

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Revocation of the
Child Care License of Pamela Boesen

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 19, 2005, at the Office of Administrative Hearings, Suite 1700, 100 Washington Square, 100 Washington Avenue South, in Minneapolis, Minnesota. The hearing record closed on October 19, 2005, with conclusion of the hearing in this matter.

Rebecca Morrisette, Assistant Hennepin County Attorney, 525 Portland Avenue, Suite 1210, Minneapolis, Minnesota, 55415-0972, appeared on behalf of the Minnesota Department of Human Services ("Department"). The Licensee, Pamela Boesen, 3520 Noble Avenue N., Crystal, Minnesota 55422, appeared on her own behalf .

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Kevin Goodno, Commissioner, Department of Human Services, 444 Lafayette Road, St. Paul, MN 55155, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

STATEMENT OF ISSUES

1. Did the Licensee fail to comply with the terms of her conditional license?
2. Did the Licensee fail to comply with the rules regarding access to hazards, use of gates, and limitations on ages of children in care?
3. If the answer to either question is yes, should the Department revoke her license?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Pamela Boesen has been licensed by the Minnesota Department of Human Services to provide family child care since 1991. She has a C-1 license, which makes Ms. Boesen eligible to have up to ten children in care (eight if only one adult caregiver) with no more than three infants and toddlers (no more than two infants).¹ Ms. Boesen provides day care in her home. Only the finished basement portion of the home is licensed for daycare.² On the basement level is a doorway leading to a laundry room that also contains a refrigerator and microwave (referred to as the “kitchen/laundry room”).³ The kitchen/laundry room is not approved for daycare use. Boesen usually has from six to eight children in daycare.⁴

Linda Meneely is a social worker and day care licenser for Hennepin County. Meneely has worked for Hennepin County social services for three years in license renewals and six months in quality assurance. Boesen’s daycare is included in Meneely’s caseload. Previously, Boesen’s daycare was overseen by Judy Ames (who recently retired), Rita Strouth, and Gena Johnson.⁵

On March 19, 2002, Gena Johnson, a licensing worker for Hennepin County, made an annual renewal visit to Boesen’s daycare. At that time, Boesen reported having four preschoolers, two toddlers, one infant, and no school age children in her care. While there, the social worker noted that the kitchen area was not properly gated to prevent daycare children from entering. The kitchen was not approved as a care area and the basement stairs lead up to the kitchen. Boesen explained that the daycare children know not to enter the kitchen and they will stand at the top of the stairs. Johnson explained that the kitchen needed to be either childproofed or inaccessible.⁶

Based on the observations in the daycare, Johnson issued a Correction Order to Boesen, citing the access to hazards and a number of forms not properly on file. The access citations were corrected that day. All of the items were corrected by April 16, 2002.⁷

On October 2, 2003, Hennepin County received a complaint from a daycare parent that just after drop-off time in the morning, one toddler was in a playpen yelling, one child was on a couch (and had been told to “nap”) and an infant was in a crib with a sheet draped over it. In response to the parent’s questions regarding the situation, Boesen stated that the infant was supposed to be napping and that the child had been crying all morning.⁸

¹ Exs. 1 and 20.

² Ex. 3.

³ Testimony of Johnson.

⁴ Testimony of Boesen.

⁵ Testimony of Meneely.

⁶ Ex. 3; Testimony of Johnson.

⁷ Ex. 3.

⁸ Ex. 5.

On October 7, 2003, Tim Hennessey, an investigator for Hennepin County, made an unannounced visit to Boesen's daycare. He discussed the prior incident with Boesen and she acknowledged that the sheet was draped over the crib. Hennessey indicated that using the sheet in that fashion could pose a safety risk. Boesen indicated that she would discontinue that practice. Hennessey found a violation of Minn. Rule 9502.0425, subp. 9, regarding the safety of a sleeping space, to be substantiated. Because of the lack of clarity in the rule, no correction order or other action was taken in regard to the situation.⁹

On March 24, 2004, Judy Ames, a licensing worker for Hennepin County, made an annual renewal visit to Boesen's daycare. At that time, Boesen had one school-age child, three preschoolers, two toddlers, and one infant in her care. Ames noted that the door to the kitchen/laundry area was not locked or otherwise inaccessible. The fire extinguisher had not been serviced as required by the Department's rules, and one immunization record was not on file. Ames explained these problems to Boesen. Ames also recommended not having the television on too frequently during daycare hours. Boesen responded that the daycare parents had not objected to the amount of television viewing by the daycare children and reported that the children appeared to like watching television. Ames noted that there was no rule restricting television in daycare.¹⁰

Based on her observations in the daycare, Ames issued a Correction Order to Boesen, citing the lack of timely service for the fire extinguisher, the access to hazards due to no lock on the kitchen/laundry room door and the single immunization form that was not properly on file. The access citation was corrected when Boesen purchased a lock for the door. All of the items were corrected by April 5, 2004.¹¹

On July 7, 2004, Hennepin County received a telephoned complaint from a person who had been to the daycare on several occasions that Boesen kept children in high chairs and infant seats for long periods of time. The caller also stated that Boesen "props bottles."¹² The caller indicated that children were afraid to speak to Boesen.¹³

On July 14, 2004, Ames and Rita Strouth, a licensing worker for Hennepin County, made an unannounced visit to Boesen's daycare. Based on their observations at the daycare, they issued another Correction Order to Boesen listing the following violations: (1) failure to follow sanitation requirements when changing diapers; (2) no gates in place for the staircase; and (3) garage door and rear gate either open or unsecured. Ames cited Minnesota Rules 9502.0425 (gates on stairs) and 9502.0435 (diaper changing and outdoor gates). Boesen explained that she was "in a rush" regarding the diapering violation and that the gate is closed when children are outside.¹⁴ Ms. Boesen indicated that the necessary corrections were made by July 16, 2004.¹⁵

⁹ Exs. 5 and 6.

¹⁰ Ex. 7.

¹¹ Ex. 8.

¹² Ex. 9. Propping bottles refers to leaving bottles of formula unattended with infants.

¹³ Ex. 9.

¹⁴ Ex. 10.

¹⁵ *Id.*

On July 15, 2004, Strouth wrote to Boesen to inform her that the complaint investigation was being closed with a conclusion of “unable to determine.”¹⁶ Strouth also noted that she had witnessed the lack of hand washing and she reiterated that stairways must be gated and the garage door locked.¹⁷

In a letter to the Department dated November 4, 2004, Strouth recommended that the Department make Boesen’s license conditional for a period of one year. Strouth’s recommendation was based on the following rule violations: improper infant sleeping arrangements; failure to use gates; and allowing access to hazardous materials by daycare children.¹⁸

On December 30, 2004, the Department placed Boesen’s license on conditional status for one year. The reasons stated for the conditional license were the continued access to hazards, the complaints on how infants were being cared for, and noncompliance with the diaper changing and hand washing rules. The rules cited relating to violations were: Minn. Rule 9502.0425, subps. 7, 9, 10, 16, and 18 (access to hazards and requirements for appropriate sleeping arrangements); and Minn. Rule 9502.0435, subps. 4, 6, 13, and 15 (access to toxic substances and hazardous materials, diapering, and hand washing).¹⁹ Pursuant to the terms of the order, Boesen could continue operating her day care with a conditional license under the following stipulations:

1. [Boesen] follow and comply with all parts of Minnesota Rules, parts 9502.0300 to 9502.0445.
2. No variances to age distribution or capacity will be granted during the conditional period.
3. [Boesen] submit a detailed plan outlining how you will maintain your family child care home in a safe manner, free of hazards. This plan must be submitted to the licensing worker for approval **by January 15, 2005**.
4. [Boesen] obtain a minimum of six (6) hours of training in the area of child safety and supervision by **May 15, 2005**. This training is in addition to the annual training requirements as listed in Minnesota Rules, part 9502. Prior to attending training, [Boesen] must obtain approval from your licensor that the training is appropriate. It is your responsibility to submit documentation of your attendance to your licensor.
5. [Boesen] must either provide a copy of the Order of Conditional License to the parents of children in care, or document that all parents have been given an opportunity to review the Order of Conditional License. [Boesen] must obtain parent signatures for each currently enrolled child, verifying that they have either received a copy of the

¹⁶ Ex. 21.

¹⁷ *Id.*

¹⁸ Ex. 2.

¹⁹ Ex. 12.

conditional order or had an opportunity to review the conditional order. You must provide this documentation to your licensing worker at Hennepin County Social Services **by January 31, 2005**. For new families, you must submit documentation of compliance with this term to your licensing worker at Hennepin County Social Services **within 5 days of any child's admission** to your child care program.²⁰

The Conditional Order included the following notice in bold type:

Failure to comply with the stipulations of your conditional license or any other provisions of Minnesota Rules and Laws may result in revocation of your license.²¹

The right to request reconsideration of the Conditional Order and the procedure for making such a request was spelled out in the Order.²² Boesen did not seek reconsideration of the Conditional Order.

On January 25, 2005, Strouth made a scheduled visit to Boesen's daycare for discussion of the terms of the Conditional Order. While there, Strouth observed a child use the bathroom and that child's hands were not washed afterward. When Strouth asked about that, Boesen responded that the children use the laundry room/kitchen for hand washing. That area is not approved for daycare use and a number of hazards are present in that area. Strouth also observed garbage cans without covers, no towels present in the bathroom, the garage door accessible (and unlocked), and the backyard gate unlatched. Strouth also discussed the need to take the children outside daily.²³

Based on her observations at the daycare, Strouth issued another Correction Order to Boesen listing the following violations: (1) failure to follow the hand washing requirements and having no individual use towels available; (2) failing to take the children outside for play; (3) garage door and rear gate either open or unsecured; (4) garbage cans lacking lids; and (5) failure to make accessible areas childproof.²⁴ Strouth cited Minnesota Rules 9502.0425 (gate, garage door, and failure to childproof), 9502.0435 (missing lids, no individual towels, and hand washing), and 9502.0395 (outdoor play).²⁵

Strouth mailed the Correction Order to Boesen on January 26, 2005. In the cover letter, Strouth reminded Boesen of the need for the safety plan and the documentation of the parents having been advised of the Conditional Order.²⁶

²⁰ Ex. 12 (emphasis in original).

²¹ Ex. 12.

²² Ex. 12.

²³ Ex. 13.

²⁴ Ex. 13.

²⁵ Ex. 13.

²⁶ Ex. 13.

On February 4, 2005, Boesen signed the Correction Order and noted how each problem was addressed. Regarding playing outside, Boesen wrote, “what do I do with the Babys (*sic*).”²⁷

On February 9, 2005, Strouth was telephoned by Boesen, who indicated that she would be returning the signed Correction Order and complete the additional training. Boesen also indicated that she would have the parents of her daycare children acknowledge the Conditional Order.²⁸

On February 22, 2005, Strouth visited Boesen’s daycare at 12:30 p.m. and noted that all the children were in their cribs. The garage door was unlocked and the gates to the backyard were open. Strouth noted that there were no footprints in the snow. Boesen indicated that she will not be taking the children outside, so there was no reason to secure those gates or the garage. Strouth concluded that Boesen was not meeting the terms of her conditional license.²⁹ In addition, a bedroom used for nap time by the daycare children had four electrical outlets, the cable connection, and the switch plate for the lights uncovered. Boesen explained that she was repainting that bedroom and the face plates were removed as part of that project.³⁰

Based on her observations at the daycare, Strouth issued another Correction Order to Boesen listing the following violations: (1) failure to make accessible areas childproof by covering electrical outlets with faceplates; and (2) failure to cover garbage cans with lids. Strouth cited Minnesota Rules 9502.0425 for both violations. In her cover letter, Strouth noted that Boesen had returned the parents’ acknowledgements, required under the Conditional Order.³¹

On April 13, 2005, Strouth and Randi Helling, a licensing supervisor with Hennepin County, visited Boesen’s daycare at 8:30 a.m. Boesen did not answer the door right away. Four children, one preschooler, one infant, and two toddlers were present. Strouth noted that Boesen also has another toddler in her daycare part-time. The stair gate was not in place. Batteries were on the stairs. Strouth reminded Boesen that her safety plan had not been filed. Boesen had completed the additional training and she showed the certificates of completion to Strouth.³²

Based on her observations at the daycare, Strouth issued another Correction Order to Boesen listing the following violations: (1) leaving hazardous materials (batteries) in an area accessible to children; (2) leaving stairs ungated; and (3) having too many toddlers enrolled in her daycare. Strouth cited Minnesota Rules 9502.0425 (gate), 9502.0435 (hazardous materials), and 9502.0367 (capacity limits) for the violations. In her cover letter, Strouth noted that Boesen had completed the required additional training, and reminded her of the need to file the safety plan. Strouth also indicated

²⁷ Ex. 13.

²⁸ Ex. 14.

²⁹ Ex. 14.

³⁰ Testimony of Boesen.

³¹ Ex. 15.

³² Ex. 14; Testimony of Helling.

that Boesen needed to reduce the number of toddlers enrolled in daycare to meet the capacity limits.³³

On April 20, 2005, Strouth and Johnson visited Boesen's daycare at 10:00 a.m. Boesen did not answer the door right away and objected to their visit. Four children under two years of age were present in the daycare. Strouth noted that electrical outlets in the bedroom still lacked faceplates, doors to the furnace room and the garage were unlocked, and hazardous and toxic materials were accessible to daycare children. Johnson noted that the required egress window was not functional.³⁴ Strouth told Boesen that she needed to stay within the distribution limits. Boesen objected to letting the most recent toddler go, expressing concern that the parent would be offended.³⁵ Boesen told Strouth that there should be notice before future visits. Boesen became angry with Strouth and demanded that she discontinue the unannounced visits.³⁶

Based on her observations at the daycare, Strouth issued another Correction Order to Boesen listing the following violations: (1) leaving hazardous materials in areas accessible to children; (2) leaving gates unlatched; (3) having electrical outlets uncovered by faceplates; (4) leaving the garage door unlocked; (5) having inoperable egress windows; and (6) having too many toddlers enrolled in her daycare. Strouth cited Minnesota Rules 9502.0425 (windows, doors and gates), 9502.0435 (hazardous materials and electrical outlets), and 9502.0367 (capacity limits) for the violations. In her cover letter, Strouth described the hazardous materials (tools, mothballs, rusted cans, etc.) to which the children had access in the daycare. She reiterated that unannounced visits would continue. Strouth also indicated that she and Boesen would need to work together to avoid having to seek revocation of Boesen's day care license.³⁷

Boesen returned the Correction Order on April 27, 2005. She indicated that her husband would be watching one of the toddlers until the child turns two years of age. She also indicated that they were looking for a faceplate for the electrical outlet and that the garage door and gates were locked when the children went outside.³⁸

On May 2, 2005, Strouth wrote back to Boesen that any child in the daycare home was counted toward the licensed capacity. Strouth also indicated that the doors and gates needed to be inaccessible throughout the daycare hours.³⁹

On May 9, 2005, Strouth and Johnson visited Boesen's daycare. Four children under two years of age were present in the daycare. Strouth noted that none of the corrections requested in the prior Correction Order had been made.⁴⁰

³³ Ex. 16.

³⁴ Testimony of Johnson.

³⁵ Testimony of Johnson.

³⁶ Ex. 14; Testimony of Johnson.

³⁷ Ex. 17.

³⁸ Ex. 17.

³⁹ Ex. 18.

⁴⁰ Ex. 23; Testimony of Johnson.

On June 10, 2005, the Department issued an Order of Revocation to Ms. Boesen. The Department informed her that it was revoking her daycare license based on her failure to comply with the terms of her conditional license, her failure to comply with the capacity limits of her license, her failure to abate a number of hazards that are accessible to daycare children, her failure to maintain operable egress windows, and her failure to follow the rules on hand washing. The Department cited Minnesota Statutes § 245A.06, subd. 3 (failure to comply with correction orders and conditional license) and Minn. Rules 9502.0367 (age distribution requirements), 9502.0435 (sanitation and health), 9502.0425 (physical environment), and 9502.0415 (activities and equipment) as the basis for the revocation. The Order notified the Licensee of her right to appeal and her right to a contested case hearing.⁴¹ The Order was served on Boesen on July 13, 2005.⁴²

Boesen appealed the revocation. On August 2, 2005, the Department served and filed a Notice of and Order for Hearing in this matter. The matter was set on for hearing before Administrative Law Judge Steve Mihalchick and the hearing set for October 19, 2005.

On August 25, 2005, Strouth and Meneely visited Boesen's daycare. The ungated stairway, unlocked gates, and unlocked garage door and laundry room door problems were present at the time of that visit. No medical permission slips were on file for the children in Boesen's daycare.⁴³ On August 29, 2005, Strouth mailed a Correction Order to Boesen that identified these items as rule violations. Boesen responded to each, indicating that she had made the particular correction for each item after the license workers had identified the problem.⁴⁴

On September 28, 2005, Meneely visited Boesen's daycare. The ungated stairway, unlocked gates, and unlocked garage door and laundry room door problems were present at the time of that visit. No medical permission slips were on file for the children in Boesen's daycare.⁴⁵ On September 29, 2005, Meneely mailed a Correction Order to Boesen that identified these items as rule violations. Boesen did not initially respond to the Correction Order.⁴⁶ Meneely received the completed Correction Order on October 13, 2005, noting the particular corrections for the noncompliant items.⁴⁷

Several parents of children who attend Boesen's day care submitted letters in support of Boesen. These parents cited Boesen's caring and affectionate nature in providing daycare for their children. These parents also indicated that Boesen's daycare was observed to be clean and safe.⁴⁸

At the hearing, Boesen testified that she blocked the garage door and ensured that the yard gates were fastened when the children are outside.⁴⁹ Boesen left a mesh

⁴¹ Ex. 2.

⁴² Ex. 23.

⁴³ Ex. 23.

⁴⁴ Ex. 25.

⁴⁵ Ex. 23.

⁴⁶ Exs. 26 and 27.

⁴⁷ Ex. 29; Testimony of Meneely.

⁴⁸ Exs. 30-33. The ALJ notes that two of the letters were marked as Exhibit 32.

⁴⁹ She did not realize that she had a key that fit that door until recently.

playpen in front of the door to prevent the daycare children from obtaining access to the garage. Boesen was in the habit of leaving the stair gate open when children were napping or eating lunch to facilitate Boesen going up and down the stairs. She acknowledged that the electrical outlet faceplates were not replaced for at least a month.⁵⁰

Any Conclusions that are more accurately described as Findings are hereby adopted as such.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Human Services have jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of statutes and rules have been fulfilled.

3. Minn. Stat. § 245A.06, subd. 3, provides as follows

If the commissioner finds that the applicant or license holder has not corrected the violations specified in the correction order or conditional license, the commissioner may impose a fine and order other licensing sanctions pursuant to section 245A.07.

4. Minn. Stat. § 245A.07, subd. 3, authorizes the Commissioner to:

suspend or revoke a license, or impose a fine if a license holder fails to comply fully with applicable laws or rules

5. Minn. Stat. § 245A.07, subd. 1, provides that, “[w]hen applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.”

6. Pursuant to Minn. Stat. § 245A.08, subd. 3, the Commissioner has the burden of proof to demonstrate that reasonable cause existed for revoking the Licensee’s license. The Commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the Licensee failed to comply fully with applicable law or rule. When such a showing is made, the burden of proof shifts to the Licensee to demonstrate by a preponderance of the evidence that she was in full compliance with the laws and rules that the Commissioner alleges were violated at the time the alleged violations occurred.

7. The Department advanced evidence establishing reasonable cause to believe that the Licensee engaged in violations of the laws governing her license to provide family day care services.

⁵⁰ Testimony of Boesen.

8. The Department advanced evidence establishing reasonable cause to believe that the Licensee failed to comply with the terms of her conditional license.

9. The Licensee failed to establish that she was in full compliance with the terms of her conditional license. The record in this matter shows that the Licensee failed to meet requirements of the Conditional Order to address access to hazards, proper use of gates, and compliance with the distribution requirements for children in her daycare. Further, there is no record of Licensee ever completing the safety plan required by the Conditional Order.

10. Based on the Licensee's failure to comply with the terms of her conditional license, the Commissioner may impose licensing sanctions pursuant to section 245A.07.

11. The Licensee has failed to demonstrate by a preponderance of the evidence that she fully complied with Minnesota Rules 9502.0425, 9502.0435, and 9502.0367. The nature, chronicity, and severity of the violations support revocation as the appropriate sanction.

12. Any Findings that are more accurately described as Conclusions are hereby adopted as such.

13. These Conclusions are reached for the reasons discussed in the attached Memorandum, which is hereby incorporated in these Conclusions by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED:

That the Commissioner revoke the Child Care License of Pamela Boesen for her failure to comply with the conditions of her conditional license.

Dated: November 17, 2005

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Taped (2 tapes); no transcript prepared.

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Licensee failed to comply with the terms of her conditional license. She repeatedly violated the rules regarding access to hazards and the distribution limitations for capacity in her daycare. Because the Licensee failed to comply with the terms of her conditional license, the Commissioner may order licensing sanctions, including revocation.⁵¹

The Licensee perceived these matters as not serious. Access to hazards is a significant problem, in that the potential for serious harm to a daycare child exists. The Department is not required to wait until a daycare child experiences actual harm before imposing discipline on a daycare provider's license. The distribution limitations are established to ensure that infants and toddlers receive the greater attention that these ages require. While the burden of proof has shifted to the Licensee, the Department has affirmatively demonstrated by a preponderance of the evidence that the Licensee was not in compliance with the statutes and rules governing the operation of her daycare.

The record in this matter demonstrates that the Licensee did not take compliance with the terms of her conditional license seriously. While the Licensee completed additional training and brought her paperwork up to date, the Licensee only corrected problems when they were pointed out the license workers. Subsequent visits resulted in the very same problems being identified and temporarily corrected by the Licensee. This conduct is not in compliance with the terms of Conditional Order.

Because the Department has established that the Licensee violated Minn. Stat. § 245A.06, subd. 3, by failing to comply with the terms of her conditional license, a licensing sanction is appropriate. The ALJ finds the violations are sufficiently serious to justify revocation and recommends that the Department revoke Ms. Boesen's license to provide family child care.

S.M.M.

⁵¹ See, Minn. Stat. §§ 245A.06 and 245A.07.