

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0787**

Cosmos E. Eneh,
Relator,

vs.

Minnesota Department of Health,
Respondent.

**Filed January 16, 2018
Affirmed
Stauber, Judge***

Minnesota Department of Health

Bobby Onyemeh Sea, Sea Law Office, PLC, St. Paul, Minnesota (for relator)

Lori Swanson, Attorney General, Lindsay K. Strauss, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

S Y L L A B U S

The Minnesota Department of Health is not required to remove a finding of physical abuse from the nursing-assistant registry after the nursing assistant's disqualification period under the Minnesota Department of Human Services Background Studies Act (Background Studies Act), Minn. Stat. §§ 245C.01-.34 (2016 & Supp. 2017), has ended.

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

O P I N I O N

STAUBER, Judge

In this certiorari appeal, relator Cosmos E. Eneh challenges a decision by respondent Minnesota Department of Health denying his request to remove a finding of maltreatment from the state's nursing-assistant registry. He argues that respondent acted arbitrarily and capriciously and misapplied federal law. Because respondent correctly applied federal law, which does not permit a finding of abuse to be removed from a state's nursing-assistant registry, we affirm.

F A C T S

In April 2008, relator was employed as a nursing assistant at a St. Paul nursing home certified in the Medicare and Medicaid programs. On April 28, 2008, a vulnerable adult identified relator as the person who struck him in the eye, causing bruising and swelling. Respondent completed an investigation into the alleged assault and found, by a preponderance of the evidence, that relator committed substantiated serious maltreatment of a vulnerable adult by physically abusing the nursing-home resident. Following the investigation, the Minnesota Department of Human Services (DHS) informed relator that the finding of substantiated serious maltreatment disqualified him from employment in any position that allows direct contact with persons receiving services from facilities licensed by DHS and respondent, among others.¹

¹ An individual is disqualified from direct-contact services for a period of seven years if the individual is found to have committed substantiated serious maltreatment of a vulnerable adult. Minn. Stat. § 245C.15, subd. 4(b)(2).

Relator requested that respondent reconsider the maltreatment determination and disqualification. Respondent denied relator's request to set aside the disqualification, indicating that relator posed a risk of harm to vulnerable adults.

An appeal hearing was held before a human-services judge (HSJ) under Minn. Stat. § 256.045, subd. 3(a)(10) (Supp. 2017), on the issues of whether relator physically abused a vulnerable adult, whether DHS correctly disqualified relator on that basis, and whether respondent correctly denied relator's request to set aside his disqualification. The HSJ concluded that (1) relator committed substantiated serious maltreatment of a vulnerable adult by physically abusing the nursing-home resident; (2) relator was properly disqualified from direct-contact services under Minn. Stat. §§ 245C.14, subd. 1(a)(3), .15, subd. 4(b)(2); and (3) the disqualification should not be set aside under Minn. Stat. § 245C.22, subd. 4, because relator failed to show that he did not pose a risk of harm to residents of a nursing home.

In August 2009, the commissioner of health adopted the HSJ's findings of fact and conclusions of law and ordered that a summary of the findings be entered into relator's record in the nursing-assistant registry maintained under 42 U.S.C. §§ 1395i-3(g)(1)(C), 1396r(g)(1)(C) (2012). The following summary was entered into relator's record on the nursing-assistant registry:

On April 28, 2008, Cosmos Eneh, while working as a Nursing Assistant at Bethel Care Center in St. Paul, physically abused a vulnerable adult. Another staff member saw the [vulnerable adult] lying in bed with a swollen, bruised left eye after Mr. Eneh had provided cares. The [vulnerable adult] identified Mr. Eneh by description and name as the person who had hit him in the eye.

On October 7, 2016, relator requested that his disqualification be set aside. Relator additionally requested “that the [n]ursing [a]ssistant registry be notified that [relator] is now permitted to work and have direct contact with persons receiving services.” Respondent notified relator that he was no longer subject to the seven-year disqualification period under Minn. Stat. § 245C.15, subd. 4(b)(2). Respondent further explained that federal regulations do not permit respondent to remove the finding of maltreatment from the nursing-assistant registry because the maltreatment involved physical abuse of a vulnerable adult, as opposed to a single incident of neglect. Respondent explained that, under federal regulations, nursing facilities are prohibited from employing relator because of the finding of maltreatment on the nursing-assistant registry.

Relator appeals respondent’s refusal to remove the maltreatment finding from the nursing-assistant registry by writ of certiorari.

ISSUES

Did respondent misapply the law or act arbitrarily or capriciously when it refused to remove the finding of physical abuse from the nursing-assistant registry?

ANALYSIS

I.

We first consider our authority to review the agency’s decision in this matter. The Minnesota Administrative Procedure Act (MAPA), Minn. Stat. §§ 14.001-.69 (2016), permits judicial review of an agency’s final decision in a “contested case.” Minn. Stat. § 14.63. A “contested case” is defined as “a proceeding before an agency in which the

legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.” Minn. Stat. § 14.02, subd. 3. In such cases, MAPA dictates the procedures for, and scope of, judicial review. Minn. Stat. §§ 14.63-.69.

But here, respondent is not required by statutory or appellate rules to conduct a contested-case proceeding when an individual requests a finding of physical abuse to be removed from the state’s nursing-assistant registry, and no such contested-case proceeding was held in this case. *See Rodne v. Comm’r of Human Servs.*, 547 N.W.2d 440, 444 (Minn. App. 1996) (indicating that MAPA did not apply to a request for reconsideration of a decision by DHS because a contested-case proceeding was not required by statute). Therefore, the procedures for judicial review under MAPA do not apply.

However, we may review an agency’s decision by writ of certiorari when there is no statute or appellate rule that otherwise permits judicial review, provided that the decision being appealed is quasi-judicial or judicial in nature. *Dietz v. Dodge County*, 487 N.W.2d 237, 239 (Minn. 1992); *In re Occupational License of Haymes*, 444 N.W.2d 257, 258-59 (Minn. 1989). A quasi-judicial decision occurs when an agency conducts an investigation into a disputed claim and weighs evidence, applies that evidence to a prescribed standard, and reaches a binding decision on the matter. *Minn. Ctr. for Envtl. Advocacy v. Metro. Council*, 587 N.W.2d 838, 842 (Minn. 1999). Respondent undertook a quasi-judicial function when it considered relator’s request to remove the maltreatment finding and the facts of his case, applied those facts to a prescribed standard, and issued a final decision. We therefore review respondent’s decision for issues “affecting the

jurisdiction of [respondent], the regularity of its proceedings, and . . . whether the order or determination . . . was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.” *Dietz*, 487 N.W.2d at 239 (quotation omitted).

II.

Relator argues that respondent acted arbitrarily and capriciously, and misapplied federal law, when it refused to remove the finding of maltreatment from the nursing-assistant registry. He argues that respondent should have applied provisions of the Social Security Act, 42 U.S.C. §§ 301-1397mm (2012 & Supp. 2015), to remove the finding of maltreatment from the nursing-assistant registry. He argues that respondent’s failure to apply sections 1395i-3(g)(1)(D)(i) and 1396r(g)(1)(D)(i) of the act to remove the finding of maltreatment has created a permanent disqualification from employment in his chosen field and deprived him of his due-process and equal-protection rights.

As an initial matter, relator fails to distinguish between a disqualification under Minnesota law from employment in certain positions, and what he refers to as respondent’s imposition of a “permanent disqualification” because of the finding of maltreatment on the nursing-assistant registry.

A. Disqualification under the Background Studies Act

Under Minnesota’s Background Studies Act, an employee or applicant may be disqualified from positions that involve direct contact with persons served by certain facilities or agencies. Minn. Stat. § 245C.03; *see also* Minn. Stat. § 245C.02, subds. 6, 14 (incorporating Minn. Stat. § 245A.02, subds. 2, 4 (2016), to define “person” as an

individual under the age of 18; an adult with mental illness, developmental or physical disability, or functional impairment; or an adult who is chemically dependent or an abuser of chemicals). Nursing-homes, boarding-care homes, and hospitals licensed by respondent are subject to the Background Studies Act. Minn. Stat. § 144.057, subd. 1(1) (2016).

Under the Background Studies Act, an employee may be disqualified for seven years from employment at a facility allowing direct contact with persons served by the facility if the employee is found to have committed “substantiated serious or recurring maltreatment of a . . . vulnerable adult under [Minn. Stat. § 626.557 (2016)].” Minn. Stat. §§ 245C.14, .15, subd. 4(b)(2); *see* Minn. Stat. § 626.557 (providing procedures for reporting and investigating allegations of maltreatment). For the purposes of section 626.557, maltreatment includes abuse. Minn. Stat. § 626.5572, subds. 1, 15 (2016). Abuse is defined as conduct, such as hitting, which is not accidental and which produces physical pain or injury. *Id.*, subd. 2(b)(1) (2016). The maltreatment is substantiated if it is proved by a preponderance of the evidence. *Id.*, subd. 19 (2016). Under the Background Studies Act, the maltreatment is serious if injury, such as bruises, resulted from the abuse. Minn. Stat. § 245C.02, subd. 18(a), (c). Under these standards, relator was disqualified for seven years from employment at nursing homes and other facilities subject to the Background Studies Act because he was found to have purposefully struck a vulnerable adult, causing bruising.

Relator argues that respondent has instituted a new permanent disqualification against him after the seven-year disqualification period ended. The Background Studies Act includes a provision that requires permanent disqualification for employees or

applicants who have committed certain crimes. *See* Minn. Stat. § 245C.15, subd. 1 (listing offenses that require permanent disqualification). But relator was not permanently disqualified under that provision. Rather, under the Background Studies Act, relator was disqualified from positions allowing direct-contact services for seven years, a period which has now ended.

B. Disqualification under the Social Security Act and federal regulations

The Social Security Act, in regulating nursing facilities in the Medicaid program and skilled-nursing facilities in the Medicare program, requires states to “establish and maintain a registry of all individuals who have satisfactorily completed a nurse aide training and competency evaluation program.” 42 U.S.C. §§ 1395i-3(e)(2)(A), 1396r(e)(2)(A); 42 C.F.R. § 483.1 (2016); Reform of Requirements for Long-Term Care Facilities (LTCF), 81 Fed. Reg. 68,688, 68,848 (Oct. 4, 2016) (to be codified at 42 C.F.R. § 483.1). Minnesota’s commissioner of health, in consultation with the commissioner of human services, is obligated to implement federal requirements concerning the registry for nursing assistants. Minn. Stat. § 144A.61, subd. 1 (2016).

Under 42 U.S.C. §§ 1395i-3(g)(1)(C), 1396r(g)(1)(C), “[i]f the State finds that a nurse aide has neglected or abused a resident or misappropriated resident property in a facility, the State shall notify the nurse aide and the registry of such finding.” The registry must then include “specific documented findings by a State . . . of resident neglect or abuse or misappropriation of resident property involving an individual listed in the registry.” 42 U.S.C. §§ 1395i-3(e)(2)(B), 1396r(e)(2)(B); *see* 42 C.F.R. §§ 483.156(a), (c) (requiring

findings of abuse to be included on the registry), 488.335(f)-(g) (2016) (requiring the state to report to the registry information about the finding of abuse or neglect).

Federal regulations promulgated by the M. S. Department of Health and Human Services provide further requirements for skilled-nursing facilities and nursing facilities participating in Medicare and Medicaid. 42 C.F.R. § 483.1; LTCF, 81 Fed. Reg. at 68,848. The regulations require that a finding of “abuse, neglect, or misappropriation of property . . . must remain in the registry permanently, unless the finding was made in error, the individual was found not guilty in a court of law, or the State is notified of the individual’s death. 42 C.F.R. § 483.156(c)(1)(iv)(D) (2016). The regulations further provide that a facility must not “employ or otherwise engage individuals who . . .[h]ave had a finding entered into the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property.” LTCF, 81 Fed. Reg. 68,688, 68,855 (Oct. 4, 2016) (to be codified at 42 C.F.R. § 483.12(a)(3)(ii)).² Under the regulations, abuse is defined as “the willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.” 42 C.F.R. § 488.301 (2016); LTCF, 81 Fed. Reg. 68,688, 68,848 (to be codified at 42 C.F.R. § 483.5).

² The subject of this regulation was formerly in the text of 42 C.F.R. § 483.13 (2016), which required long-term care facilities to not employ individuals who have had a finding of abuse entered into a nursing-assistant registry. Section 483.13 was removed from the regulations and section 483.12 was amended to include a similar prohibition on employment of an individual with a finding of abuse on a nursing-assistant registry. LTCF, 81 Fed. Reg. at 68,855.

The Social Security Act provides a limited opportunity for a nurse aide to have his or her name removed from a state's nursing-assistant registry. 42 U.S.C. §§ 1395i-3(g)(1)(D)(i), 1396r(g)(1)(D)(i). In cases "of a finding of neglect" on the state's registry,

the State shall establish a procedure to permit a nurse aide to petition the State to have his or her name removed from the registry upon a determination by the State that—

- (I) the employment and personal history of the nurse aide does not reflect a pattern of abusive behavior or neglect; and
- (II) the neglect involved in the original finding was a singular occurrence.

Id.

Relator argues that respondent should have applied these provisions to his case and removed his finding of maltreatment from the registry because he has only had one finding of maltreatment and because his history does not reflect a pattern of abusive behavior. But relator ignores the exact language of the provision: it is only available "[i]n the case of a finding of neglect." *Id.* Relator's maltreatment finding on the nursing-assistant registry is not a finding of neglect as defined under Minnesota law, *see* Minn. Stat. § 626.5572, subd. 17 (2016) (defining neglect as the failure to supply care or services to a vulnerable adult), or the federal regulations, *see* 42 C.F.R. § 488.301; LTCF, 81 Fed. Reg. at 68,848 (defining neglect, in part, as a failure to provide services or goods necessary to avoid physical harm). Rather, the finding on the nursing-assistant registry is one of physical abuse which resulted in injury. Neither the Social Security Act, nor the federal regulations promulgated by the Department of Health and Human Services, permit removal of a finding of physical abuse. Appellant seeks a remedy that is not permitted under federal law. The finding of physical

abuse must remain on the nursing-assistant registry. Respondent did not misapply the law, or act arbitrarily or capriciously, when it informed relator that it could not remove the finding of maltreatment from the state's nursing-assistant registry.

III.

Relator additionally argues that respondent violated his rights to due process of law and equal protection. He argues that respondent violated his due-process rights when it denied him the opportunity to petition for removal of the finding of maltreatment under sections 1395i-3(g)(1)(D)(i) and 1396r(g)(1)(D)(i). He additionally argues that application of the federal regulations to permanently disqualify him from certain employment positions has created a class of persons who are treated differently from others who are similarly situated. We have reviewed relator's constitutional arguments thoroughly and find them unavailing.

DECISION

Respondent did not misapply the law or act arbitrarily or capriciously when it refused to remove a finding of physical abuse of a vulnerable adult from the nursing-assistant registry where federal regulations require findings of abuse to remain on a state's nursing-assistant registry "permanently."

Affirmed.