other injuries or markings. When ■■■■ was examined by doctors at the hospital she is found to have a fractured right thumb that has bruising on it. The doctors did not find any other external injuries on Joys' body, including the neck or knee. ■■■■ reported to officers and a witness that her father (appellant) had stepped on her throat and that he flipped a mattress that she was laying on over causing her to fall to the floor. She is inconsistent in reports as whether her father (appellant) was going to whip her or he actually whipped her, if he was going to throw pepper at her, and if he was going to kill her. The appellant did threaten to send ■■■■ to Africa with her grandfather because of her behavior. ■■■■ later gives conflicting information to the Social Worker, she at first denies that her father threw anything at her and tried to step on her throat and that she fell running down the stairs and hit her hand on the railing. The Social Worker then tells ■■■■ that they are going to through her early report line by line, at this point ■■■■ confirms her early report of her father (appellant) throwing a belt and him trying to choke her. .

b. ■■■■ did sustain an injury to her thumb, although it is unclear how this injury occurred. ■■■■ has given different versions of the events on November 30, 2013 and is inconsistent. The appellant has denied causing the injury to ■■■■ There were no other injuries that were visible on ■■■■ and doctors noted that they did not see any external injuries and that she had no pain or tenderness to her neck. Although, there is an injury to the minor the county agency has not met the burden of showing that the appellant caused this injury. Therefore, I conclude that the appellant did not maltreat of minor by physical abuse.

6. **Disqualification.**

a. Minn. Stat. § 245C.14, subd. 1(a)(3) requires the Department of Human Services to disqualify a person from direct contact with people served by certain programs if after a background study if an individual has been found to have committed substantiated serious or recurring maltreatment of a minor under section 626.556.

b. Minn. Stat. § 245C.14, subd. 1(a)(2) also requires the Department of Human Services to disqualify a person from direct contact with people served by certain

programs if after a background study 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, regardless of whether the preponderance of the evidence is for a felony, gross misdemeanor, or misdemeanor level crime. An individual is disqualified under section 245C.14 if: (1) less than 15 years have passed since the discharge of the sentence imposed, if any, for the offense; and (2) the individual has committed a felony-level violation of any of the following offenses: sections 256.98 (wrongfully obtaining assistance); 268.182 (false representation; concealment of facts); 393.07, subdivision 10, paragraph (c) (federal Food Stamp Program fraud); 609.165 (felon ineligible to possess firearm); 609.21 (criminal vehicular homicide and injury); 609.215 (suicide); **609.223 or 609.2231 (assault in the third or fourth degree)**; repeat offenses under 609.224 (assault in the fifth degree); 609.229 (crimes committed for benefit of a gang); 609.2325 (criminal abuse of a vulnerable adult); 609.2335 (financial exploitation of a vulnerable adult); 609.235 (use of drugs to injure or facilitate crime); 609.24 (simple robbery); 609.255 (false imprisonment); 609.2664 (manslaughter of an unborn child in the first degree); 609.2665 (manslaughter of an unborn child in the second degree); 609.267 (assault of an unborn child in the first degree); 609.2671 (assault of an unborn child in the second degree); 609.268 (injury or death of an unborn child in the commission of a crime); 609.27 (coercion); 609.275 (attempt to coerce); 609.466 (medical assistance fraud); 609.495 (aiding an offender); 609.498, subdivision 1 or 1b (aggravated first-degree or first-degree tampering with a witness); 609.52 (theft); 609.521 (possession of shoplifting gear); 609.525 (bringing stolen goods into Minnesota); 609.527 (identity theft); 609.53 (receiving stolen property); 609.535 (issuance of dishonored checks); 609.562 (arson in the second degree); 609.563 (arson in the third degree); 609.582 (burglary); 609.59 (possession of burglary tools); 609.611 (insurance fraud); 609.625 (aggravated forgery); 609.63 (forgery); 609.631 (check forgery; offering a forged check); 609.635 (obtaining signature by false pretense); 609.66 (dangerous weapons); 609.67 (machine guns and short-barreled shotguns); 609.687 (adulteration); 609.71 (riot); 609.713 (terroristic threats); 609.82 (fraud in obtaining credit); 609.821 (financial transaction card fraud); 617.23 (indecent exposure), not involving a minor; repeat offenses under 617.241 (obscene materials and performances; distribution and exhibition prohibited; penalty); 624.713 (certain persons not to possess firearms); chapter 152 (drugs; controlled substance); or a felony-level conviction involving alcohol or drug use. *Minn. Stat. § 245C.15, subd. 2(a)*. (emphasis added)

c. ***Assault in the Third Degree.*** Whoever assaults another and inflicts substantial bodily harm be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both. *Minn. Stat. § 609.223 subd. 1*. Substantial bodily harm means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member. *Minn. Stat. § 609.02 subd. 7a*.

7. **Conclusion.**

a. I have determined that the appellant has not committed maltreatment of minor by physical abuse so he cannot be disqualified based on serious or recurring maltreatment.

b. [REDACTED] did sustain an injury to her thumb, although it is unclear how this injury occurred. [REDACTED] has given different versions of the events on November 30, 2013 and is inconsistent in her statements. She has stated that she fell down the stairs and that is how she hurt her thumb. The appellant has denied causing injury to [REDACTED]. There were no other injuries that were visible on [REDACTED]. Doctors noted that they did not see any external injuries and that she had no pain or tenderness to her neck. Although, there is an injury to the minor and it is substantial bodily injury, MDH has not shown by a preponderance of evidence that the appellant caused this injury. Therefore, I conclude that MDH has not proven by a preponderance of the evidence that the appellant committed assault in the third degree.

8. **Set Aside.**

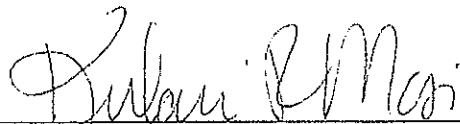
a. Minn. Stat. § 245C.21, subd. 3(a)(3) allows a disqualified person to seek reconsideration of a disqualification, asking that it be set aside for purposes of one's current employment or other circumstances. Setting aside a disqualification means that a person remains disqualified, but is allowed to have direct contact with or access to persons receiving services in licensed and other programs.

b. I have determined that the maltreatment has not occurred and that there is not preponderance of evidence that the appellant committed assault in the third degree. Therefore, there is no basis for a set aside determination and MDH decision to not set aside the appellant's disqualification should be reversed.

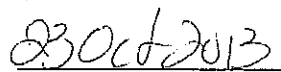
RECOMMENDED ORDER

THE HUMAN SERVICES JUDGE RECOMMENDS THAT the Commissioner of Health REVERSE the agency's determination that the appellant be disqualified from having direct contact with persons in facility licensed by the Department of Health.

THE HUMAN SERVICES JUDGE RECOMMENDS THAT the Commissioner of Health REVERSE the agency's determination that the appellant be disqualification not be set aside.



Kulani/R. Moti
Human Services Judge



Date

cc: [REDACTED] Appellant
Ryan Garry, Attorney
David Stokirch, Asst. Attorney General
Duane Bartz, Asst. Hennepin County Attorney
Diana Kasa, Appeals, Minnesota Department of Health