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VIA EMAIL ONLY

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**Re: In the Matter of the Appeal by Pamela Lang of the Order of Temporary
Immediate Suspension of License No. 1076367**
OAH Docket No. 60-1801-38397
Commissioner's File No. 38397

Dear Parties:

On August 8, 2022, the Commissioner issued an Order regarding the appeal by Pamela Lang (Appellant). Minnesota Statutes, section 14.64, authorizes reconsideration of agency decisions in contested cases. Parties were notified that any requests for reconsideration in this matter must be filed by August 22, 2022. Through Counsel, the Appellant timely filed a request for reconsideration.¹ No submission by the Minnesota Department of Human Services ("Department") was received. By letter dated August 29, 2022, the Commissioner granted Appellant's request for reconsideration.

An administrative agency may correct its order, with notice to the parties, where there has been fraud, mistake or misconception of facts in the contested case decision.² An agency may also exercise its discretion to reconsider an order on the ground of newly discovered evidence, but it is not an abuse of discretion to deny a request to reopen a case when the evidence offered is merely cumulative of what was in the record, in existence, or known to the parties at the time the Commissioner's decision was rendered.³

In this matter, the Commissioner affirmed the temporary immediate suspension of the family child care license of Appellant. The Order was based on the Commissioner's thorough examination of the record, which led to the conclusion that Appellant's

¹ Appellant's Request for Reconsideration, dated August 19, 2022, filed via electronic mail.

² *Anchor Casualty Co. v. Bongards Cooperative Creamery Ass'n*, 91 N.W.2d 122, 126 (Minn. 1958).

³ *See Stepan v. J.C. Campbell Co. et. al.*, 36 N.W.2d 401, 404 (Minn. 1949).

“averments [were] not sufficient to overcome the concerns for the children in care arising out of the facts in this case.”⁴ Preeminent consideration must be given for the children in Appellant’s care.⁵

In her request for reconsideration, Appellant, through counsel, focuses her argument on a misinterpretation of the Commissioner’s Order by reading it to require the termination of Ms. Sievers.⁶ This reading of the Commissioner’s Order is inaccurate.

In addition to Appellant’s arguments made in her request for reconsideration, Appellant enclosed with her request two letters that were both dated August 10, 2022, from the Wabasha County Department of Social Services.⁷ These letters were issued after the issuance of the Commissioner’s Order in this matter and were therefore not made part of the official record prior to reconsideration. The first letter sets forth the Wabasha County Department of Social Services determination as to Appellant:

Results of investigation:

Based on the information gathered, there is not preponderance of the evidence to support a finding of environmental hazards. It has been determined that maltreatment did not occur, and that child protective services are not needed. The reasons for the determinations are based off interviews and observations over the course of the investigation.⁸

The second letter sets forth the following determination, presumably, as to Ms. Lang’s full time employee Ms. Sievers:

Results of investigation:

Based on the information gathered, there is a preponderance of the evidence to support a finding of unreasonable interference with a child's breathing. It has been determined that maltreatment did occur, but that child protective services are not needed. You are not responsible for the maltreatment. The reasons for the determinations are based on interviews, observations, and documentation obtained over the course of the investigation.⁹

⁴ Final Order of the Commissioner of Human Services, Case Number 38397 (Aug. 8, 2022) at 3. The ALJ concluded that Appellant’s proposed plan that had not yet been implemented, was sufficient to overcome the imminent risk of harm to the health, safety, or rights of persons served by the program. The Commissioner disagrees with the ALJ in that the TIS statute takes into consideration a license holder’s proposed actions when in actuality the statute requires the review of the Appellant’s actions or the actions of others. See Minn. Stat. § 247A.07, subd. 2(a)(1).

⁵ *Id.*

⁶ Appellant’s request for reconsideration dated August 19, 2022.

⁷ *Id.* at 4-6.

⁸ *Id.* at 4.

⁹ *Id.* at 5.

No further supporting documentation or evidence accompanied Appellant's request for reconsideration. Reconsideration of the Commissioner's Order was granted on the basis of this new evidence and to consider Appellant's arguments regarding the same.

ORDER

Based upon Appellant's request for reconsideration and the entire record of this proceeding, as well as Minnesota law and regulations, and the public policy of this state, the Commissioner's Decision on Reconsideration makes the following modifications to the August 8, 2022, Order (modified language has a strikethrough; the added language is bolded and underlined):

16. Ms. Lang informed Wabasha County Social Services and testified under oath that she would bar Ms. Sievers from the daycare until the investigation was complete and a final order issued regarding the forced feeding allegation. However, Ms. Lang has not terminated Ms. Sievers as a caregiver **nor did she take sufficient concrete action regarding her employee, who was alleged to have caused the serious harm to a child, immediately after the incident.**¹⁰ **The forced feeding incident occurred on May 13, 2022 and the TIS was issued on May 17, 2022.**¹¹ **Appellant did not share her plan to keep Ms. Sievers out of the daycare until just before the contested hearing, which began on June 28, 2022.**¹² **The failure of Ms. Lang to impose safeguards with regards to Ms. Sievers immediately after the events at issue raises a reasonable suspicion that there is an imminent risk of harm to the children served by Ms. Lang's program.** Ms. Lang also pledged to keep the birds in their cages while children were present in the daycare, and she consented to unannounced visits by the County to ensure these conditions were met.

All provisions of the Commissioner's August 8, 2022, Order not modified are upheld. Accordingly, the temporary immediate suspension of the family child care license of Appellant is upheld. This Decision on Reconsideration, constitutes the final agency decision for purposes of judicial review under Minnesota Statutes, section 14.63.

¹⁰ *Id.* at 2. Appellant's reconsideration request notes that Ms. Lang had worked side-by-side with Ms. Sievers for years and had never seen such behavior so "...of course Ms. Lang would be skeptical when such serious allegations were made against [Ms. Sievers}." Appellant's reconsideration request also admits that Ms. Lang did not investigate the allegation since she is not a criminal investigator or a child protection worker.

¹¹ Test. of Adolescent 1; OAH-0021 to 24.

¹² Test. of P. Lang.

MEMORANDUM

Under Minnesota law, a temporary immediate suspension will remain in effect where the Commissioner determines that children are at imminent risk of harm. By statute, the "commissioner shall act immediately to temporarily suspend" the license of a child care provider if the provider's actions, failure to comply with law or regulations, or program conditions "pose an imminent risk of harm to the health, safety, or rights of persons served by the program."¹³ By rule, "[i]f the license holder's actions or failure to comply with applicable law or rule poses an imminent risk of harm to the health, safety, or rights of persons served by a program, the agency ... shall notify the commissioner immediately."¹⁴

The burden of proof in expedited hearings under subdivision 2(a)(1) shall be limited to the Department's demonstration that reasonable cause exists to believe that the license holder's actions or failure to comply with applicable law or rule, or the actions of other individuals or conditions in the program, poses an imminent risk of harm to the health, safety, or rights of persons served by the program.¹⁵ "Reasonable cause" means there exist specific articulable facts or circumstances which provide the commissioner with a reasonable suspicion that there is an imminent risk of harm to the health, safety, or rights of persons served by the program.¹⁶ *Id.*

The scope of a hearing regarding an order for a temporary immediate suspension is limited solely to the issue of whether the temporary immediate suspension should remain in effect pending the Commissioner's final order as to a licensing sanction.¹⁷ As noted in the Commissioner's prior order, this is a modest burden of proof and is very narrow as it is intended to give preeminent consideration to a child's health and safety. The new evidence presented, although relevant as to the extent it may be indicative of the overall direction of the investigation in this matter, is not sufficient for the Commissioner to overturn her decision at this time. The Commissioner must examine the record before her, though incomplete that record may be, and make her determination based on the record as it exists. Although the letters submitted are relevant evidence, a determination by child services is separate from that of licensing. To be clear, this order does not include any consideration of whether a final licensing sanction is ultimately warranted, or a determination as to the appropriate outcome of the Department's licensing investigation.¹⁸

¹³ Minn. Stat. § 245A.07, subd. 2(a)(1).

¹⁴ Minn. R. 9543.0100, subp. 2A.

¹⁵ Minn. Stat. § 245A.07, subd. 2a(a) (emphasis added).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The Commissioner recognizes that with the passage of time and additional investigation there may in fact be additional evidence/investigation that calls into question the appropriateness of the TIS in this matter; however, the Commissioner must

In this matter, the Department has met the modest burden necessary to sustain the temporary immediate suspension. The suspension of Appellant's license shall remain in effect for a 90-day period while the Department determines what conditions, if any, are required to protect the health and safety of any children placed in Appellant's care. The Commissioner notes that the Department has had ample time now to conduct its investigation and therefore she would request that the Department move promptly with its final licensing determination and provide prompt notice to Appellant regarding the same. At this time, however, the record before the Commissioner clearly establishes that there is a basis for the TIS Order, and that Appellant should remain subject to a suspension pending a final determination as to her license.

APPEAL RIGHTS

Any person aggrieved by a final decision in a contested case is entitled to judicial review of the decision under Minnesota Statutes, sections 14.63 to 14.68. A petition for review must be filed with the Minnesota Court of Appeals and served on the Commissioner of Human Services within 30 days after receipt of this order.¹⁹

Sincerely,

Marisela E. Cantu

Marisela E. Cantu
Interim Senior Associate General Counsel

cc: The Honorable Judge James E. LaFave
DHS Legal Licensing Unit

review the record before her and leave it to the County/Department to take further licensing action as they deem appropriate.

¹⁹ See Minn. Stat. § 14.64 (stating that the 30-day period for petitioning for judicial review is stayed pending the Commissioner's decision on a Request for Reconsideration if the Request for Reconsideration was made within 10 days after the decision and order of the agency).