**IN THE COURT OF APPEALS OF IOWA**

No. 1999-587 (9-848) / 99-0616
Filed March 15, 2000

**JERRY THIESSEN,**
Petitioner-Appellant,

**vs.**

**HEALTH FACILITIES DIVISION, IOWA DEPARTMENT OF INSPECTIONS AND APPEALS,**
Respondent-Appellee.

FILED
MAR 15 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Jerry Thiessen appeals from the district court's ruling on judicial review affirming the decision of the Department of Human Services finding he committed child abuse through denial of critical care. **AFFIRMED.**

James L. Sayre of James L. Sayre, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Cristina Kuhn, Assistant Attorney General, for appellee.

Heard by Mahan, J., and Zimmer and Vaitheswaran, JJ., but decided by Streit, P.J., and Mahan, and Zimmer, JJ.

**MAHAN, J.**

Jerry Thiessen appeals from the district court's ruling on judicial review affirming the decision of the Iowa Department of Human Services (DHS) finding he committed child abuse through denial of critical care. Thiessen contends the court erred in failing to find (1) the agency decision was contrary to statute, unreasonable, arbitrary, capricious and an abuse of discretion, and (2) adding his name to the child abuse registry is contrary to Iowa Code section 232.71D. We affirm.

Thiessen was employed as a youth service worker with the Iowa Juvenile Home in Toledo. On March 30, 1996, Tena Metchell, a resident child, exhibited behavioral problems in the cottage where she lived.[1] Jerry Melcher, a youth service worker assigned to Tena's cottage placed her in the "quiet room" with the assistance of another worker. That evening Melcher determined Tena's behavior would be detrimental to the other children in the cottage. He contacted the duty supervisor for permission to move Tena to the infirmary.

The supervisor sent Kim Struve and Roger Smith, also youth service workers assigned to the security unit, to assist Melcher in moving Tena to the infirmary, one hundred yards away. Tena refused to walk to the infirmary, so Smith placed her in a facility approved Mandt position.[2] Thiessen was dispensing medication on the lower floor of the cottage when he heard a disturbance

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[1] Metchell was five feet four inches tall and weighed 100 pounds. She regularly demonstrated aggressive behavior and was a challenge to staff.

[2] The Mandt system consists of safe physical intervention techniques to handle aggressive behavior.

upstairs. Thiessen went upstairs and took control of Tena's legs, using the Mandt technique.

Thiessen and Smith carried Tena from the cottage. Tena freed her arm from Smith's hold, so Struve managed her arm. Melcher assisted as Thiessen and Smith carried Tena down the cottage stairs.

Tena struggled violently as Thiessen and Smith carried her from the cottage, freeing her right arm. Struve managed her right arm as they proceeded toward the infirmary. Tena calmed down, but refused to walk to the infirmary. Thiessen and Smith carried her to the infirmary, with Thiessen managing her legs, and Smith managing her upper body using the Mandt technique. Melcher gathered some of her clothing and took it to the infirmary.

As the four youth service workers entered the infirmary, Tena began struggling. Smith became exhausted, so Thiessen and Smith placed Tena on the floor near the entrance door. Shortly thereafter, Thiessen and Smith proceeded to carry Tena toward the control room, using the Mandt technique. Tena struggled vigorously, and Smith lost control of her. Thiessen lost control of Tena's legs. Somehow she turned her body around and her back was toward Thiessen. Thiessen grabbed her left arm near her wrist and pulled her to the control room. He did not use the Mandt technique to move Tena. Tena continued to resist. As Thiessen pulled her down the hall, Tena's head struck a protrusion from a wall, causing a severe laceration and heavy bleeding.[3]

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[3] Thiessen pulled the child for a distance of eight to seventeen feet.

Following an investigation, DHS issued a founded child abuse report of denial of critical care, failure to provide proper supervision. On October 8, 1996, Thiessen sent a letter to the Central Child Abuse Registry of DHS, requesting DHS expunge the child abuse report. The registry forwarded the letter to the Health Facilities Division (HFD) of the Iowa Department of Inspections and Appeals (DIA). On November 4, 1996, the HFD bureau chief sent Thiessen a letter notifying him the report findings would not be changed. The letter noted Thiessen's right to appeal the decision.

On November 25, 1996, Thiessen sent a notice of appeal to the DHS Appeals Section, which was forwarded to the DIA Division of Appeals. The DIA Division of Appeals returned the notice of appeal to the DHS Appeals Section with directions to route the notice of appeal through the HFD of the DIA. On January 23, 1997, the HFD of the DIA received the notice of appeal.

On June 20, 1997, the hearing was held on the appeal. On August 4, 1997, the administrative law judge issued a proposed decision, holding there was child abuse through a denial of critical care, and not by means of physical abuse, and the report should remain on the central registry as a founded report, finding:

> [a] reasonable and prudent person in the circumstances of the appellant would not have pulled the child down the hall by her arm. A reasonable and prudent person would have foreseen a danger of injury to the child. A reasonable and prudent person would have recognized that less hazardous means were available for managing the child. In pulling the child down the hall by her arm, the appellant was failing to provide proper supervision of the child to the extent that there was a danger of the child suffering an injury.

On August 12, 1997, Thiessen sent a letter of appeal. Thiessen then filed a petition for judicial review. The parties filed a joint motion and the district court remanded the case on March 19, 1998.

On May 28, 1998, DHS adopted the proposed decision of August 4, 1997, as the final agency decision. On June 23, 1998, Thiessen filed a petition for judicial review. The district court heard arguments on the petition for judicial review on December 31, 1998. On March 17, 1999, the district court affirmed the final decision upholding a founded claim of child abuse. Thiessen appeals.

**I. Standard of Review.** The district court reviews an agency decision in an appellate capacity for errors of law. *Shine v. Iowa Dep't of Human Servs.*, 592 N.W.2d 684, 686 (Iowa 1999). Like the district court, our review is controlled by Iowa Code section 17A.19(8) (1995). We will reverse if the agency action is unreasonable, arbitrary or capricious. Iowa Code § 17A.19(8)(g). Agency factual findings are binding on appeal unless they are not supported by substantial evidence. *Dico, Inc. v. Iowa Employment Appeal Bd.*, 576 N.W.2d 352, 354 (Iowa 1998). While we may give weight to the agency's interpretation of the statutes it administers, we are not bound by the agency's legal conclusions. *Berger v. Iowa Fin. Auth.*, 593 N.W.2d 136, 138 (Iowa 1999).

**II. Denial of Critical Care**

**A. Statutory Background.** The agency found Thiessen committed child abuse through a denial of critical care under Iowa Code section 232.68(2)(d). A founded report of child abuse must be made by a preponderance of the evidence to be maintained on the child abuse registry. Iowa Code § 235A.18-19.

"Child abuse" means "the failure on the part of a person responsible for the care of a child to provide for the adequate food, shelter, clothing or other care necessary for the child's health and welfare." Iowa Code § 232.68(2)(d). Agency regulations define "denial of critical care" as the "failure to provide proper supervision of the child to such an extent that there is danger of the child suffering harm, injury or death, and which a reasonable and prudent person would exercise under similar facts and circumstances." Iowa Admin. Code r. 441-175.1 (1995). The regulations further define "proper supervision" as "supervision which a reasonable and prudent person would exercise under similar facts and circumstances, but in no event shall the person place a child in a situation that may endanger the child's life or heath, or cruelly or unduly confine the child. . . ." *Id.*

**B. Sufficiency of the Evidence.** Thiessen contends the agency acted in an unreasonable, arbitrary, and capricious manner, and abused its discretion by relying on insufficient evidence to support its finding he committed child abuse. We examine whether substantial evidence supports the agency's decision, not whether the evidence supports a different finding. *Sahu v. Iowa Bd. of Med. Exam'rs*, 537 N.W.2d 674, 676-77 (Iowa 1995). "Evidence is not substantial 'when a reasonable mind would find the evidence inadequate to reach' the conclusion reached by the agency." *Id.* at 677.

Thiessen failed to use the appropriate Mandt technique when he grabbed Tena's wrist and pulled her into the infirmary's control room, contrary to facility policy. As a result of Thiessen's actions Tena sustained a severe laceration on

the back of her head. Thiessen admitted it was not an emergency situation and other options were available to him. The evidence established Thiessen had been warned on a previous occasion he must use the Mandt technique. The previous warning, which occurred in 1995, was issued by his supervisor following staff concerns about his physical management of another child. After carefully reviewing the record we conclude substantial evidence supports the agency's findings. Therefore, we affirm the district court.

**C. Retrospective Applicability of Statutory Authority.** Thiessen contends the district court acted contrary to the child abuse registry statute in directing his name be placed on the central registry because Tena's injury was minor, isolated, and unlikely to reoccur.

In 1997, the Iowa Legislature enacted Iowa Code section 232.71D, with an effective date July 1, 1998. New section 232.71D(2) provides:

> If the alleged child abuse meets the definition of child abuse under section 232.68, subsection 2, paragraph "a" or "d", and the department determines the injury or risk of harm to the child was minor and isolated and is unlikely to reoccur, the names of the child and the alleged perpetrator of the child abuse and any other child abuse information shall not be placed in the central registry as a case of founded child abuse.

1997 Iowa Acts ch. 176, § 5(2).

Regardless of whether retrospective application is appropriate, it does not change the result of this case when the new statute is read in its entirety. Section 232.71D(3) provides:

> Except as otherwise provided in section 232.68, subsection 2, paragraph "d", regarding parents legitimately practicing religious beliefs, the names of the child and the alleged perpetrator and the report data and disposition data shall be placed in the central

> registry as a case of founded child abuse under any of the following circumstances:
> (i) The alleged abuse took place in any of the following licensed, registered, unregistered, or regulated facilities or services:
> (6) An institution controlled by the department and enumerated in section 218.1.

*Id.* at § 5(3). The alleged abuse took place in the Iowa Juvenile Home, which is one of the institutions controlled by DHS and enumerated in section 218.1. If we were to apply section 232.71D(2) retrospectively, we would also have to apply section 232.71D(3), which affords Thiessen no relief. We affirm the district court.

**AFFIRMED.**