

STATE OF MINNESOTA

IN SUPREME COURT

A15-1470

Court of Appeals

Lillehaug, J.

Concurring in part, dissenting in part, Anderson, J.

Concurring in part, dissenting in part, Chutich, Anderson, JJ.

In the Matter of the Appeal by Kind Heart Daycare, Inc.
of the Order of License Revocation and the Appeal by
Yasmin Muhina Salim of the Disqualification Determination,

Appellants,

vs.

Filed: November 22, 2017
Office of Appellate Courts

Commissioner of Human Services,

Respondent.

Joseph A. Gangi, Daniel J. Bellig, Farrish Johnson Law Office, Chtd., Mankato, Minnesota,
for appellants.

Lori Swanson, Attorney General, Heather N. Kjos, Assistant Attorney General, Saint Paul,
Minnesota, for respondent.

S Y L L A B U S

1. A person charged with obtaining “the receipt of payments to which the individual is not entitled” under Minn. Stat. § 256.98, subd. 1(3) (2016), is liable only if the person receives payments for public assistance to which the person would not have otherwise been entitled in the absence of a misrepresentation or concealment.

2. The Minnesota Department of Human Services did not violate Minn. Stat. § 14.69 (2016) by revoking a child care provider's license and disqualifying its owner.

3. The court of appeals engaged in proper judicial review of the Department's actions.

Affirmed.

OPINION

LILLEHAUG, Justice.

The Minnesota Department of Human Services (the Department) determined by a preponderance of the evidence that appellant Yasmin Salim wrongfully obtained public assistance for appellant Kind Heart Daycare, Inc. (Kind Heart), in violation of Minn. Stat. § 256.98, subd. 1(3) (2016). Kind Heart had submitted bills to Blue Earth County (the County) under the State of Minnesota's Child Care Assistance Program (CCAP), representing that children from low-income families were present at Kind Heart when in fact they were absent or no longer enrolled with the daycare. The Department disqualified Salim from providing daycare services and revoked Kind Heart's license. The Commissioner of Human Services (the Commissioner) issued an order affirming these decisions, and the Commissioner's order was affirmed in its entirety by the court of appeals. Appellants Salim and Kind Heart assert that: (1) they were actually entitled to the CCAP payments; (2) the Department's actions violated Minn. Stat. § 14.69 (2016); and (3) the court of appeals' review failed to provide adequate judicial oversight of agency action. We affirm.

FACTS

1. *Minnesota's Child Care Assistance Program.*

CCAP helps low-income parents pay for child care. In order for a licensed provider like Kind Heart to receive CCAP payments, it must fill out attendance records using CCAP's MEC²PRO billing system. Each county uses this billing system to administer CCAP and disburse payments directly to the provider. The Department, which is responsible for licensing child care providers, has a CCAP Child Care Provider Guide¹ that sets forth the requirements to receive CCAP payments.

The Guide extensively addresses how to receive CCAP payments for days on which a child is absent. CCAP "will pay for up to 25 absent days per calendar year, per child," but the provider may bill CCAP for those absent days only if the "hours are identified in the provider's attendance records as absent." The Guide includes a sample Billing Form, which shows how to fill out the attendance record and expressly includes a section for identifying absences. The Guide directs, "Fill in an 'A' for any day the child is absent." The Guide also states, "Providers who give false information on a Billing Form could be disqualified from receiving future CCAP payments and could face criminal charges."

2. *Kind Heart's billing history.*

Salim was the sole owner, controlling individual,² and license holder for Kind Heart.

¹ Both parties treat the Guide as binding, and only dispute how to interpret the language of the Guide.

² A "[c]ontrolling individual" includes the "owner, or managerial official whose responsibilities include the direction of the management or policies of a program." Minn. Stat. § 245A.02, subd. 5a (2016).

CCAP payments for services provided by Kind Heart were directly deposited into a Wells Fargo business account in Salim's name. Appellants primarily obtained CCAP payments from the County. In order to obtain such payments, Salim signed a Blue Earth County MEC²PRO Child Care Provider Assurance Form, wherein she acknowledged the importance of (1) ensuring that CCAP funds were appropriately utilized, and (2) preventing the misuse of public funds. In the same form, Salim authorized the County to access Kind Heart's child attendance records to ensure accurate submission of billing forms and appropriate use of CCAP funds. Kind Heart also maintained records acknowledging that Salim was the license holder for Kind Heart and that "wrongfully obtaining child care assistance will be investigated and may be charged as a crime."

From October 2013 until March 14, 2014, Diane Sorenson was responsible for submitting Kind Heart's CCAP bills, which Salim occasionally reviewed. Both Salim and Sorenson were listed as authorized users on the MEC²PRO billing system. The authorization forms included language to "prevent misuse of public funds," including an acknowledgment that the provider is required to "authenticate the accuracy of the billing forms."

Sorenson eventually resigned from Kind Heart. Her last day was March 14, 2014. Sorenson last submitted a bill seeking a CCAP payment on March 3, 2014.

After Sorenson left, Salim set up a new MEC²PRO account for which she was the sole authorized user. The Department alleges that an "egregious amount of discrepancies" began to appear in Kind Heart's CCAP bills. Salim asserts that she asked another employee, Kim Patterson, to take over Sorenson's CCAP billing responsibilities, but

Patterson asserts that she only submitted two weeks' worth of bills and that Salim did the vast majority of the billing after Sorenson left. Salim disputes Patterson's account and alleges that Patterson did the billing.

3. The County's investigation.

In the spring of 2014, the Blue Earth County Sheriff's Office received reports indicating that Kind Heart was committing child care financial fraud. Investigator Ginger Peterson confirmed hundreds of instances in March, April, and May 2014, in which Kind Heart had submitted CCAP bills to the County, representing that children were present at Kind Heart, when in fact they were absent or no longer enrolled in the daycare. In total, the County determined that there was probable cause to believe that Kind Heart had billed for \$12,437.94 to which it was not entitled. On June 17, 2014, the State of Minnesota charged Salim with one felony count of wrongfully obtaining child care payments, in violation of Minn. Stat. § 256.98, subd. 1(3), and two additional felony counts of theft. The criminal case has not been tried.³

4. The Department's actions.

The County informed the Department of its investigation and the charge against Salim. The Department considered whether the evidence supported disqualifying Salim from providing child care services. Specifically, Minn. Stat. § 245C.14, subd. 1(a)(2) (2016), requires the Commissioner to disqualify an individual from direct contact with persons receiving child care services if a preponderance of the evidence indicates that the

³ On October 6, 2017, counsel for appellants advised that the criminal case had been continued for dismissal.

individual has committed an act that meets the definition of a crime listed in Minn. Stat. § 245C.15 (2016). That statute's list includes Minn. Stat. § 256.98 (2016), which states:

A person who commits any of the following acts or omissions with the intent to defeat the purposes of . . . child care assistance programs . . . is guilty of theft . . . : (3) obtains or attempts to obtain, alone or in collusion with others, the receipt of payments to which the individual is not entitled as a provider of subsidized child care, or by furnishing or concurring in a willfully false claim for child care assistance.

Minn. Stat. § 256.98, subd. 1; *see* Minn. Stat. § 245C.15.

On June 18, 2014, the Department sent an e-mail asking for one of its staff attorneys to volunteer to conduct a preponderance-of-the-evidence (POE) review under Minn. Stat. § 245C.14, subd. 1(a)(2). The e-mail's subject line was "Be a part of history in the making..." and asked if there was a staff attorney who had "time to drop everything and review this POE today?" The e-mail asked that this be done "right away."

One of the staff attorneys for the Department volunteered to conduct the POE review. She correctly understood that a POE review "is a record review to determine whether it's more likely than not that the person committed an act" that warrants disqualification under Minn. Stat. § 245C.14, which includes violating Minn. Stat. § 256.98 by wrongfully obtaining child care assistance. But she mistakenly thought that "[p]robable cause is higher than preponderance of evidence." The staff attorney reviewed the County's incident report, a supplemental report, and the criminal complaint. Based on these documents, she determined that a preponderance of the evidence supported the conclusion that Salim had wrongfully obtained child care assistance.

Based on the staff attorney's report, on June 20, 2014, the Department disqualified Salim from "any position allowing direct contact with, or access to, persons receiving services from programs licensed by [the Department]." Because Salim was the controlling individual for Kind Heart, the Department revoked Kind Heart's child care center license on June 23, 2014. The Department also advised county CCAP administrators to make Kind Heart ineligible for future CCAP payments.

On June 30, 2014, Kind Heart appealed the license revocation. Consistent with standard procedure, Kind Heart was allowed to continue operating pending a final order from the Commissioner, and Salim submitted a supervision plan allowing her to continue working at Kind Heart in the interim.

On July 7 and 9, 2014, the Department sent two licensing investigators to Kind Heart to see whether the facility was complying with licensing requirements while the appeal was pending. The Department identified 14 new licensing violations, including failure to properly supervise Salim after her disqualification, failure to submit a background study request for an employee who had direct contact with children, failure to properly supervise children, failure to have required documentation establishing proper employee education and training, failure to maintain required staff-to-child ratios, failure to provide meals containing sufficient nutritional value, and hygiene violations. On July 24, 2014, the Department issued a supplemental order of license revocation to Kind Heart, determining that the violations constituted "additional reasons to revoke the license." That same day, Salim requested reconsideration of the Department's order to disqualify her.

Due to Salim’s reconsideration request, a senior staff attorney for the Department (not the staff attorney who conducted the POE review) reviewed Salim’s disqualification on July 31, 2014, to determine whether the disqualification should be set aside. The review was governed by Minn. Stat. § 245C.22, subd. 4 (2016), which allowed the Department to set aside Salim’s disqualification upon a showing that she did not “pose a risk of harm to any person served by” Kind Heart. The statute required the senior staff attorney to consider nine factors in determining whether Salim posed a risk of harm. Minn. Stat. § 245C.22, subd. 4(b)(1)–(9). The senior staff attorney expressly analyzed each factor and determined that Salim failed to show that she did not pose a risk of harm. Accordingly, Salim’s request to set aside her disqualification was denied.

5. The Administrative Law Judge’s decision.

The Department consolidated Salim’s disqualification, Kind Heart’s license revocation, the senior staff attorney’s decision not to set aside Salim’s disqualification, and the supplemental revocation order for the 14 licensing violations, for consideration by an administrative law judge (ALJ). The ALJ held an evidentiary hearing over 4 days.

The ALJ subsequently issued findings of fact, conclusions of law, and recommendations. The ALJ found that Kind Heart’s post-Sorenson CCAP billings from March to May 2014 were submitted by Patterson and Salim, and that the “pattern of errors in the bills they submitted demonstrated incompetence in billing and dishonesty.”⁴ The

⁴ The ALJ found, “Some of the errors in the billing occurred in favor of the government (children were present and not billed for), but most occurred in favor of Kind Heart (children were not present but billed for).”

ALJ determined that Patterson's billing "demonstrate[d] a lack of competency" but there was "no evidence she intentionally submitted false billings." The ALJ determined that Salim, however, "more likely than not, had knowledge of both Patterson's erroneous billing as well as her own," that "she knew of Patterson's errors and failed to correct them," and that "it is more likely than not that Salim knew exactly what was going on with the bills, whether she submitted them herself or not." The ALJ ultimately found that Salim "billed public child care assistance for \$9,434 that [she] was not entitled to."

The ALJ also found that, although the staff attorney "mistakenly believed that the preponderance of evidence review . . . was a lower standard of review than the probable cause required for an arrest warrant . . . the evidence demonstrates that it is more likely than not that [Salim] wrongfully obtained public child care assistance for Kind Heart." Accordingly, the ALJ concluded that Salim "wrongfully obtained child care assistance in violation of Minn. Stat. § 256.98 and, therefore, was properly disqualified pursuant to Minn. Stat. § 245C.14."

But the ALJ disagreed with the senior staff attorney's determination that Salim posed a risk of harm to people served by Kind Heart. The ALJ found that "the purpose of [Salim's] activity was to aid families in obtaining and keeping access to child care." Accordingly, the ALJ recommended that the Department's decision to disqualify Salim was proper, but that the disqualification be set aside.

Further, the ALJ concluded that the 14 licensing violations in the supplemental revocation order did not "reflect the need for license revocation." Thus, the ALJ concluded and recommended that the order revoking Kind Heart's license be rescinded.

6. *The Commissioner's order.*

On August 6, 2015, the Commissioner issued a final order, through a designee, accepting in part and rejecting in part the ALJ's recommendations.

First, the Commissioner accepted the ALJ's recommendation to disqualify Salim. Specifically, the Commissioner adopted the ALJ's finding regarding the staff attorney's mistaken understanding of the relative burdens of proof, and the ALJ's conclusion that a preponderance of the evidence supported a determination that Salim wrongfully obtained public child care assistance. Regarding Salim's intent and knowledge of the wrongful billing, the Commissioner agreed with the ALJ's finding that Salim either submitted the erroneous bills herself or knew of them and did not stop them. Accordingly, the Commissioner concluded that the Department properly disqualified Salim. The Commissioner amended the dollar amount fraudulently obtained to \$9,766 from the \$9,434 found by the ALJ.

Second, the Commissioner disagreed with the ALJ's conclusion that Salim did not pose a risk of harm and rejected the ALJ's recommendation that her disqualification should be set aside. The Commissioner struck the ALJ's finding that "the purpose of [Salim's] activity was to aid families in obtaining and keeping access to child care," instead finding that Salim posed a risk of harm due to "the harm suffered by the government and other families needing child care." In a supporting memorandum, the Commissioner explained:

I rejected the ALJ's recommendation that [Salim's] disqualification should be set aside. The ALJ found that [Salim] established that she does not pose a risk of harm to children enrolled in Kind Heart and that the Department had not demonstrated otherwise. I rejected both the findings and the ALJ's conclusion. As the Department pointed out, [Salim's] fraudulent billing is

an indication that she may provide erroneous information in other situations. [Salim's] failure to be truthful in other situations and comply with other program requirements could harm the children Kind Heart serves.

[Salim] was required to demonstrate that she does not pose a risk of harm to "any person served by the . . . license holder . . . or other entities." Minn. Stat. § 245C.22, subd. 4(a) (2014). [Salim] did not make the required showing. The ALJ focused only on the children enrolled in Kind Heart. I take a much broader view. CCAP, Blue Earth County and [the Department] are entities that were harmed [by Salim's] fraudulent billings. State tax payers were also harmed by [Salim] when she received funds she was not entitled to receive. Moreover, the families waiting to be served by CCAP were also harmed. Money that could have been used to pay for their children's daycare services was unavailable because it was used to pay Kind Heart's erroneous bills.

Third, the Commissioner concluded that the Department properly revoked Kind Heart's license. But the Commissioner agreed with the ALJ that the licensing violations in the supplemental revocation order "by themselves did not warrant a license revocation sanction." The Commissioner rescinded the supplemental order.

Salim and Kind Heart appealed by filing a writ of certiorari with the court of appeals.

7. The court of appeals decision.

On July 25, 2016, the court of appeals affirmed the Commissioner's order in its entirety. *In re Kind Heart Daycare*, No. A15-1470, 2016 WL 3961815 (Minn. App. Jul. 25, 2016). The court concluded that Salim was not entitled to any of the \$9,766, and that the Department had not violated Minn. Stat. § 14.69 (2016) in reviewing either the disqualification or the license revocation. *Id.* at *2–3, *6. We granted review.

ANALYSIS

This is a proceeding governed by the Minnesota Administrative Procedures Act (APA). *See generally* Minn. Stat. ch. 14 (2016). Agency decisions enjoy a "presumption

of correctness” and warrant deference by courts. *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977). But, under the Minnesota APA, a court “may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions” are made upon unlawful procedure, arbitrary or capricious, unsupported by substantial evidence, or affected by an error of law. Minn. Stat. § 14.69. Questions of law are reviewed de novo. *St. Otto’s Home v. Minn. Dep’t of Human Servs.*, 437 N.W.2d 35, 39–40 (Minn. 1989).

I.

We first address the issue of whether the Commissioner correctly determined that appellants were not entitled to \$9,766 of CCAP payments. Appellants argue that Salim was legally entitled to receive CCAP payments for up to 25 absent days per child, whether or not those days were identified as such by entering an “A” on the computerized billing form. In other words, appellants argue, had the form been completely accurate, Kind Heart would have received the same payments that it did in fact receive. Therefore, as to those days, appellants argue that Salim did not violate the statute.

In support, appellants cite *State v. Ibarra*, 355 N.W.2d 125, 127–32 (Minn. 1984), for the proposition that “the amount of assistance a person is ‘entitled to’ refers to the amount of assistance the person was eligible for absent the misrepresentation.” Appellants point out that enrolled children were actually absent in many of the erroneous CCAP billings, and that Salim was eligible to bill for these absent children. Thus, appellants argue, they are still entitled to those CCAP payments.

We agree with appellants. The plain language of Minn. Stat. § 256.98 (2016)

supports their argument. First, Minn. Stat. § 256.98, subd. 3(1), defines the “amount of assistance incorrectly paid” to be “the difference between the amount of assistance actually received on the basis of misrepresented or concealed facts and the amount to which the recipient would have been entitled had the specific concealment or misrepresentation not occurred.” Minn. Stat. § 256.98, subd. 3(1). This definition contemplates that “assistance incorrectly paid” only includes the amount of assistance to which the person was not actually entitled. Second, subdivision 4 of the statute provides that “[t]he amount of assistance determined to have been incorrectly paid is recoverable from . . . the recipient,” and that “[t]he obligations established under this subdivision . . . shall extend to . . . cases involving wrongfully obtained assistance.” *Id.*, subd. 4. Third, subdivision 1(3) of the statute, defining, in relevant part, the crime of “wrongfully obtaining assistance,” makes it a crime to “obtain[] or attempt[] to obtain . . . the receipt of payments to which the individual is not entitled . . .” *Id.*, subd. 1(3).

Read together, the statute’s provisions plainly contemplate that a person is liable for wrongfully obtaining public assistance payments only to the extent that payments are received to which the person is not entitled and which would not have been received absent the concealment or misrepresentation. Of the \$9,766 at issue in this case, appellants billed over \$7,000 for enrolled children who were absent and for whom Kind Heart had not yet billed 25 absent days. Accordingly, appellants were entitled to these funds.

Even so, the precise amount of public assistance fraudulently obtained is immaterial to a violation of Minn. Stat. § 256.98, subd. 1(3), as long as *some* amount has been fraudulently obtained. If any amounts were so obtained, that is sufficient for

disqualification.

II.

Appellants next argue that the Department took a number of unlawful actions leading up to and including the Commissioner's final order, all in violation of Minn. Stat. § 14.69.

A.

We first address various actions by the Department preceding the Commissioner's final order.

1. *The staff attorney's misunderstanding of the relationship between preponderance of the evidence and probable cause.*

Appellants first argue that the Department's decision was based on the wrong legal standard: probable cause instead of a preponderance of the evidence.

It is unclear whether the staff attorney correctly applied a preponderance-of-the-evidence standard in her initial determination. She understood that her review to determine whether a preponderance of the evidence supported Salim's disqualification required a determination of "whether it's more likely than not" that Salim violated Minn. Stat. § 256.98. But her mistaken belief that probable cause was a higher standard than a preponderance of the evidence may have led her to the incorrect conclusion that Salim's criminal complaint constituted *prima facie* evidence that there was a preponderance of evidence for disqualification.

But we need not decide this issue, as any error was corrected when both the ALJ and the Commissioner applied the correct legal standard. Both the ALJ and the

Commissioner expressly acknowledged the staff attorney's misunderstanding of the relative burdens and emphasized that their own determinations were based on a preponderance of the evidence, not simply on probable cause.

We have affirmed final agency orders where an error in the underlying proceedings has been acknowledged and the actual circumstances still support the initial determination. For example, in *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. & Gas Utils.*, we affirmed the Minnesota Public Utilities Commission's denial of a request for a variance by a utility that sought to recoup unrecovered natural gas costs, despite an error in the initial determination that was corrected in the final order. 768 N.W.2d 112, 122 (Minn. 2009).

Here, we decline to reverse Salim's disqualification on the basis of the staff attorney's misunderstanding. Any error in the initial determination was corrected by the ALJ and the Commissioner.

2. *Department POE reviews based on arrest reports.*

Appellants next argue that the Department improperly disqualified Salim based solely on a criminal complaint and supporting documents.

In this case, the County provided the Department with an incident report, a supplemental report, and a criminal complaint, which totaled 22 pages and were the products of months of investigation. The supplemental report is particularly thorough, including day-by-day comparisons of attendance records against MEC²PRO bills, analysis of administrative and banking records, and information from multiple interviews. The staff attorney reviewed the reports and complaint when conducting her POE review.

We disagree with appellants' assertion that the review was insufficient simply because the facts were contained in these documents. The depth of the investigation in this case revealed facts sufficient not only for an arrest based on probable cause, but also for the Department to disqualify Salim based on a preponderance of the evidence.

3. *The Department's alleged predetermination to disqualify Salim and revoke Kind Heart's license.*

Appellants also point to several Department actions to argue that the agency predetermined that it would disqualify Salim and revoke Kind Heart's license.

First, appellants argue that the Department's internal e-mail asked a staff attorney to disqualify Salim "right away" and that being "a part of history" implied that her disqualification was inevitable. But the e-mail asked someone to conduct a POE review "right away," not to disqualify Salim. Further, the e-mail attached a Mankato Free Press article stating "this is the first criminal prosecution of a child care center for fraudulently billing for child care assistance." The e-mail's subject line, "Be a part of history," although inartful, referred to the prosecution, not a predetermination to disqualify.

Next, appellants argue that the Department's supplemental revocation order evinces a predetermined mindset that requires reversal of Kind Heart's license revocation. We disagree, because the ALJ recommended that the supplemental revocation order be rescinded, and the Commissioner agreed, negating any effect of the supplemental order. Moreover, Kind Heart's license revocation was based on Salim's disqualification, not on the supplemental order.⁵

⁵ Appellants also argue that the Department's licensing investigator "entrapped"

Appellants also argue that the Department’s work with county CCAP administrators—advising them on the necessary work to do to ensure that Kind Heart did not receive future CCAP payments—requires reversal. But these actions to aid the County were legal. Restricting a violator’s access to future CCAP payments is contemplated by the relevant statutes. Minnesota Statutes § 119B.13, subdivision 6(d) (2016), allows a county to “revoke an existing child care authorization . . . , stop payment . . . , or refuse to pay a bill submitted by a licensed . . . provider if: . . . (5) the provider submits false attendance reports” In order for the county to do so, however, it must include a policy in its child care plan stating that it may take such action. *Id.*, subd. 6(f). In this case, the Department worked with county administrators to explain the requirements of subdivision 6(f). Assisting in this manner was hardly improper.

Salim during the visit to Kind Heart on July 9, 2014. Specifically, Salim was under the order prohibiting “direct contact” with children at the daycare when she began to lead the investigators into a classroom with children. The investigators asked if this was in conflict with the no-contact order, at which point Salim turned around and returned to an office. The investigators talked with other facility staff and determined that Salim had been in direct contact with children on several occasions.

To be clear, “the fact that government agents ‘merely afford opportunities or facilities for the commission of the offense does not’ constitute entrapment.” *Sherman v. United States*, 356 U.S. 369, 372 (1958) (quoting *Sorrells v. United States*, 287 U.S. 435, 441 (1932)). A government agent’s acts may constitute entrapment “when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense.” *Sorrells*, 287 U.S. at 442. A classic example of this is *Jacobson v. United States*, 503 U.S. 540, 550 (1992), in which the petitioner was “the target of 26 months of repeated mailing and communications from government agents and fictitious organizations” that sought to cultivate an interest for child pornography that he had previously lacked.

Plainly, the acts by the Department’s investigators fall well short of entrapment.

Finally, appellants argue that, because the staff attorney refused to acknowledge at the evidentiary hearing that Salim did not personally profit from the erroneous billing, she had a predetermined outcome in mind. Appellants' argument, however, ignores the fact that Kind Heart benefitted from the erroneous billing and that Kind Heart was Salim's wholly-owned business. Even if Salim did not directly use the business bank account for personal purchases, she still had a financial incentive to increase Kind Heart's income. The staff attorney rightly recognized this, as did the senior staff attorney, the ALJ, the Commissioner, and the court of appeals.

In sum, none of the alleged pre-final-order errors require reversal.

B.

Appellants additionally allege various errors in the Commissioner's final order that they assert require reversal.

1. *Salim's intent.*

Appellants first argue that the Commissioner's order is based on an error of law: Salim cannot be held liable for Patterson's incompetence because Patterson lacked intent.⁶ Specifically, appellants argue that Patterson's incompetent filings cannot satisfy Minn. Stat. § 256.98, subd. 1(3)'s language regarding acting "in collusion with others" and "concurring in a willfully false claim."

⁶ Appellants also argue that the Commissioner was inconsistent in determining that the erroneous bills constituted fraudulent intent for Salim but not for Patterson. But it was Salim, not Patterson, who knew how the bills were supposed to be submitted, and yet Salim did not correct Patterson's erroneous billing (if it was in fact Patterson who submitted the bills). Moreover, it was Salim's business that benefitted from the overstated bills. Those facts do not require a finding of criminal intent by Patterson, only Salim.

Yet there are several avenues to liability under subdivision 1(3). In this case, the relevant language is “the receipt of payments to which the individual is not entitled.” Minn. Stat. § 256.98, subd. 1(3). This language is an independent basis for liability that Salim’s actions satisfied.

Intent is an element of the statute under the introduction to subdivision 1, which requires “intent to defeat the purposes of . . . child care assistance programs.” Minn. Stat. § 256.98, subd. 1. Appellants argue that this element is not supported by substantial evidence because the ALJ found that Salim acted “to aid families in obtaining and keeping access to child care.” But this finding was in regard to whether Salim posed a risk of harm for purposes of her set-aside request under Minn. Stat. § 245C.22, subd. 4. That was a separate determination from Salim’s actual disqualification under Minn. Stat. § 256.98, subd. 1, which the ALJ found was supported by a preponderance of the evidence.

As to intent under the latter statute—“to defeat the purposes of . . . child care assistance programs”—the Commissioner adopted the ALJ’s findings that Salim either submitted the erroneous bills herself or knew of them and did nothing to correct them, and that billing for services that were not provided defeats the purpose of CCAP. Regardless of whether Salim was acting for the benefit of her clients under the risk-of-harm analysis, Salim still knew that she was receiving CCAP payments for services she did not provide, and that the program depended upon accurate billing by child care providers. There is substantial evidence to support a preponderance-of-the-evidence determination that Salim knew she was defeating the purpose of CCAP. Accordingly, the Commissioner did not

make an error of law in concluding that it was more likely than not that Salim had the requisite intent.

2. *Striking a finding by the ALJ without explanation.*

Appellants next argue that the Commissioner acted in an arbitrary and capricious manner by striking a finding by the ALJ—allegedly without explanation—that Salim acted for the purpose of helping families obtain child care assistance.

This is simply incorrect. The Commissioner expressly addressed the stricken language in the supporting memorandum, and adequately explained how the Commissioner was taking a broader view of the risk of harm that Salim posed.

3. *The Commissioner's alleged rejection of testimony that Patterson billed, which was allegedly credited by the ALJ.*

Appellants also argue that the Commissioner rejected testimony by Salim that Patterson, not Salim, conducted the billing, and that the ALJ had actually credited Salim's testimony on this point.

Again, this is simply incorrect. The ALJ found that the erroneous bills were either submitted by Salim herself, or by Patterson with knowledge by Salim of the errors and without an intention to correct them. Thus, the ALJ did not unequivocally adopt Salim's testimony in this regard. The ALJ also noted in a supporting memorandum that Salim more likely than not knew of the erroneous billing, regardless of who actually submitted the bills. The Commissioner expressly stated that she was deferring to the ALJ on this point and, in any event, agreed with the ALJ.

III.

Finally, we consider the issue of whether the court of appeals provided meaningful judicial review of the Department's actions under Minn. Stat. § 14.69. Appellants argue it did not, requiring that we reverse the disqualification decision. But, as discussed above, any errors were corrected, independently re-evaluated, or harmless. Accordingly, appellants have not demonstrated that reversal of the court of appeals is warranted.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

CONCURRENCE & DISSENT

ANDERSON, Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Chutich, but write separately to note that given the increasing use of administrative power—particularly in licensure matters—in the appropriate case we may need to reconsider the very high level of judicial deference extended to the executive branch. *See Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824-25 (Minn. 1977); *see also* Minn. Stat. § 14.69(f) (2016). The detailed and admirable work of the administrative law judge in this case is entirely advisory, and the Commissioner has what amounts to almost unfettered discretion—discretion to which we defer—to reject the administrative law judge’s recommendation. *See In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001). The clearly troubling question presented by these circumstances is whether an individual license holder can receive meaningful judicial review of an administrative action. *See State v. Duluth, M. & I. R. Ry. Co.*, 75 N.W.2d 398, 404 (Minn. 1956). For the purpose of today’s dispute, however, I conclude that it is unnecessary to address these concerns and that a remand, as Justice Chutich proposes, would be sufficient. I therefore join in the concurrence and dissent of Justice Chutich.

CONCURRENCE & DISSENT

CHUTICH, Justice (concurring in part, dissenting in part).

The Department of Human Services disqualified appellant Yasmin Salim from having direct contact with the children served by appellant Kind Heart Daycare, Inc. *See* Minn. Stat. § 245C.14, subd. 1(a)(2) (2016). The disqualification was based on a determination that Salim wrongfully obtained payments from the Child Care Assistance Program for Kind Heart, in violation of Minn. Stat. § 256.98, subd. 1(3) (2016). The Department then revoked Kind Heart’s license to provide child care under Minn. Stat. § 245A.07, subd. 3(a)(2) (2016), which allows the Department to revoke a child care license when a controlling individual—in this case, Salim—has a disqualification that has not been set aside under Minn. Stat. § 245C.22, subd. 4 (2016). Later, the Department rejected Salim’s request to have her disqualification set aside. Finally, the Department also issued a supplemental order of license revocation based on unrelated violations that it discovered after Salim and Kind Heart sought review of these decisions.

Appellants sought review by an administrative law judge, who held an evidentiary hearing on the consolidated matter. The judge found that Salim had wrongfully obtained payments but further found that Salim had demonstrated that she “poses no risk of harm to the children or families Kind Heart Daycare serves.” *See* Minn. Stat. § 245C.22, subd. 4.

Accordingly, the judge recommended that Salim’s disqualification, although appropriate, be “set aside” to allow Salim to continue to have direct contact with children in the daycare. Because Kind Heart’s loss of license was based in part upon Salim’s disqualification, which the judge recommended setting aside, the judge further

recommended that the Commissioner rescind Kind Heart's license revocation. In particular, the judge determined that "revocation is too severe a penalty to impose," in part because Kind Heart "provided a valuable service to a particular segment of the community," Somali immigrants and refugees, and "children there were safe and at no risk of harm from the Appellant."

The administrative law judge also concluded that the additional violations reported in the supplemental revocation order "were all relatively minor" and did not merit license revocation. Finally, the judge recommended that Kind Heart could continue to operate, albeit under a conditional license that set forth a specific timeframe for Kind Heart to comply with a correction order.

The Commissioner of Human Services, acting through a representative, rejected the administrative law judge's recommendation on whether Salim posed a risk of harm to the children or their families. Her order therefore refused to set aside Salim's disqualification and upheld the revocation of Kind Heart's license. The Commissioner agreed that the supplemental violations did not merit revocation.

Under the Minnesota Administrative Procedure Act, we may reverse or modify the Commissioner's decision if, among other things, the agency proceedings were made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence, or arbitrary and capricious. Minn. Stat. § 14.69 (2016). I am concerned about the propriety of the procedures followed, and other actions taken by the Department, that led to its initial determinations of disqualification. But like the court, I am unable to conclude that the Commissioner's final order was either made upon unlawful procedure or was arbitrary or

capricious. In my view, however, the Commissioner's order was affected by an error of law that requires reversal of her order and a remand for further proceedings. As the court holds, most of the Child Care Assistance Program payments that the Commissioner determined that appellants fraudulently obtained were payments that they were legally entitled to receive. The Commissioner's analysis of the risk of harm that Salim presented, when determining whether Salim's disqualification should be set aside, relied heavily on the Commissioner's erroneous determination to the contrary. Accordingly, I concur in part and dissent in part.

I.

The Department's involvement began when Blue Earth County informed it that Salim had been arrested and charged with violating section 256.98, subdivision 1(3), and with theft. The day after Salim's arrest, the Department sent an e-mail asking for a staff attorney volunteer to conduct a preponderance-of-evidence review—that is, to determine whether it was more likely than not that Salim had committed a crime that merited disqualification. *See* Minn. Stat. § 245C.14, subd. 1(a)(2). The e-mail's subject line was “Be a part of history in the making . . .” and it sought a volunteer who had “time to drop everything and review this [matter] today”—indeed, “right away.”

A Department staff attorney volunteered and made the determination based solely on documentation—namely, the County's incident report, a supplemental report, and the criminal complaint. The staff attorney mistakenly believed that the preponderance-of-evidence review she conducted on behalf of the Department was a lower standard of review than the probable cause required for an arrest warrant. But as the court points out, she

correctly understood that a preponderance-of-evidence review requires a determination whether it is more likely than not that the person committed a disqualifying act. The administrative law judge determined after an evidentiary hearing that, despite the attorney's misunderstanding, the evidence demonstrated that it was more likely than not that Salim wrongfully obtained public child care assistance for Kind Heart.

This sequence of events is troubling for at least two reasons. First, the initial e-mail sent by the Department, seeking volunteers to be “part of history in the making,” certainly could give the appearance that the Department put a hand on the scale in favor of finding a preponderance of evidence to disqualify Salim. Unlike the court, I am not so certain that the reference to being “a part of history” referred to the historic nature of the prosecution rather than a predetermination to disqualify Salim. Even assuming, as the court does, that the Department's invocation of “history in the making” was intended to refer to the allegedly historic first criminal prosecution of a child care center for fraudulently billing for child care assistance—an argument that the Department notably does *not* make in its brief to our court—that assumption does not alleviate an unseemly appearance of bias by the Department. The Department's invitation to be *a part of* that history is more readily interpreted as an invitation to sign-off on the review and find disqualification. After all, the staff attorney would not be “part of history in the making” if she came back with a review that found no disqualifying event.

Second, the court asserts that it is “unclear” whether staff counsel applied the incorrect standard when undertaking the initial review. My reading of the record suggests otherwise; staff counsel testified—twice—that the preponderance-of-evidence standard

she used is a lower standard than probable cause. The administrative law judge confirmed that staff counsel mistakenly believed that the preponderance-of-evidence review she conducted was a lower standard than probable cause, and the Commissioner agreed. The staff attorney was charged with conducting a review, with “history in the making” on the line, in a hurry, and based solely on documentation that *included an arrest warrant*—a document that may issue only upon a finding of probable cause. *See* U.S. Const. amend. IV. Under these circumstances, it is difficult to imagine that the staff attorney’s determination—that a preponderance of the evidence demonstrated that Salim committed a disqualifying act—was uncolored by the issuance of an arrest warrant based on probable cause to find that she had done that very thing.

To be sure, the administrative law judge eventually found it more likely than not that Salim violated section 256.98, subdivision 1(3), rendering these errors “harmless” on appellate review. But it is deeply troubling to contemplate that the Department may have launched the machinery of the State against Salim based on an initial review that was little more than a rubber stamp of the criminal complaint against her, made in a spirit of excitement about being part of a “historically” important proceeding. The result of the initial incorrect review was that Salim was disqualified and Kind Heart’s license was revoked, requiring them both to seek review from the administrative law judge in an attempt to preserve their rights, based on a problematic proceeding.

Despite my misgivings about this inappropriate e-mail and questionable review by the Department, I am unable to conclude that the Commissioner’s final order was either made upon unlawful procedure or was arbitrary or capricious. We are charged with

reviewing the Commissioner's order, which addressed these issues by adopting the administrative law judge's *independent* finding that it was more likely than not that Salim violated section 256.98, subdivision 1(3). An agency may act arbitrarily or capriciously if "its determination represents its will and not its judgment." *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). Although I do not believe that standard was met in this case, the Department's pre-hearing conduct drew the agency's impartiality into question in a way that undermines confidence in its ultimate decision. I join the portions of the court's opinion rejecting appellants' challenges to the Department's pre-hearing conduct only because administrative review by the administrative law judge and the Commissioner provided an adequate opportunity for appellants to fairly present their case.

II.

Under the Minnesota Administrative Procedure Act, this court "may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are . . . affected by . . . error of law." Minn. Stat § 14.69. In this case, the Commissioner's reasoning regarding the risk of harm presented by Salim, and consequently her decision that Salim's disqualification should not be set aside, were substantially affected by an erroneous interpretation of the law: the theory that Salim's failure to mark an "A" on a computer drop-down box, for payments to which she would be entitled if she had correctly completed the computerized form, was fraudulent. Accordingly, I would order the matter remanded to the Commissioner to apply the law correctly.

As the court explained, much of the dispute in this case turns on Kind Heart’s entries in the Child Care Assistance Program’s billing system, which counties use to administer the program and to disburse payments to help low-income parents pay for child care. Under applicable law and regulations, a provider such as Kind Heart is entitled to payment for a limited number of days—generally 25—on which a child enrolled in the program is absent. *See* Minn. Stat. § 119B.13, subd. 7(a) (2016) (“Licensed child care providers . . . must not be reimbursed for more than 25 full-day absent days per child, excluding holidays, in a fiscal year, or for more than ten consecutive full-day absent days.”); Minn. R. 3400.0110, subp. 9 (2015). But neither the statute nor the regulations address how absent days are to be identified in bills that care providers submit—or, indeed, even contain a requirement that absent days be identified. That task falls to the Department’s Child Care Provider Guide, which states at the bottom of page 29, “Fill in an ‘A’ for any day the child is absent for all scheduled hours that day.”¹

The Commissioner found by a preponderance of the evidence that Salim failed to “fill in an ‘A’ ” as required by the Guide on many occasions, leading to payment of \$9,766 in Child Care Assistance Program funds to which Kind Heart was not entitled.

But as the court observed, the statute does not support the Commissioner’s conclusion as it applies to billings for enrolled children who were absent and for whom Kind Heart had not yet billed 25 absent days. As to those billings, Salim’s failure to enter

¹ As the court notes, the parties treat the Guide as binding. Accordingly, neither party addresses why this single-sentence guidance in a Department publication should have the force of law.

an “A” in the billing system gained Salim and Kind Heart nothing: if the “A” had been entered, Kind Heart would have received the same payments under the program that it did in fact receive. By the court’s count, absent days that were *eligible* for payment amount to over \$7,000 of the \$9,766 in billings at issue in this case.²

The Commissioner’s memorandum leaves no doubt that the Commissioner relied heavily on her mistaken interpretation of the law when she analyzed the risk-of-harm factors to determine whether Salim’s disqualification should be set aside. The Commissioner stated:

I reject Appellant’s argument that she would have been entitled to the majority of the erroneous payments had the bills correctly identified the absent days. I agree with the [administrative law judge] that the argument is unavailing. Appellant was required to bill the days as absent days[;] because she failed to do so she was not entitled to payment.

...

Any one factor set out in Minnesota Statutes section 245C.22, subdivision 4 (2014) can be decisive of whether to set aside a disqualification. Minn. Stat. § 245C.22, subd. 3 (2014). Appellant’s fraudulent billing alone is sufficient to reject her set aside request. The fraudulent billing together with the fact that they were recent and numerous and Appellant’s refusal to take responsibility for them justify the set aside denial.

Likewise, the Commissioner modified the administrative law judge’s finding of fact regarding risk of harm to emphasize “the recency, nature, *severity and frequency* of the erroneous billings.” (Emphasis added.) Thus, the Commissioner’s findings reflect that she

² I agree with the court’s conclusion that the amount of public assistance fraudulently obtained is not material to the question of whether Salim violated section 256.98, subdivision 1(3). The amount of public assistance fraudulently obtained *is* relevant, however, to the risk-of-harm determination.

made her risk-of-harm determination based on three factors: (1) that Salim made fraudulent billings; (2) the fraudulent billings were recent and “numerous,” “sever[e],” or “frequen[t]”; and (3) Salim’s “refusal to take responsibility for” the billings. Both the second and third of these factors are affected by the court’s ruling today that Salim was in fact entitled to payment for absent days under 25 per child.

As to the second factor, the incorrect billings that were *actually fraudulent* were much less numerous, severe, and frequent than the Commissioner, based on her mistaken interpretation of the law, believed. Thus, the administrative law judge’s conclusion that because “much of the funds may have been accessible to the Appellant had she ensured proper procedures were followed (e.g., reporting that children were absent . . .), there is little consequence to the County or Department” was correct. And as to the third factor, Salim’s “refusal to take responsibility for” the incorrect billings was in fact *vindicated*, at least as to absent days under 25 per child. Accordingly, the Commissioner may well have reached a different decision if she had applied the correct law, especially in light of the recognition by the administrative law judge that Salim’s billing difficulties were a result of “her over-eager desire to provide safe and necessary services to the children of Somali immigrants and refugees.”

The court does not reach this issue, but I conclude that appellants adequately pressed the issue and we must therefore confront it. In response to appellant’s petition, we granted review of four issues, including: “When CCAP rules allow payment for 25 absent days per year, does a provider commit fraud under § 256.98 by not identifying an absent day?” That issue is just as relevant to the risk-of-harm/set-aside decision as it is to the disqualification

decision—indeed, it is *more* relevant, because (1) it was never really disputed that *some* of the payments Kind Heart received were not for absent days under 25, (2) as the court points out, the amount of public assistance fraudulently obtained is not material to the question of whether Salim violated section 256.98, subdivision 1(3), but (3) it is relevant to the risk-of-harm question.

In their briefs before us, appellants argued that the “Agency Decision,” rather than specifically the disqualification decision *or* the set-aside decision, was based on a misinterpretation of section 256.98. Given the consolidated agency actions at issue in this appeal, I interpret appellants’ request to seek review of every action to which their arguments were relevant. To be sure, most of appellants’ arguments were framed in terms of reversing the disqualification rather than the set-aside decision. But appellants also made reference to the administrative law judge’s determination that the harm to the government was minimal because most of the funds at issue would have been properly paid if Salim had followed the correct procedure by entering an “A” in the billing system—a fact most relevant to the set-aside decision.

In the circumstances of this case, and given our authority to “reverse, affirm or modify the judgment or order appealed from or take any other action as the interest of justice may require,” Minn. R. Civ. App. P. 103.04, I would hold that appellants adequately raised the issue to preserve it for our review. Accordingly, I would remand the matter to the Commissioner to reconsider its decision regarding Salim’s request for a set-aside (and the related revocation of Kind Heart’s license) using the correct interpretation of section 256.98.

CONCLUSION

For these reasons, I respectfully concur in part and dissent in part.

ANDERSON, Justice (concurring in part, dissenting in part).

I join in the concurrence and dissent of Justice Chutich.