

DHS Discretionary Decisions

Catherine Ryan | Background Studies Legal Manager

Who Can Work – Statutory Authority

- Study must be affiliated with a program
- Most programs – statute generally allows subject to work before study is completed
 - E.g., Substance Use Disorder Treatment Programs, Home and Community Based Services, Hospitals, Nursing Homes, Home Care, Boarding Care, Child Foster Care
 - In limited cases, supervision or immediate removal may be ordered (next slide)
- Some programs – statute prohibits subject from working before they receive an eligible status (clearance) or set aside
 - E.g., Personal Care Provider Organizations, Special Transportation Services, Child Care

Who Can Work – Discretionary Authority

- More Time Needed – DHS options while study is processing - §245C.13
 - Work without supervision
 - Work with supervision (within sight and hearing of a cleared person at all times)
 - DHS uses factors in §245C.16 to determine risk of harm/whether to order supervision
- Disqualification – DHS options during reconsideration period - §245C.16
 - Work without supervision
 - Work with supervision (within sight and hearing of a cleared person at all times)
 - Immediate removal

Maltreatment Disqualifications

- DHS reviews maltreatment substantiations from counties, DHS, and MDH
 - Appeal of the maltreatment substantiation is separate from appeal of the DQ
- Substantiated maltreatment is disqualifying when it is determined to be serious and/or recurring - §245C.14, §245C.15, §245C.02
 - Serious – includes sexual abuse and certain types of physical abuse or neglect
 - Recurring – more than one incident of maltreatment
- Evidentiary hearing for first time maltreatment DQ – consolidated with appeal of underlying maltreatment substantiation if timelines align

POE Reviews – Preponderance Standard

- Preponderance standard = more likely than not
 - Same standard as maltreatment determinations
 - Same standard as most determinations made by Human Services Judges (determining issues broader than background study disqualifications)
- DHS is required to prioritize safety and wellbeing of the people served by programs and integrity of programs – see §245.03, §245C.22
 - Preponderance of evidence (“POE”) reviews allow DHS to identify conduct that, if proven, would pose a risk to the people and/or programs

POE Reviews – Which Cases Are Reviewed

- Chapter 245C requires disqualification when a preponderance of evidence is found, but does not identify which cases should be reviewed
- DHS uses a set of guidelines for consistency in determining which cases are reviewed for a preponderance
 - Most reviews require a criminal charge (2017 update)
 - Focuses on permanent disqualifications, violent crimes (§609.1095), domestic assault, misconduct against vulnerable adults, and misuse of government funds

POE Reviews – Records Reviewed

- Records Reviewed - §245C.08

- BCA/FBI records
- Law enforcement
 - police reports, audio, video, photos
- Courts
 - MNCIS/MGA, plea/sentencing documents, motions, orders
- DHS/MDH and County investigations
 - investigation and determination documents, audio and video where available

DHS does not conduct live interviews in the preponderance review process:

- Interviews are not authorized in §245C.08
- Data privacy is required by Chapter 245C and Chapter 13

POE Reviews – Analysis

- POE reviews are done by attorneys licensed to practice in Minnesota
- Factors analyzed include:
 - Details – level of detail in statements; comprehensiveness of investigation; timeline of report/investigation
 - Credibility
 - Consistency among statements and with photos/videos/audio
 - Potential for bias or whether an individual would have motive to be untruthful
 - Hearsay – admissible in evidentiary hearings but not always given great weight
 - Dismissals – Rule 30.01 (by prosecutor) or by court – whether reason for dismissal related to merits of case
 - E.g., victim/witness unavailable, recanted, legal issue with stop or search, plea deal
- DHS finds POE of disqualifying conduct in about 40% of cases reviewed for a POE

POE Reviews - Conclusions

- When POE found – DHS attorney writes memo explaining why POE found and how level of DQ determined
- How level of DQ is determined
 - When pled/convicted of a non-disqualifying offense related to the POE conduct – DHS uses the level of disposition for the plea/conviction
 - E.g., charged with gross misdemeanor assault 5, pled to disorderly conduct, received 90 days stayed for probationary period = misdemeanor sentence = DQ for POE of misdemeanor assault 5
 - Note – level is not relevant for most disqualifications under §245C.15, subd. 1(a) (permanents)
 - When no sentence – DHS uses the statutory level of the POE offense

Reconsiderations - Agencies

- DHS completes reconsiderations for programs licensed, certified, or regulated by DHS, and programs certified by the Minnesota Department of Transportation (MnDOT)
 - Speaking here for DHS process only – all reconsideration decisions are made by attorneys licensed to practice in Minnesota
- The Minnesota Department of Health (MDH) completes reconsiderations for programs licensed/regulated by MDH
- The Minnesota Department of Corrections (DOC) completes reconsiderations for programs licensed/regulated by DOC

Federally Required DQs & Bars

- Some disqualifications and bars are required by federal law, but many are required only by state law
- 42 USC §9858f – child care
 - Enhances some 245C disqualifications from time-limited to permanent
- 42 USC §671(a)(20)(A) – child foster care and adoption
 - Requires certain disqualifications and bars
 - CFC studies are for the funding and the contact/access to the child
 - Adoption studies are for the funding only; district court decides whether to approve adoption

Reconsiderations – Basis for Review

- All disqualifications are eligible for correctness review every time
 - Study subject seeking correctness review must submit reconsideration request in writing
 - Conclusiveness in §245C.29 applies to hearing rights
- All disqualifications are eligible for risk of harm review (for potential set aside) except bars
 - Study subject seeking risk of harm review must submit request in writing
 - Disqualification is the background study result – §245C.15
 - Bar is prohibition of set aside – §245C.24
 - All permanent disqualifications in §245C.15 are also permanent bars to set aside in §245C.24, but there is still a difference
 - Hypothetical – if bars didn't exist, would still have DQ at same level but even permanent DQ would be eligible for set aside

Reconsiderations – Risk of Harm Analysis

- Risk of harm analysis - §245C.22, subd. 4
- Focuses on the subject's conduct and the vulnerabilities associated with the program
 - Certain disqualifying characteristics may be more significant based on the type of program
 - Required to prioritize safety/wellbeing and program integrity
 - Study subject could receive set aside for one program and not set aside for another program
- 245C identifies the disqualifying characteristic as risk of harm; places burden of proof on study subject to demonstrate they do not pose a risk of harm for the specified program
- Disqualification letters include suggested form for requesting reconsideration
 - Letters also notify subjects that they are not required to hire attorney for reconsideration, but provide information for no/low cost legal services

Post-Reconsideration Appeals

- Study subjects with a first time preponderance of evidence or maltreatment disqualification are eligible for an evidentiary hearing with testimony and exhibits
 - Even if they are no longer pursuing employment with the specific provider, they must timely request an evidentiary hearing (mostly fair hearings with Human Services Judges) to challenge their disqualification with testimony and exhibits
 - Hearings for POE/maltx DQs provide opportunity for evidentiary hearing on underlying allegations similar to convictions/admissions/TPR that went through court process
- Study subjects with all other disqualifications (e.g., conclusive POE/maltreatment, conviction, admission, etc.) are not eligible for evidentiary hearing; file appeal with the Court of Appeals after reconsideration

- Chapter 609A – adult expungements
 - Specific criteria for eligibility based on offense and disposition
 - 12-factor analysis for expungements (§609A.03, subd. 5(c)) is similar to 9 factor risk of harm analysis for set aside determinations (§245C.22, subd. 4)
- Section 260B.198 – juvenile expungements
 - Gives courts broader authority to grant expungement
- DHS objects to about 2% of expungement petitions received each year

Expungement Objections

- DHS reviews expungement petitions for DHS and MDH
- Factors considered in determining whether to object:
 - Whether the petitioner has had a background study or other significant involvement with DHS programs/regulation
 - If no background study history, consider likelihood of petitioner having a study – e.g., statements about career goals, age of petitioner (given broad scope of DHS background studies)
 - Whether eligible for statutory expungement
 - If not eligible, DHS may file an “inherent” objection clarifying the limits of the court’s authority when DHS would have objected if petitioner were eligible for statutory expungement
 - 12 factors (adult) or 8 factors (juvenile) – similar to risk of harm factors in §245C.22
 - No objection if petitioner would be likely to get a set aside for a variety of program types

Thank You!