

2015 WL 5969527 (Minn.App.) (Appellate Brief)
Court of Appeals of Minnesota.

Beth Ann BAIENGER, Appellant,

v.

MINNESOTA DEPARTMENT OF HEALTH, Respondent.

No. A15-0226.

June 11, 2015.

Respondent's Brief

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***1 LEGAL ISSUES**

I. Is the Commissioner of Health's determination that Appellant abused a Vulnerable Adult, in violation of the Minnesota Vulnerable Adults Act, supported by substantial evidence.

The District Court held: Yes

Most Apposite Authorities:

Minnesota Statutes Sections 626.557 and .5572

In re Excess Surplus Status of Blue Cross Blue Shield of Minn., 624 N.W.2d 264 (Minn. 2001)

Reserve Mining Co. v. Herbst, 256 N.W.2d 808 (Minn. 1977)

J.R.B. v. Dept. of Human Servs., 633 N.W. 2d 33 (Minn. Ct. App. 2001)

II. Does the Commissioner's Order contain errors of law?

The District Court held: No

Most Apposite Authorities:

In re Appeal of Jonnie Sue Staley, 730 N.W.2d 289 (Minn. Ct. App. 2007) *In re Expulsion of E.J. W. from Indp. School Dist. 500*, 632 N.W.2d 775 (Minn. Ct. App. 2001)

III. Is the Commissioner's Order Arbitrary and Capricious?

The District Court held: No

Most Apposite Authority:

In re Excess Surplus Status of Blue Cross Blue Shield of Minn., 624 N.W.2d 264 (Minn. 2001)

Ellis v. Minneapolis Comm 'n on Civil Rights, 295 N.W.2d 523 (Minn. 1980).

IV. Is the Commissioner's Order based upon unlawful process that violated due process?

The District Court held: No

Most Apposite Authorities:

*2 *In re Application of Christensen*, 417 N.W.2d 607 (Minn. 1987)

Hutchinson Technology v. Comm 'r of Revenue, 609 N.W.2d 1 (Minn. 2005)

Mathews v. Eldridge, 424 U.S. 319 (1976)

***3 STATEMENT OF THE CASE**

This is an appeal of a Hennepin County District Court Order affirming a final decision by the Commissioner of the Minnesota Department of Health¹ finding that Beth Ann Balenger (“Appellant”) abused a vulnerable adult (“VA”) in violation of the Vulnerable Adults Act (“Act” or “VAA”), [Minn. Stat. § § 626.557-.5572](#).

The Commissioner's decision was preceded by an investigation that found Appellant abused a VA, who was a client of Unity Health Care (“Unity”), and a resident of the Thomas Johnson Housing with Services establishment (“HWS”) by spraying the VA with water from a garden hose and then squirting shampoo on the VA as she sat in the front yard of the HWS. On March 1, 2012, the Department issued a Notice of Findings of Maltreatment and advised Appellant of her right to administrative reconsideration and hearing. See Tab 40, Ex. 2. That notice also advised Appellant how to challenge the finding. See *Id.* Appellant requested reconsideration and a hearing to challenge the finding of abuse. See Tabs 46 and 48.

The administrative fair hearing was held before Human Services Judge David Gassoway² on September 25 and 26, 2012. *See* Minn. Stat. § 256.045, subd. 3(b). The hearing was conducted in accordance with the Fair Hearing Statutes, *4 Minn. Stat. § 256.045-.0451. On January 2, 2013, HSJ Gassoway submitted proposed findings of fact, conclusions and a recommendation (“Report”) to the Commissioner, recommending that the Department’s finding of maltreatment be reversed. *See* Tab 26.³ The Office of Health Facility Complaints (“OHFC”), which -conducted the maltreatment investigation, and Appellant submitted exceptions to the Report. *See* Tabs 18, 19 and 21.

On December 23, 2013, the Commissioner issued a Proposed Final Order, adopting parts of HSJ Gassoway’s Report, making additional findings, and affirming the Department’s abuse determination. *See* Tab 16. Both parties submitted comments on the Proposed Modified Order, after which a Final Order was issued on February 14, 2014, affirming the Department’s maltreatment determination. *See* Tabs 9, 10, 11, 12, and 13. Appellant requested reconsideration of the Final Order (Tab 7), and both sides again submitted comments and argument. *See* Tabs 7 and 3. On April 24, 2014, the Commissioner issued a “Final, Final Order” upholding the finding that Appellant maltreated a vulnerable adult. *See* Tab 2. Thereafter, Appellant appealed the Commissioner’s Order⁴ to Hennepin County District Court pursuant to Minn. Stat. § 256.045, subd. 7 (2014). The district court affirmed the Commissioner’s Order. App. Add. 1-29⁵ Appellant now brings this appeal.

*5 STATEMENT OF FACTS

A. The Department’s Role Under The Vulnerable Adults Act.

The Act establishes certain requirements for reporting and investigating allegations of maltreatment of vulnerable adults. Maltreatment includes abuse, neglect, and **financial exploitation**. *See* Minn. Stat. § 626.5572, subs. 2, 9, and 17 (2014). Investigations of maltreatment allegations are handled by a “lead agency.” *See* Minn. Stat. § 626.5572, subd. 13. The Department is the “lead agency” under the Act for Department-licensed facilities and programs, including home care agencies, such as Unity, and HWS establishments, such as the Thomas Johnson HWS. *See id.*, subd. 13(a). When an individual, requests a hearing on a maltreatment finding, and has requested reconsideration, which is denied, the individual has a right to a hearing under Minn. Stat. § 256.045, the Fair Hearing Statute. *See* Minn. Stat. § 626.557, subd. 9d (b).

B. The Commissioner’s Finding Of Maltreatment.

The Commissioner’s Order, issued after the fair hearing, is based on the following facts:

1. The Vulnerable Adult.

The VA was a home care client of Unity Health Care (“Unity”). She was a 47-year-old woman with a history of **chronic obstructive pulmonary disease** (“COPD”), **pulmonary hypertension**, uncontrolled **diabetes**, and memory deficits due to a **traumatic brain injury**. *See* Tab 29, T. at 61⁶. She used a scooter or a wheelchair for mobility due to recent **leg fractures** and a susceptibility to falls, and used oxygen for assistance with *6 breathing due to her COPD. *See* Tab 40, Ex. 8. The VA testified at the fair hearing that Appellant had “doused” her with water from a garden hose and squirted shampoo on the VA from her lap to her hair while she was sitting on a scooter outside the Thomas Johnson HWS in Minneapolis where she lived. The VA also testified that she was moving back from Appellant as the event was occurring and that she was terrified by the incident. *See* App. Add 35, Finding No. 7. The VA testified that her oxygen tank emits cold air, which she referred to as “smoke.” The Commissioner found that “vapor (cold air) was emitted” from the VA’s oxygen tank at the hearing, and that the mist or cold air from the oxygen tank was clearly visible across the hearing room. *Id.*, Finding No. 12. When describing the incident during the hearing, the VA testified that Appellant was 6 to 10 feet away from her when Appellant started spraying her with water from

the hose (Tab 29, T. at 26), that Appellant squirted shampoo on the VA from her lap to her hair, and that Appellant then rubbed the shampoo on the VA's head, her shoulders and her leg. *Id.* at 28.

2. Appellant.

Appellant is the owner of Unity, a home care agency, and was employed as the Director of Operations at the Thomas Johnson HWS, the establishment where the VA lived when the incident occurred. *See* App. Add. 59, Finding No. 5. She testified that she has been involved in providing health care or running a home care agency for 20 years. *See* Tab 30, T. at 522-3. Appellant admitted that she sprayed the VA's cart with water from a garden hose, and that Appellant "kept saying [to the VA] move your cigarette" while the VA "was telling me to stop and I was telling her put her cigarette out, *7 cause that cart's on fire." *See id.* at 503. Appellant admits that when she sprayed the VA's cart, she got the VA's feet wet. App. Br. 43, n.1. Appellant testified that after she sprayed water at the VA's cart, she put lice shampoo on the VA's hair while the VA sat outside on her cart because she thought the VA had lice. Tab 30, T. at 538. Appellant admitted that she never confirmed that the VA had lice and that a nurse at the HSW establishment told her that she was overly concerned about lice. *See id.* at 553.

3. The Investigation and Finding of Abuse.

The Department received two reports about the incident: The VA asked Tracy Pouti, a Department surveyor who was conducting a licensing survey of Unity in October 2011, whether "Beth," the owner of Unity, could give her a shower outside. *See* App. Add. 64, Finding No. 20. OHFC also received a report from a concerned community member who was driving by the HWS when the incident occurred, and who reported an incident in which a person, who she assumed was a resident of a group home, was given a shower outside. *See* App. Add. 36-37, Finding No. 20. Both reporters described the incident as the VA being given a shower outside. *See id.*

Tracy Pouti, testified that she spoke with the VA on October 1, 2011, during the licensing survey, and the VA asked her if the owner of the facility could make her take a shower outside. The VA told Ms. Pouti that Appellant had "soaped her up" and given her a shower outside. *See* App. Add. 36 and 64, Finding No. 20. Ms. Pouti interviewed Appellant on October 3, 2011, who denied giving the VA a shower outside. Appellant told Ms. Pouti that she was out watering flowers and thought the VA's cart was on fire, so she tried to put out the fire and some of the water may have gotten on the VA's toes. *8 *See Id.* When Ms. Pouti told her she had gotten a different version of the event from the VA, Appellant told Ms. Pouti that the VA fabricates, and that "they all do." *See Id.*

The concerned community member called OHFC to report that she saw a resident at a group home being given a shower outside and Ms. Pouti responded to that call. *See* App. Add. 37, Finding No. 20. The community member told Ms. Pouti that a few days earlier she saw a person who she assumed was a resident at the group home, in a wheelchair outside and an aide described as an African American woman was holding a hose over the resident's head. *See id.* The community member told Ms. Pouti that she "thought the resident was upset because her arms were failing above her head in an attempt to protect herself. She also described the exchange as a heated argument, although she did not stop her car and could not hear what was being said." *See id.*

OHFC assigned Special Investigator Lisa Jacobsen, R.N., to conduct an investigation pursuant to the VAA. Ms. Jacobsen interviewed the VA, the VA's case manager, Appellant, the concerned community member, and several staff at the HWS establishment. *See* App. Add. 65-66, Finding Nos. 24 and 26. The VA described the incident to Ms. Jacobsen, saying that Appellant had hosed her down with water from a garden hose, getting the VA all wet, and then Appellant "turned her back for a minute and turned around and had a shampoo bottle in her hand and started putting shampoo all over [the VA] and rubbing it in her body, in her hair, in her clothes." Tab 30, T. at 144. As the VA described the incident to Ms. Jacobsen, she became agitated and said that she "couldn't believe that someone who was put in charge of people would do this." *See id.* *9 The VA reported that Appellant told her: "I guess this means you are going to take a shower, doesn't it?" *See* Tab 40, Ex. 1.

On November 9, 2011, Ms. Jacobsen interviewed the community member, who told Ms. Jacobsen that as she was driving by what she assumed was a group home, she saw a woman spraying water from a garden hose on another woman, who was in a wheelchair outside. The community member reported that the woman in the wheelchair was attempting to block the water and the hose. See Tab 9, Report, Finding No. 26. She described the person holding the hose over the VA's head as a heavy-set African American woman, and the woman in the wheelchair as an older Caucasian woman. She observed the VA putting up her hands as if to fight off the hose. Tab 38, Ex. 36, track 0358.⁷ The community member was so concerned about the incident that she turned her car around but by the time she drove past the house a few minutes later, neither woman was outside. See *id.* The community member observed soapy suds on the sidewalk and another aide pushing the VA's wheelchair up the ramp into the house. The community member said that she had worked in group homes in the past and knew this was not right. See *id.* When she returned, she called the police, who said they could not intervene because the event was over. See *id.*

***10** Ms. Jacobsen interviewed Appellant, who said that she was out watering flowers when she saw that the VA, who had an oxygen tank on her scooter, had a lit cigarette that she was holding over a bag on her scooter and it appeared that smoke was coming from the bag. Appellant told Ms. Jacobsen that she was concerned that the bag hanging on the handle of the VA's scooter was smoking, so she sprayed the bag with water from the garden hose. Appellant said that she also wet the VA's toes and the wheels of the scooter. See App. Add. 68, Finding No. 28. Appellant testified that the VA screamed at her to stop spraying water because the cart was not on fire. See *id.*, App. Add. 48, and Tab 30, T. at 548.

Appellant initially told Ms. Jacobsen that she did not have soap or detergent with her in the yard, but after Ms. Jacobsen told her that someone had observed soap suds on the ground, Appellant stated that she went into the house and retrieved a another resident's bottle of lice shampoo, because the VA needed a lice check. See Tab 9, Final Order, Finding No. 28. There was no record of a doctor's order to use lice shampoo on the VA, and no record that the VA had lice.⁸ See *id.*, Tab 29, T. at 151-153. The LPN who worked for Unity told Appellant that "it wasn't lice." See Tab 30, T. at 544.

The VA's case manager testified that he spoke with both the VA and Appellant about the incident. He testified that the VA told him that Appellant poured shampoo on ***11** the VA's hair and hosed her down while she was sitting outside; that Appellant then told a staff member to take her in and give her a shower; and that the VA was crying and protesting, but that staff stripped her clothes off and gave her a shower. See Tab 29, T. at 83. He also testified the VA's description of the incident "pretty much stayed the same" and that to his knowledge the VA had not made false accusations against caregivers. See *id.* at 90. He testified that the VA would lie about her own behavior, such as denying that she smoked while using oxygen or drinking sugary drinks, but he was not aware of her lying about other people, or lying about caregivers. See *id.* T. at 72 and 76. He also testified that he asked Appellant about the incident but she did not mention that she thought she saw smoke or that she put shampoo on the VA; Appellant only told him that "she was watering in the yard and might have got [the VA's] foot wet." See *id.* at 92. He described Appellant's tone when describing the incident as "not a serious tone" and "dismissive." See *id.* at 93. He denied that Appellant told him that she saw smoke coming out of the VA's cart. See *id.* at 92.

One of the aides who worked for Appellant testified that she did not see the incident, but that the VA came in and asked her for a shower and already had shampoo in her hair. T. at 254. The aide testified that she did not recall using lice shampoo on the VA (T. at 256) and that she did not check the VA for lice. T. at 262. App. Add. 39, Finding No. 47.

The Commissioner determined, after the fair hearing, that on the morning of September 27, 2011, an employee of Unity told the VA that she needed to take a shower. The VA declined to take a shower, stating that she liked to take her showers in the ***12** evening, not during the day. See Tab 29, T. at 17, and App. Add. 60, Finding No. 7. The VA then went outside on her scooter and smoked a cigarette. *Id.* at 18. The VA had a portable oxygen tank on her scooter, but testified that the oxygen was turned off during the incident. See *id.*, and App. Add. 35. Appellant was in the yard, watering flowers with the garden hose, and began "flickering" water in the direction of the VA. The VA asked Appellant if she was going to hose her down, and Appellant

said she “wouldn't do that” (T. at 25) but Appellant then moved closer to the VA (T. at 26) and sprayed water on the VA as the VA told Appellant to “stop it.” *See id.* at 27 and App. Add. 60, and Finding No. 7. Appellant began “flipping” the garden hose at the VA in an “X” pattern (T. at 59), and then held the hose out toward the VA, getting her “totally wet.” *See* App. Add. 35, Finding No. 8. Appellant briefly turned her back to the VA as the VA was trying to get her hair and water out of her eyes, and when Appellant turned back to the VA, she squirted the VA's shampoo on the VA. *See id.* and T. at 27. Appellant then rubbed shampoo on the VA's shoulder, leg, and head and said “now you're going to take a shower.” *See* App. Add. 60, Finding No. 7. The Commissioner determined that Appellant placed the VA's own shampoo on the VA. *See* App. Add. 39, Finding No. 51, and T. at 27. The VA stated that she was moving back from Appellant, and was “terrified” during the incident. *See* App. Add. 35, Finding No. 7. The VA testified that she was “scared” and “horrified” because she did not know what Appellant would do next, that she was crying, and then was taken into the house by another staff member and given a shower. *See* Tab 29, T. at 31, and App. Add. 60, Finding No. 7. The VA stated that she was crying during the shower and that Appellant was outside of the bathroom *13 door during the shower and pounded on the bathroom door and yelled at the VA to stop crying. *See id.*, and Tab 30, T. at 145. The VA became distraught and started crying when she testified at the hearing, so a brief recess was taken. *See* App. Add. 34, Finding No. 7, and T. at 29 and 86-87.

The Commissioner determined that Appellant placed the VA's own shampoo on the VA rather than lice shampoo. *See* App. Add. 39, Finding No. 51. That finding was based on the VA's consistent reports to the investigators and at the hearing that Appellant squirted the VA's own shampoo on her hair, the fact that Appellant did not mention lice shampoo to Ms. Pouti when Ms. Pouti interviewed her, and because the VA did not have lice and did not have a physician's order to be treated for lice. The Commissioner noted that Appellant first mentioned lice shampoo when Ms. Jacobsen told her someone saw suds on the ground. *See id.* The Commissioner reasoned, if Appellant had applied lice shampoo to the VA so it could be combed out outside, Appellant would have made sure it was combed out as directed, but that did not happen. *See id.* Finally, the Commissioner found it “highly unlikely” that someone with 20 years of experience in home care would not know that home care agencies are “prohibited from using over-the-counter treatments on residents without a physician's order.” *See id.* Appellant appealed the Commissioner's Order to the district court, which upheld the Commissioner's Order. *See* App. Add. 1-29.

SCOPE OF REVIEW

The administrative hearing held below and judicial review of the findings of maltreatment by the Commissioner are governed by the Fair Hearing Statute, *14 *Minn. Stat. § 256.045*. A person who is aggrieved by a decision of the Commissioner may appeal to the district court of the county where the maltreatment occurred. *See id.*, subd. 7. The district court order may be appealed as in other civil cases. *See id.*, subd. 9.

An appeal under *Minn. Stat. § 256.045* follows the scope of review in the Minnesota Administrative Procedure Act, *Minn. Stat. § 14.69* (2012). *See Zahler v. Minn. Dep't of Human Serv's*, 624 N.W.2d 297, 301 (Minn. Ct. App. 2001); *Brunner v. State*, 285 N.W.2d 74, 75 (Minn. 1979). Under this scope of review, an agency's final decision can be overturned upon a showing that the decision violated the constitution, was in excess of the statutory authority of the agency, was made upon unlawful procedure, is affected by an error of law, is unsupported by substantial evidence in view of the entire record as submitted, or is arbitrary or capricious. *See Minn. Stat. § 14.69*. The party seeking review of an administrative decision has the burden of proving that the conclusions of the agency were improper. *See Markwardt v. State Water Resources Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

Deference should be given to the Commissioner's expertise in administering and enforcing the VAA. As the Minnesota Supreme Court stated in *In the Matter of the Excess Surplus Status of Blue Cross and Blue Shield of Minnesota (“Blue Cross”)*, 624 N.W.2d 264, 278 (Minn. 2001):

When reviewing the agency decisions we “adhere to the fundamental concept that decisions of administrative agencies enjoy a presumption of correctness, and deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience.” The agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority and judicial deference, rooted in the separation

of *15 powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing. We defer to the agency's conclusions regarding conflicts in testimony, the weight given to expert testimony and the inferences to be drawn from testimony.

(footnote and citations omitted.) Moreover, the agency's conclusions “are not arbitrary and capricious so long as a ‘rational connection between the facts found and the choice made’ has been articulated.” *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). The reviewing court is required to “refrain from substituting its judgment concerning inferences to be drawn from the evidence for that of the agency.” *Ellis v. Minneapolis Commission on Civil Rights*, 295 N.W.2d 523, 525 (Minn. 1980). “Unless there is manifest injustice, the limitation applies even though it may appear that contrary inferences would be better supported or that the reviewing court would be inclined to reach a different result or at the trier of fact.” *Id.*

The constitutionality of a statute is a question of law which this Court reviews de novo. See *Sweet v. Commissioner of Human Services*, 702 N.W.2d 314, 319 (Minn. Ct. App. 2005). Minnesota statutes are presumed constitutional, and the power to declare the statutes unconstitutional should be exercised “with extreme caution” and only when absolutely necessary. See *Associated Builders and Contractors v. Ventura*, 610 N.W.2d 293, 298-99 (Minn. 2000); *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). A party challenging the constitutionality of a statute “carries the heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional.” See *Sweet*, 702 N.W.2d at 319 (quoting *Unity Church of St. Paul v. State*, 694 N.W.2d 585, 591 (Minn. Ct. App. 2005)); see also *Haggerty*, 448 N.W.2d at 364.

*16 In considering a constitutional challenge to a law, a court must interpret the law to preserve its constitutionality, wherever possible. *Hutchinson Technology, Inc. v. Comm’r of Revenue*, 698 N.W.2d 1, 18 (Minn. 2005). It is a well-settled rule that if a statute can be made constitutionally definite by a reasonable construction, it must be given that construction. See *Humenansky v. Minn. Bd. of Medical Examiners*, 525 N.W.2d 559, 564 (Minn. Ct. App. 1994).

This Court should apply a two-step analysis to Appellant's alleged procedural due process violations to determine whether the Commissioner violated Appellant's procedural due process rights. See *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). First, the Court must identify whether the Commissioner has deprived Appellant of a protected life, liberty, or property interest. *Id.*; *Carrillo v. Fabian*, 701 N.W.2d 763, 768 (Minn. 2005). If the Commissioner's action does not deprive an individual of such an interest, then no process is due. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972). The second step in the procedural due process analysis is to determine whether the process afforded to Appellant was constitutionally sufficient. To assess the adequacy of administrative procedures, the Supreme Court established a three-factor balancing test to determine if a law violates due process: 1) the private interest that will be affected; 2) the risk of an erroneous deprivation of such interest through the procedures used; and 3) the Government's interest, including the additional fiscal and administrative burdens. See *Sweet*, 702 N.W.2d 319, which adopted the standard set forth in *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976).

*17 ARGUMENT

The Commissioner's decision is supported by substantial evidence, was made using lawful process, is not affected by errors of law, and is not arbitrary or capricious. Appellant challenges the decision on all of those grounds. As described below, Appellant's arguments fail.

I. The Commissioner's Order Is Supported By Substantial Evidence.

Substantial evidence in the record supports the Commissioner's Order, finding that Appellant abused the VA on September 27, 2011, when she sprayed water on the VA while the VA was sitting on a scooter outside of the HSW, and then squirted shampoo on the VA's head and body, forcing the VA to take a shower.

A. Substantial Evidence In The Record Supports The Commissioner's Conclusion That Appellant Abused The VA.

Minnesota courts have defined “substantial evidence” as follows:

1. Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion;
2. More than a scintilla of evidence;
3. More than some evidence;
4. More than any evidence; and
5. The evidence based in its entirety.

Cable Comm. Bd. v. Nor-West Cable Commc'ns. P'ship, 356 N.W.2d 658, 668 (Minn. 1984). If the ruling by the Commissioner is “supported by substantial evidence, it must be affirmed.” See *Blue Cross*, 624 N.W.2d at 279. As described below, substantial evidence in the record supports the Commissioner's decision.

Three individuals observed or participated in the incident: Appellant, the VA and the concerned community member who was driving by on the street when the incident *18 occurred. The VA reported that Appellant doused her with water from a garden hose, got the VA totally wet and applied the VA's own shampoo to the VA, over her protests, while the VA was sitting on her scooter outside the FIWS establishment. Tab 29, T. at 18-20. The VA testified that she was attempting to back away from Appellant during the incident (T. at 26), told Appellant to stop spraying her and started crying. The VA testified that she was “scared and horrified” because she did not know what Appellant would do next. See *Id.* at 24-31, and Tab 9, Report and Final Order, Finding No. 7.

Appellant admitted that she sprayed water on the VA's scooter because she thought the scooter was “going to catch on fire,” and she may have wet part of the VA's body. See Tab 30, T. at 503. Appellant admits that the VA screamed at her to “stop spraying” and that the scooter was not on fire. See *id.* at 548. Appellant also admits that she put shampoo on the VA's hair outside, but claims it was lice shampoo left over from another client. See App. Add. 39, Final Order, Finding No. 51, and Tab 30, T. at 535-538. The community member reported that she saw someone who generally fit Appellant's description holding a hose over the head of a woman sitting in a wheelchair, that the woman in the wheelchair “putting up her hands as if to fight off the hose.” See Tab 38, Ex. 36, and App. Add. 11, Conclusion No. 18.

The Commissioner's Order states: “My decision stems from two key facts: 1) a community member corroborated the vulnerable adult's allegation that the Appellant deliberately doused her with [water from] the garden hose while she was seated on her scooter outside, in front of the residence, in full view of the street; and 2) by her own admission, the Appellant put shampoo on the VA's head also while they were outside. *19 Appellant thus treated the VA in a manner that a reasonable person would consider to be disparaging, derogatory, humiliating, harassing, or threatening. Therefore Appellant's conduct constituted abuse as defined under the Vulnerable Adults Act.” See App. Add. 48.

B. Appellant's Conduct Is Abuse Under The VAA.

Abuse is defined in the VAA, among other things, as:

(b) Conduct which is not an accident or therapeutic conduct as defined in this section, which produces or could reasonably be expected to produce physical pain or injury or emotional distress including, but not limited to, the following:

- (1) hitting, slapping, kicking, pinching, biting, or corporal punishment of a vulnerable adult;

(2) use of repeated or malicious oral, written, or gestured language toward a vulnerable adult or *the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening*;

[Minn. Stat. § 626.5572, subd. 2\(b\)](#) (emphasis added).

The decision-maker found that the Department proved by a preponderance of evidence that Appellant's treatment of a VA was abuse under the VAA because it was treatment that a "reasonable person" would consider to be "disparaging, derogatory, humiliating, harassing or threatening," as defined at [Minn. Stat § 626.5572, subd. 2\(b\)\(2\)](#). App. Add. 49. Appellant suggests the determining factor in deciding whether abuse occurred was Appellant's subjective perception and motivation. App. Br. 37. This Court, however, has rejected the subjective standard, noting the legislative intent behind the VAA is "to protect adults who, because of physical or [mental disability](#) or depending *20 on institutional services, are particularly vulnerable to maltreatment [and] to assist in providing safe environments for vulnerable adults." See *In Re Kleven*, 736 N.W. 2d 707, 710 (Minn. Ct. App. 2007) (citing [Minn. Stat. § 626.557, subd. 1](#)). The appellant in *Kleven* argued that because the vulnerable adults could not understand the foul language directed against them, the appellant's conduct did not constitute abuse. See *id.* The Court in *Kleven* noted "that a subjective interpretation of abuse "is an affront to the purpose of the act and leads to absurd results, which we presume the legislature did not intend... Given the deference owed to the department's interpretation, the statute's remedial nature, and the potentially absurd results that the relator's interpretation could present, we conclude the department did not err in its interpretation of the statute." *Id.* at 711.

The Commissioner rejected Appellant's arguments that the VA's description of the incident must be rejected and that the community member could not corroborate the VA's account because she did not know Appellant's motivation. The decision-maker noted: the final decision does not depend on the VA's own credibility (App. Add. 32); the VA exhibited indicia of credibility (App. Add. 56); Appellant admitted placing shampoo in the VA's hair while they were outside (App. Add. 48); the community member corroborated the VA's description of the hosing incident. See *id.* The Commissioner addressed Appellant's argument about inconsistencies in the community member's description as follows:

There is no reason for an unrelated community member to make up such a report. Her statement is consistent with the VA's complaint that Appellant hosed her down... I find that the inconsistencies not to be contradictory, *21 but are readily explained by the fact that the community member was driving by in a car and only saw the incident for a brief period of time. Thus, if Appellant had a legitimate reason to spray the VA's scooter, she went too far by spraying her to the degree that a passerby identified her actions as giving a fully dressed VA a shower in the yard.

App. Add. 50-51.

The Commissioner's Order demonstrates that the decision-maker carefully reviewed the record and clearly articulated the reason for the decision, including the reason for rejecting the credibility determinations of the HSJ.⁹ Specifically, the HSJ failed to accord any weight to the report of the concerned community member, which the Commissioner found to be "highly significant information," because the reporter was a neutral third party¹⁰ who saw the incident as she was driving by on the street when the incident occurred and was concerned about the behavior she witnessed. See *id.* The decision-maker rejected the HSJ's recommendation in part because the HSJ "failed to examine significant indicia of credibility." See App. Add. 23-4. The HSJ also failed to correctly apply the therapeutic conduct exception to Appellant's use of shampoo. See App. Add. 41-42, Conclusion No. 15.

In administrative proceedings, the agency decision-maker is not required to defer to any party in the proceeding, or to the findings, conclusions or recommendation of the *22 hearing officer. *In Re Staley*, 730 N.W. 2d 289, 296 (Minn. Ct. App. 2007) (citing *Blue Cross*, 624 N.W.2d at 278).

The Commissioner found Appellant's alleged reason for putting shampoo on the VA to be unpersuasive for a number of reasons: 1) there was no evidence that the VA had lice or a physician's order for lice shampoo, which would be required by the Home Care rules before applying lice shampoo to the VA; 2) the VA consistently stated that Appellant used the VA's own shampoo; 3) Appellant did not introduce evidence at the hearing that she had purchased lice shampoo; 4) Appellant did not mention lice shampoo to Ms. Pouti, and initially denied having any soap or detergent in the yard when questioned by Ms. Jacobsen; 5) Appellant said that she placed lice shampoo on the VA's head while she was outside because she wanted the VA's hair combed out, but there is no evidence that happened and the person who later washed the shampoo out of the VA's hair in the house did not comb out the VA's hair to check for head lice because she did not recall using lice shampoo and, 6) it is highly unlikely that a person operating a Class F home care agency would not know that she could not put lice shampoo on the VA without a physician's order.¹¹ See App. Add. 39, Finding No. 51.

*23 Both the Commissioner and the district court properly found that there is substantial evidence in the record to support the finding of maltreatment. The Commissioner weighed the evidence and determined that the finding of abuse was supported by the following: 1) the Appellant admitted that she sprayed water on the VA's cart, and by extension the VA (App. Add. 48) and then put shampoo on the VA while the VA sat outside on her scooter (App. Add. 52); 2) there was no evidence that the VA had lice (App. Add. 40); and 3) "accepting for the purpose of argument that the Appellant's actions were compelled by genuine panic to put out a fire that turned out to be nonexistent" Appellant's version of the facts, that "she only wet the VA's toes incidentally" is contrary to the report by the uninvolved community witness. App. Add. 48-9. The Commissioner rejected Appellant's argument that the investigator "admitted that the weight of the evidence" favored the Appellant, noting that the investigator properly relied on the community member's description of the evidence, and that the investigator properly evaluated the conflicting evidence. App. Add. 55.

The district court agreed with the Commissioner, noting "[t]he portions of the transcript cited by Appellant do not demonstrate inaccuracies in the Commissioner's findings as Appellant alleges, but instead point to one side of particular conflicts in the factual record." App. Add. 25-6. The court also noted "Appellant's numerous challenges to [the VA's] credibility and identifications of [the VA's] potential motives to fabricate were not definitive" and, citing *Staley*, 730 N.W.2d at 730 and *24 *Blue Cross*, 624 N.W.2d at 278, deferred "to the conclusions reached by the Commissioner in resolving these conflicting indicia of credibility." App. Add. 26.

In evaluating the very different descriptions of the incident provided by the VA and Appellant, the decision-maker reasonably relied on the report from a third party, the concerned community member, who observed one woman hosing down another woman while she was driving by on the street, and who noted the expressions on the faces of the women indicated they were angry or fighting. See App. Add. 41, Conclusion No. 15. The community member first called the police to report the incident, but was told they could not do anything, since the incident had ended. See *id.* The community member was so concerned about the incident that she called the Department to report her observations several days later. See *id.* Clearly the report from a community member who was troubled about the incident is significant evidence and the type of evidence that a reasonable person would rely on in his or her normal affairs.¹²

The Commissioner determined that there were multiple indicia of reliability on the part of the VA, including: despite cognitive impairments due to a [traumatic brain injury](#), the VA became so distressed during the hearing when describing the incident that she started to cry (Tab 29, and T. at 29 and 87); the VA spoke up right away when she spoke with Ms. Pouti; and the VA recalled and recounted the same description of the event over time, including to Ms. Jacobsen, to her case manager and at the hearing. App. Add. 56. *25 It is appropriate to defer to the Commissioner on the VA's credibility because the Commissioner has "medical and scientific expertise in matters involving the health care of vulnerable adults and the court will defer to that expertise." See *J.R.B. v. Dep't of Human Servs.*, 633 N.W.2d 33, 38 (Minn. Ct. App. 2001).

The record shows that the VA had refused to take a shower shortly before the hosing incident, saying that she wanted to take the shower at night, and that she went outside to smoke a cigarette. She testified that Appellant “sprayed me down with the hose and then she put shampoo on me and said now you're going to take a shower.” Tab 29, T. at 18. Appellant claims that she thought she saw smoke near the VA's cart, so she sprayed water at the cart, and in the process may have wet parts of the VA's body. Tab 30, T. at 503. Appellant testified that the VA “started screaming to stop spraying that it wasn't on fire.” *See id.* at 548. This is not a “he said/she said” situation as argued by Appellant App. Br. at 37. Rather, Appellant admitted the basic facts, but argues that her actions were justified by her motivation: to put out a suspected fire and to treat the VA for lice. Those arguments fail because 1) there was no evidence that the cart was on fire and the VA told Appellant that the cart was not on fire (App. Add. 48); 2), the record does not show that the VA had lice (App. Add. 40, Conclusion No. 14); and 3) the community member corroborated the VA's description of the event. App. Add. 43, Conclusion No. 18.

***26 II. The Commissioner's Order is Not Arbitrary And Capricious.**

A. The Commissioner's Order Is Based Upon The Record.

The Commissioner's Order articulates a clear and rational connection between the facts found and the choices made in issuing that order. In compliance with the standards set forth by the Minnesota Supreme Court, the Commissioner explained in detail the basis for the final determination, including the reasons that the Commissioner rejected the HSJ's recommendation. *See Blue Cross*, 624 N.W.2d at 278. Specifically, the Commissioner stated that the final decision stems from two key facts: the community member corroborated the VA's allegation that Appellant deliberately doused the VA with water while the VA was sitting outside in full view of the street, and the Appellant admitted that she put shampoo on the VA's head while they were outside. App. ADD 48. The Commissioner found this is conduct that a reasonable person would find to be disparaging, derogatory, humiliating, harassing, or threatening. *See id.* The VA testified at the fair hearing that she was terrified by Appellant's action. App. Add. 35, Finding No. 7. Appellant also admitted that she kept spraying the VA and her cart after the VA had “hollered” at her to stop and after the VA had moved the cigarette, which supposedly was the reason Appellant was spraying the VA's cart. Tab 30, T. at 572.

The Commissioner determined that the “CEP Report by the uninvolved community witness, a neutral third party who happened to be driving by on the street” was a “critical piece of evidence.”¹³ App. Add. 49. The Commissioner specifically notes *27 that the community member reported seeing the VA in the yard on her scooter and “an aide” “trying to wet the resident's hair down with the water hose.” *See id.* The community member reported that when she drove back she saw suds on the sidewalk. Tab 40, Ex. 36. That is consistent with the VA's description to Ms. Pouti that Appellant “soaped her up” and gave her “a shower outside.” Add. 36. The Commissioner found that “[i]t is not reasonable to conclude that the Appellant, an experienced caregiver and facility manager, would not know that she cannot treat a resident with lice shampoo without a physician's order. Furthermore, even if Appellant's concerns were warranted, surprising VA by applying shampoo outside would be humiliating.” App. Add. 52. Clearly that is the type of reasoning that represents the Commissioner's judgment rather than his will. The decision of an administrative agency is not arbitrary or capricious if the agency reaches a reasoned decision that rejects one point of view. *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. Ct. App. 2001).

B. Appellant's Claimed Defenses Are Not Supported By The Record.

Appellant incorrectly argues that the final decision-maker 1) failed to consider Appellant's defenses and that 2) the Department investigators “authored misleading and false public reports” which were relied on by the Commissioner. App. Br. 41. Neither of those arguments have any merit. The Commissioner's Order clearly shows that the Commissioner carefully considered Appellant's defenses, such as the “unrefuted fact” (sic) that the VA said that her oxygen tank was “smoking.” App.'s Br. 44. The final decision-maker rejected that defense, noting “the VA's oxygen tank clearly emitted cool vapor rather than smoke.” App. Add. 53. The district court, noting that Appellant *28 “places particular emphasis” on that portion of the interview, found

that “listening to the quoted portion in context makes clear that [the VA] believed Appellant was using the oxygen tank as an excuse to douse [the VA] with the hose.” App. Add. 27.

Appellant alleges without support that Department employees authored “misleading and false public records which were relied on by the Commissioner.” App. Br. 41. Appellant made a similar argument below, and the district court noted that Appellant failed to identify the false statements in public records, and could have challenged alleged false statements in the hearing process. App. Add. 10. Appellant argues that “MDH staff also falsely indicate *in their* notes that Balenger reported to other staff that she had put out a fire.” (emphasis added) App. Br. 44. Those notes, however, are not public records. The public records show that both investigators included in their descriptions of the interview with the RN at the home care agency, that she was told by Appellant that Appellant “thought” the scooter was on fire. See Tab 38, Ex. 31 and Tab 40, Ex. 1. The “notes” referred to in Appellant’s Brief (App. Br. 44) are simply that: notes. They are not public documents under the Minnesota Government Data Practices Act and are not the basis for the Commissioner’s Order.¹⁴

***29** The VAA only requires a summary of the findings to be in the Public Report. [Minn. Stat. § 626.557, subd. 12b\(b\)\(1\)](#). The Public VAA Report issued by the Department includes Appellant’s description of the incident. See Tab 40, Ex. 1. Appellant disagrees with the conclusion of the Public VAA report, but that report contains the data required by the VAA, including the nature of the alleged maltreatment and the summary of the investigator’s findings. See [Minn. Stat. § 626.557, subd. 12b\(b\)](#).

Appellant also argues that the VA has “fabricated” in the past about whether she smokes while using oxygen. (App. Br. 42), but the Commissioner did take that information into consideration and noted that the case manager was not aware of the VA fabricating stories about other people, and the VA’s doctor was not aware of the VA making false accusations. App. Add. 37.

While the parties disagree over which description of the incident is more accurate and which witness is more credible, it is the type of dispute that arises in contested proceedings and is not a false statement in a public record, nor was it the result of an “unlawful procedure” as argued by Appellant.

Appellant also suggests that the Commissioner’s Order eliminates “exculpatory evidence” from the record. App.’s Br. 44. As noted by the district court, Appellant failed to identify what exculpatory evidence was withheld or eliminated from the record. App. Add. 10. The decision-maker appropriately rejected certain “findings” recommended by the HSJ about what was not included in the Public VAA report. App. Add. 68, Proposed Finding Nos. 31-32. The decision-maker also rejected findings based on speculation as to what Ms. Jacobsen would have concluded if she had found different ***30** facts. See *id.*, Proposed Finding Nos. 33-34. Clearly those “findings” were appropriately rejected because the Commissioner found that Appellant spraying the scooter was a pretext to force the VA to take a shower against her will. App. Add. 53.

Appellant incorrectly argues that this was a “he said/she said” situation and thus should have been inconclusive rather than substantiated as maltreatment. App.’s Br. 43. That is incorrect. The community member clearly corroborated the VA’s description of the incident: that Appellant hosed down the VA outside, forcing a shower on the VA against her will. As is discussed below, the information of that community member was properly received into evidence and considered by the Commissioner.

III. The Commissioner Followed Lawful Procedure

A. Hearsay Is Allowable In Fair Hearings.

The Fair Hearing Law provides: “[t]he appeals referee shall accept all evidence, except evidence privileged by law, that is commonly accepted by reasonable people in the conduct of their affairs as having probative value on the issues to be addressed at the hearing.” See [Minn. Stat. § 256.0451, subd. 19](#). The report from the concerned community member, which corroborated the description of the incident reported by the VA, is clearly admissible under the Fair Hearing Law. Appellant mistakenly argues that the Commissioner “heavily relied, if not solely, on the community’s member’s” report, which it characterizes as

hearsay that “is not the type of hearsay anticipated by the administrative rules.” App’s. Br. 36. That argument fails to recognize that the Fair Hearing Law is a special law that allows hearsay. This Court has held:

*31 The general rule governing the use of hearsay in administrative proceedings is that “in the absence of a special statute, an administrative agency cannot, at least over objection, rest its findings of fact solely upon hearsay evidence that is inadmissible in judicial proceeding.”

In the Matter of Expulsion of E.J.W. from Indep. School Dist. 500, 632 N.W.2d 775, 782 (Minn. Ct. App. 2001) (quoting *State ex rel. Indep. School Dist. No. 276 v. Dept. of Ed.*, 256 N.W.2d 619, 627 (Minn. 1977)). The community member’s statement is the type of information that a reasonable person would rely on in conducting his or her affairs as having probative value, and thus was properly relied on by the Commissioner.

Further, the Commissioner’s decision is based not solely on the report of the concerned community member, but upon the admissions of Appellant that she sprayed water at the VA’s cart and may have gotten the VA’s foot wet and that Appellant put shampoo on the VA while she sat outside. Finally, the testimony of the VA was not hearsay, and should not be disregarded as suggested by Appellant. The Commissioner found that the VA’s description and the community member’s description of the incident are “generally consistent” and the community member’s statement supports the VA’s statement that Appellant gave her a shower out in the yard. App. Add. 43.

B. Appellant’s Actions Were Not Therapeutic Conduct.

The definition of abuse under the VAA excludes actions that are not accidents or therapeutic conduct. *See* Minn. Stat. § 626.5572, subd. 2(b). Appellant argues that she made a “therapeutic mistake” and that “Minnesota law provides that mistakes of judgment, accidents, and even improper therapeutic treatment do not constitute maltreatment or abuse. Minn. Stat. § 626.5572, subd. 2(b).” App. Br. 29-30. That is a *32 misunderstanding of the law and an incorrect description of the Act.¹⁵ The definition of “therapeutic conduct” for purposes of the VAA states as follows:

...the provision of program services, health care, or other personal care services *done in good faith in the interest of the vulnerable adult* by: (1) an individual, facility, employee or personal providing services in a facility under the rights, privileges and responsibilities conferred by state license, certification, or registration; or (2) a caregiver.

Minn. Stat. § 626.5572, subd. 20 (emphasis added).

To qualify for the therapeutic conduct exception, Appellant must have acted: 1) in good faith and 2) in the interests of the VA. The Commissioner found that [i]t was not in the interest of the VA to have her hair shampooed with lice shampoo outside the facility when she did not have lice and there was no doctor’s order for lice shampoo to be used on the VA.” App. Add. 53. The Commissioner also found that “spraying the scooter and the VA was a pretext to force the VA to take a shower against her will.” *Id.* That finding is supported by the evidence that both the VA and Appellant testified that the VA screamed at Appellant to stop spraying water and that her scooter was not on fire, but the Appellant kept spraying water. *See* Tabs 29 and 30, T. at 27 and 572. Appellant’s argument that she panicked is contradicted by the VA’s testimony that Appellant started flipping water from the garden hose towards the VA, that the VA and Appellant engaged in a conversation before Appellant sprayed the cart, and that Appellant put the VA’s on *33 the VA after hosing her down with a garden hose. *See* Tab 29, T. at 24-27. Appellant would not have had VA’s shampoo outside had she not planned to hose down the VA and apply shampoo to the VA to make her take a shower.

Finally, Appellant testified that she applied the lice shampoo to the VA so it could be “combed out outside,” and any mites “would fall of outside.” *See* Tab 30, T. at 551. As the Commissioner found, even assuming that Appellant did not want to expose other residents to lice, that fact would not establish therapeutic conduct because Appellant testified that she was acting in the interest of others, not in the interest of the VA. App. Add. 42, Conclusion No. 15.

The district court properly found that the Commissioner's Order regarding the parties' conduct “rests upon a factual determination rather than an interpretation of” the VAA, and thus the court deferred to the factual determination because it is supported by substantial evidence. App. Add. 16. The district court, citing *In re Cities of Annandale and Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 514-17; *Blue Cross*, 624 N.W.2d at 278; and *J.R.B.*, 633 N.W.2d at 38 (Minn. 2007), also properly found that the Commissioner reached a legal conclusion that even if Appellant's version of the facts is accurate, Appellant is not entitled to claim therapeutic conduct because her conduct did not comply with the home care rules. App. Add. 16. The district court found that the Commissioner's construction and application of the VAA is entitled to deference from the court because the maltreatment decision “implicates the home care regulations promulgated by the Department.” App. Add. 17. This Court has held that it is appropriate to consider the rules and standards applicable to a health care setting in ***34** determining whether a given action is therapeutic conduct for purposes of determining whether maltreatment occurred. See *J.R.B.*, 633 N.W.2d at 38.

In addressing Appellant's argument about lice shampoo, the Commissioner explained: “It is not reasonable to conclude that the Appellant, an experienced caregiver and facility manager, would not know that she cannot treat a resident with lice shampoo without a physician's order. Furthermore, even if Appellant's concerns were warranted, surprising VA by applying shampoo outside would be humiliating.” App. Add. 52. That point is made abundantly clear in the Final Final Order, which clarifies the therapeutic conduct issue, by stating that “[a]ssuming for the purpose of argument that the Appellant used lice shampoo, Appellant's use of lice shampoo on the VA for a condition that did not exist would not be therapeutic conduct as defined by Minn. Stat. § 626.5572, subd. 20.” (Emphasis added.) App. Add. 30.

Appellant's treatment of the VA was not therapeutic conduct as suggested by Appellant, but rather Appellant bullying and abusing the VA to force the VA to take a shower by hosing her down outside, in the view of passersby, and squirting shampoo on the VA. Such actions are clearly the type of actions that a reasonable person would find to be humiliating, harassing and threatening. Indeed, the community member who saw the incident was so concerned about the incident that she called the police and the Department to report her concerns, and the VA began crying when she testified about the incident a year later, saying she was terrified of what Appellant might do next.

***35 C. Appellant's Actions Were Egregious and Maltreatment Under The VAA.**

Maltreatment under the VAA includes abuse that is “use of repeated or malicious oral, written, or gestured language towards a vulnerable adult or the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, harassing, or threatening.” Minn. Stat. § 626.5572, subd. 2(b)(2) (emphasis added). Appellant mistakenly relies on *In Re Appeal of Staley*, 730 N.W.2d 289 (Minn. App. 2007), to argue that her conduct was not egregious and thus cannot be considered to be maltreatment. App's Br. 35-6. As noted by the District Court, that “argument relies upon a misreading and misapplication of holding in *Staley*.” App. Add. 17.

In *Staley*, the alleged abuse involved a single oral statement which was not malicious, to a patient with dementia who did not recall the statement. The court in that case found that an oral statement was not treatment, even though it was no doubt “disparaging, derogatory, humiliating [or] harassing.” *Staley*, 730 N.W.2d at 298. The court went on to say that “treatment” does not include an “isolated non-malicious statement” for purposes of Minn. Stat. § 626.557, subd. 2(b). *Id.* at 298-99. The facts in *Staley* trigger a different part of the above definition of abuse; the facts of the instant case involve Appellant's conduct, which is clearly treatment rather than a single oral statement, and was egregious conduct that a reasonable person would find to be disparaging, derogatory, humiliating, harassing and threatening.

***36** Appellant fails to recognize that *Staley* involved a question of statutory interpretation as to whether the facts of that case involved “repeated or malicious oral, written, or gestured language toward a VA...” (emphasis added). See *id.* at 298. In the instant case, however, the maltreatment is based on that part of subdivision (2)(b)(2) which addresses whether “the treatment of a vulnerable adult which would be considered by a reasonable person to be disparaging, derogatory, humiliating, or threatening.”

Further, as noted by the district court, “the Commissioner has determined that Appellant's actions were egregious and this conclusion is supported by substantial evidence of the significant distress suffered by [the VA].” App. Add. 19.

The Commissioner's Order states: “The record, taken as a whole, supports the finding of the Department that Appellant abused the VA by spraying her with a garden hose, and then placing shampoo in the VA's hair while she was sitting on her scooter outside the facility.” App. Add. 44. The Commissioner's Order thus is not based solely on the application of shampoo on a client's head while the client is outside as suggested by Appellant. App.'s Br. 35.

IV. Appellant Was Accorded Due Process.

The Department gave Appellant notice of the allegations against her, and sent her a copy of the report describing the OHFC investigation. That notice advised Appellant that the Department made the following finding:

Beth Balenger, while working as a Director/Administrator at Unity Health Care in Richfield, emotionally abused a client on September 27, 2011. The client refused to take a shower. Ms. Balenger sprayed the client with water using a garden hose in the front yard of the facility saturating her clothing *37 and then squirted shampoo all over the client's hair and clothes stating, “I guess that means you're going to take a shower now doesn't it?”

Tab 40, Ex 2. The notice also advised Appellant of her right to challenge the finding of abuse, which she did at a two-day evidentiary hearing. She exercised her statutory right to call and cross-examine witnesses at the hearing, as well as the right to comment, argue, take exception to and request reconsideration of the Commissioner's final order. Despite the abundant procedures available to Appellant she alleges that the Commissioner's Order violates due process because: 1) she did not have notice that applying shampoo on the client's hair would be considered to be maltreatment (App's Br. 24-26) and 2) the Commissioner refused to take judicial notice of an old conviction record regarding the VA, while taking judicial notice of weather reports regarding the weather on the day in question. App's Br. 27-29. Both arguments fail.

A. Appellant Received All Process That Was Due.

The burden proof is on the party alleging a constitutional violation, such as a due process violations alleged by Appellant, and Appellant has not carried that burden. See *Sweet*, 702 N.W.2d at 319; see also *Haggerty*, 448 N.W.2d at 364. As noted by the district court, Appellant had notice of the statute at issue, and a detailed description of the allegations, including the allegation that applying shampoo to the VA was part of the maltreatment determination. App. Add. 11. The District Court also applied the correct test in determining whether Appellant was given sufficient notice of the allegations against her. Specifically, the lower court noted that “[d]ue process requires notice reasonably calculated, under all the circumstances, to apprise interested parties and afford *38 them an opportunity to be heard. The type of notice that is required by due process will vary with the circumstances and conditions of each case, making it ‘impossible to draw a standard set of specifications as to what is constitutionally adequate notice, to be mechanically applied in every situation.’” See *id.* (citations omitted). *In re Application of Christensen*, 417 N.W.2d 607, 611-12 (Minn. 1987).

The Department provided Appellant with a copy of the OHFC investigative report, which included a description of the complaint, a summary of the investigation and a citation to the definitions of substantiated abuse (Tab 40, Ex. 1), as well as a notice describing the finding of abuse and how Appellant could challenge the finding of maltreatment. Tab 40, Ex. 2. The notice of the finding includes squirting shampoo on the VA to force her to take a shower. See *Id.*

Appellant raised the lice shampoo defense, noting that she applied lice shampoo while the VA was sitting outside, and she was given the opportunity to present evidence on that issue. Her “evidence,” however, was unpersuasive because: there was no evidence that the VA had lice, or an order to be treated with lice shampoo, and the VA consistently testified that Appellant squirted the VA's own shampoo on the VA. See App. Add. 39, Finding No. 51. Further, Appellant initially denied having

shampoo or soap in the yard, and did not mention lice shampoo until after the investigator told her that someone saw suds on the ground after the incident, at which time Appellant admitted that she placed lice shampoo in the VA's hair. *See id.*

There is no question that Appellant received notice of the charges against her and had the opportunity to present evidence and call and cross-examine witnesses. Tab 40, *39 Ex. 2. As noted by the district court, such notice meets the standard set forth in *Graham v. Itasca Cnty. Planning Comm'n.*, 601 N.W.2d 461, 464 (Minn. Ct. App. 1999) because it “provided Appellant with sufficient notice that the propriety of her application of lice shampoo would be an issue in the case, providing her with ample opportunity to prepare and present a defense.” App. Add. 12.

In *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976), the Supreme Court established a three-factor balancing test to determine the sufficiency of a particular process: 1) the private interest at issue; 2) the risk of erroneous deprivation of such interest; and 3) the government interest. Applying that test to the present case, it is clear that Appellant received adequate notice. First, the private interest Appellant raises is that she did not have notice that application of shampoo is maltreatment, and that neither she nor the home care agency were cited under the home care rules or VAA for applying shampoo without a physician's order. App. Br. 26. The application of shampoo is not per se maltreatment, although applying lice shampoo to a home care client without a physician's order for the treatment, without confirmation that the VA had lice, and not done under the supervision of a nurse, violates Minn. R. 4668.0860. The Department specifically described the incident that was the basis for the maltreatment determination, which included spraying water and squirting shampoo on the VA while she sat outside, when it gave her notice of her appeal rights. Tab 40, Ex. 2. Appellant thus was given notice of the charges against her, and the opportunity to defend against those charges.

In applying the second *Mathews* factor, there is little or no risk of an erroneous deprivation of rights due to the process used. Appellant was notified of the *40 Department's finding and allowed to present evidence and testimony on her defenses, including the application of lice shampoo. The Department's finding did not conclude that she used lice shampoo, but it did notify her that part of its determination was that she “squirted shampoo all over the client's hair and clothing, stating, ‘I guess that means you're going to take the shower now doesn't it?’” *See id.*

The final factor, the Government's interest, including fiscal and administrative burdens, weighs in favor of the process used. Appellant apparently believes that she should have been notified that the application of shampoo outside, without any other conduct, would be considered maltreatment. App. Br. 24. The VAA need not and cannot list every action that might be considered disparaging, derogatory, humiliating, harassing, or threatening, because that degree of specificity imposes an impossible burden on the State. The VAA establishes a reasonable person standard for determining what constitutes maltreatment. Appellant's treatment of the VA was humiliating, harassing and threatening, as is demonstrated by the fact that a community member driving by was so concerned that she reported the matter both to the police and to MDH, and the VA was so mortified by Appellant's conduct that she cried when recounting the incident over a year later. As noted by this Court, the VAA is a remedial statute, designed to protect vulnerable adults from maltreatment, and as such is to be construed liberally in favor of that class of people. *J.R.B.*, 633 N.W.2d at 39-40. The VAA is not required to include that degree of specificity, but does include the reasonable person standard, which is sufficient for purposes of procedural due process.

***41 B. The Commissioner Did Not Err By Refusing To Take Judicial Notice of An Old Criminal Conviction.**

Refusal to take judicial notice of an old criminal conviction, especially in a fair hearing that does not use the Rules of Evidence, is not a due process violation. Appellant's argument that the Commissioner violated due process and subjected her to “unfair process” by taking judicial notice of the weather reports from the National Weather Service and the Farmer's Almanac for the day of the incident, but not taking notice that the VA had 2006 criminal conviction (App's Br. 26-9), also fails. A 2006 criminal conviction for filing a false police report is not evidence of whether Appellant abused the VA in 2011, but instead goes to the VA's credibility. The Commissioner properly determined that the VA had credibility issues, but also concluded that the VA is entitled to be treated with dignity and to be free from abuse. App. Add. 43, Conclusion No. 16. That conclusion is entirely consistent with the public policy behind the VAA, which is to protect vulnerable adults from maltreatment. *See Minn. Stat. §*

626.557, subd. 1. As noted by the decision-maker, the maltreatment determination “does *not* depend on the VA's credibility.” App. Add. 32. Even someone with a past criminal conviction can accurately report abuse.

The maltreatment determination in this case was made based upon the totality of the evidence, which, in addition to the VA's report, includes 1) Appellant's admission that she sprayed water on the VA, kept spraying water after the VA told her the cart was not on fire, and then squirted shampoo to the VA while the VA was sitting outside and 2) the report of the community member who saw a woman being hosed down in the yard as *42 she was driving by the HWS. The district court addressed this issue below and properly found that it was “within the province of the Commissioner to weigh the evidence and make credibility determinations” and those determination do not result in unfair process or a violation of Appellant's due process rights. App. Add. 13.

Appellant objects that the Commissioner's Order violates of the [Rule 602 of the Minnesota Rules of Evidence](#) by relying on that statement because the community member could not know the reason for Appellant's. App's Br. 45. That argument is incorrect on several counts. First, the Rules of Evidence, only apply to court actions. See Minn. R. Evid., [Rule 1101](#). Second, the corroborating evidence in this case is based upon the community member's observation of Appellant's conduct, not her motivation. Third, fair hearings specifically allow “all evidence, except evidence privileged by law, that is commonly accepted by reasonable people in the conduct of their affairs as having probative value on the issues to be addressed.” [Minn. Stat. § 256.0451, subd. 19](#). Finally, both the VA and a community member described Appellant's actions as forcing a shower on the VA by spraying the VA with water from a garden hose.

*43 CONCLUSION

Substantial evidence in the record supports the Commissioner's determination that Appellant abused the VA. That decision represents the judgment of the agency decision maker which is owed deference by this Court, was made based upon proper procedure and is not based on errors of law. Accordingly, this Court should affirm the decision of the Commissioner.

Footnotes

- 1 The Commissioner delegated his decision-making authority to Patricia Winget. References to the “Commissioner” or “decision-maker” in this brief are references to Ms. Winget, his delegate.
- 2 Appellant incorrectly refers to Human Service Judge Gassoway both as a human services judge and as an “administrative law judge” or “ALJ.” App's. Br. 30 and 38. Judge Gassoway is a human services judge, or “HSJ.” He does not hear matters under the Administrative Procedures Act; rather he hears appeals specified at [Minn. Stat. § 256.045, subd. 3](#), under Minnesota's “Fair Hearing Law.”
- 3 “Tab” refers to the Administrative Record filed with the district court.
- 4 The final agency decision consists of those portions of the Report adopted by the Commissioner, the Final Order and the “Final, Final Order,” jointly referred to as the “Commissioner's Order.” Tab 1.
- 5 “App. Add.” refers to the addendum attached to Appellant's Brief, followed by the addendum page number.
- 6 “T” refers to the transcript from fair hearing, which is at Tabs 29 and 30.
- 7 The interviews Ms. Jacobsen conducted as part of her investigation were recorded and the CD containing the interviews is part of the record. The interview of the community member was redacted to remove the reporter's name and identity in compliance with [Minn. Stat. § 626.557, subd. 12b\(c\)](#), which requires that the reporter's name be confidential. The interview of the community member is found at Tab 38, Exhibit 36, track 0358 of the CD.
- 8 Appellant testified that the LPN to whom she reported her concerns about the VA having lice told her “to stop being so paranoid because of the lice incident that happened with” another resident. *See* Tab. 30, T. at 545. Appellant reported her concerns about lice to the LPN *after* the hosing incident. *See Id.* Ms. Jacobsen spoke with the RN at the home care agency, who told Ms. Jacobsen that she did not know whether the VA had lice, but before the incident “I heard maybe she did” have lice. Tab 38, Ex. 19.
- 9 The district court's ruling below noted that its “review of the record reveals that the Commissioner engaged in a reasoned and thorough process of fact-finding and reached conclusions based upon reasonable inferences supported by evidence in the record.” App. Add. 23.
- 10 The Common Entry Point report made by the community member indicates that the reporter had no relationship to either the VA or the Appellant. Tab 30, Ex. 22.

- 11 During post-hearing briefing, Appellant tried to change her testimony by submitting an illegible receipt, supposedly for a different type of “natural” lice shampoo, that had different directions for its use. *See* Tab 7, Att. C. Appellant thus gave three different explanations of the incident: she did not mention putting shampoo on the VA when she described the incident to Ms. Pouti and the VA’s case manager; she told Ms. Jacobsen and testified at the hearing that she applied Rid-X shampoo to the VA; and she argued to the Commissioner and to the District Court that she applied a different lice shampoo, which includes different directions for use, to the VA. Appellant’s changing story of what happened clearly called into question her credibility.
- 12 The Commissioner’s Order notes that there are minor inconsistencies in the community member’s description of the event, but finds those inconsistencies were caused by the brief period of time the community member saw the event as she was driving by, and her position relative to the incident. App. Add. 18, and App. Add. 50.
- 13 “CEP” refers to Common Entry Point under the VAA. [Minn. Stat. § 626.557, subd. 5](#).
- 14 Appellant argues that the Department’s report was misleading and gives as an example that the public report did not include the VA’s action of throwing a lit cigarette outside the window several days after the hosing incident. App. Br. 23. The VA denied that she threw a cigarette outside the window, and that incident was not investigated by the Department, so it was not appropriate to include that information in the report. An unproven allegation that occurred days after the maltreatment incident does not justify maltreatment.
- 15 Appellant may be referring to the “error in provision of therapeutic conduct” exception to the definition of neglect also found in the VAA. That exception is not available to Appellant, however, because this case involves a finding of abuse, which does not contain such an exception. *Compare* [Minn. Stat. § 626.5572, subd. 2\(b\)](#) (definition of “abuse”) with subd. 17(c)(4) and (5) (definition of “neglect”).

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