

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE AND JOCELYN DUSTIN,)
)
 Petitioners,)
)
 vs.) Case No. 99-3442
)
 DEPARTMENT OF CHILDREN AND)
 FAMILY SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 8, 1999, in Inverness, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: James F. Cummins, Esquire
103 West Dampier Street
Inverness, Florida 34450-4209

For Respondent: Ralph J. McMurphy, Esquire
Department of Children and
Family Services
1601 West Gulf Atlantic Highway
Wildwood, Florida 34785-8158

STATEMENT OF THE ISSUE

The issue is whether Petitioners' application for a foster home license should be denied because of their demonstrated inability or unwillingness to follow the requirements of an agency regulation, as alleged in Respondent's letter dated August 2, 1999.

PRELIMINARY STATEMENT

This matter began on August 2, 1999, when Respondent, Department of Children and Family Services, issued a letter advising Petitioners, Lawrence and Jocelyn Dustin, that their application for a foster home license was being denied "due to [their] demonstrated inability or unwillingness to follow the requirements of [Rule] 65C-13.010, Florida Administrative Code." Petitioners requested a formal hearing under Section 120.569, Florida Statutes, to contest the proposed action.

The matter was referred by Respondent to the Division of Administrative Hearings on August 11, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated September 3, 1999, a final hearing was scheduled on October 12, 1999, in Inverness, Florida. At Petitioners' request, the matter was continued to December 8, 1999, at the same location. On December 7, 1999, the case was transferred from Administrative Law Judge Charles C. Adams to the undersigned.

At the final hearing, Petitioner Jocelyn Dustin testified on her own behalf, and Petitioners jointly presented the testimony of Mary Terschak, a guardian ad litem for a child once under Petitioners' care. Also, they offered Petitioners' Exhibit 1, which was received in evidence. Respondent presented the testimony of Ralph Hunter, a child protective supervisor; and

John Lewis, a family services counselor. Also, it offered Respondent's Exhibits 1 and 2, which were received in evidence.

There is no transcript of the hearing. Respondent filed a paper styled Respondent's Written Argument on December 27, 1999, which has been considered by the undersigned in the preparation of this Recommended Order. Nothing was filed by Petitioners.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. In this proceeding, which bears some resemblance to a child custody dispute, Petitioners, Lawrence and Jocelyn Dustin, seek the issuance of a foster home license from Respondent, Department of Children and Family Services (DCFS). In a letter dated August 3, 1999, DCFS denied the application on the ground that due to Petitioners' "actions and attitudes," which led to the Circuit Court for Citrus County (the court) removing a child from their custody, DCFS had "significant concerns about [their] inability or unwillingness to be a team player" in contravention of Rule 65C-13.010, Florida Administrative Code. Petitioners denied the allegations and requested a formal hearing to contest the proposed action.

2. Through circumstances unknown, Petitioners became acquainted with C. A., the natural mother of T. H., a female born on December 16, 1987. Because of various difficulties experienced by the natural mother in caring for her daughter, and

as an alternative to foster care, the court entered an order on June 12, 1995, allowing Petitioners to temporarily serve as substitute care parents for T. H.

3. Because a reunification plan involving the child and natural mother had not been implemented by late 1996, the matter was referred by the court to a mediator to establish a new case plan. A mediation conference was held on March 27, 1997, and a written mediation agreement was formalized in handwritten form by the natural mother's attorney at the conclusion of the conference. The agreement was approved by the court on May 16, 1997.

4. Petitioners attended the conference and signed the handwritten agreement, but they claimed that they left the meeting before it was concluded and that certain matters agreed upon were not incorporated into the agreement. This was partially confirmed by T. H.'s guardian ad litem, who also attended the conference.

5. The agreement approved by the court provided, among other things, that "visitation between the [natural] mother/stepfather and T. [H.] shall continue on a weekly basis with the modification being that Ralph Hunter, the case worker [from DCFS], be the supervising party." In other words, the weekly visitation by the mother with her child could take place at a variety of places, such as a McDonald's Restaurant

(McDonald's), the DCFS office, or a park, so long as Ralph Hunter (Hunter) was present.

6. Although Petitioners contended that the parties orally agreed at the mediation conference that such visits could only take place in the local DCFS office, this condition was not incorporated into the agreement which they signed. Further, there is no evidence that Petitioners complained to the court about this apparent omission in the agreement, or even if they did, that it was added to the agreement.

7. On July 16, 1997, the natural mother sought permission from Hunter to meet T. H. at a local McDonald's for visitation purposes. Although this was an "extra" visit, apparently it was to replace one which would be missed because Petitioners were leaving on an out-of-state vacation within a couple of days. Hunter agreed to this request, and he instructed Jocelyn Dustin (Jocelyn) to bring T. H. to his office that day. After the child arrived, Hunter carried her to McDonald's where her mother and stepfather were waiting.

8. Jocelyn explained that because it was a rainy day with thunder and lightning, and T. H. was extremely frightened under those conditions, out of concern for the child she followed Hunter and T. H. to McDonald's. At the same time, Jocelyn believed that the visit violated the court's order regarding visitation rights since she incorrectly interpreted it to mean that visitations could only take place at the DCFS office.

9. For the above reasons, Jocelyn drove up beside Hunter's car at McDonald's, opened the passenger door, and asked him if they could all meet at the DCFS office to discuss why the agreement was being violated. Jocelyn then pulled T. H. out of Hunter's car, told him that she was returning to the DCFS office, and left the premises. Thereafter, Jocelyn drove to her mother's house in nearby Hernando, Florida, where she telephoned a DCFS representative. After speaking with the representative, Jocelyn brought the child to the DCFS office.

10. A DCFS witness established that despite the well-meaning intentions of Jocelyn, her conduct that day called into question her ability to work with DCFS and the natural parent in achieving the court's goal of eventually reunifying the child and mother.

11. Five days later, or on July 21, 1997, the natural mother, through her attorney, filed with the court an Emergency Motion to Remove Child from Foster [sic] Home. Among others, the motion contained allegations that Petitioners "had continuously interfered with the visitations between the child and her mother," had "physically wrestled the child from Mr. Hunter's hands and sped off in a motor vehicle with the child," and had "become increasingly difficult to deal with." The motion asked that the court enter an order "restraining and enjoining the foster [sic] parents from removing the child from the

jurisdiction" and removing "the child from [Petitioners'] custody and control pending further Order of this Court."

12. At the hearing in the instant case, a DCFS witness conceded that the foregoing allegations were not wholly accurate, and that Jocelyn had not "continuously interfered with the visitations," had not "physically wrestled the child from Mr. Hunter's hands," and had not "become increasingly difficult to deal with." This is apparently due to the fact that the natural mother's attorney, and not DCFS, drafted the motion.

13. After an ex parte hearing in which neither Jocelyn nor the child's guardian ad litem were allowed to "give input," on July 28, 1997, the court entered an Order Modifying Placement to Foster [sic] Care in which it found a modification in the child's placement to be in its best interest. T. H. was placed in the temporary custody of DCFS, but Petitioners and the natural mother were granted "supervised visitation" rights. Although the child was later returned to the natural mother's custody, she has been in foster status since June 1999, and a termination of parental rights is now being sought by DCFS.

14. On an undisclosed date in 1999, Petitioners filed an application for licensure as foster parents. They did so because of their love of children and their desire to serve as foster parents for older children whose parental rights had been terminated.

15. Although the assertion has been made in this case that Petitioners would not be suitable foster parents because of the incident in 1997, for several years, Jocelyn has satisfactorily served in the court system as a guardian ad litem for a number of foster children. This demonstrates her ability to work with both the court and DCFS in matters concerning foster children. In addition, there is no evidence that she or her husband would pose a threat to the safety or welfare of foster children. Except for the one isolated incident which occurred some 30 months ago when Jocelyn sincerely thought that she was acting in T. H.'s best interests, there is no evidence that Petitioners are unwilling or unable to be a "team player" with the DCFS in providing care to foster children, or otherwise fulfill their foster care responsibilities.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57, Florida Statutes (1999).

17. As the party seeking licensure, Petitioners bear the burden of proving by a preponderance of the evidence that they are entitled to the requested license. To gain a license, Petitioners must counter the objection lodged in the agency's denial letter, that is, that they are unable or unwilling to be a "team player" within the meaning of an agency regulation. In making this determination, Section 409.175(2)(f), Florida

Statutes (1999), requires that the factfinder be guided by the principle that a foster home license is not a professional license or an entitlement, but rather is a "public trust and a privilege."

18. Section 409.175(4)(a), Florida Statutes (1999), authorizes DCFS to "adopt and amend licensing rules for family foster homes." Relying on that statute as the source of its rulemaking authority, the agency has adopted Rule 65C-13.010, Florida Administrative Code, a lengthy rule entitled "Substitute Care Parents' Role as a Team Member." In a post-hearing filing, and without correlating by argument or facts Petitioners' conduct to any portions of the above rule, Respondent has simply cited paragraphs (2)(a)-(e) and (4)(j) and (k) as being the specific provisions within the rule which Petitioners allegedly violated and which form the basis for the denial of the application.

Those provisions read as follows:

(2) Responsibilities of the Substitute Care Parents to the Child's Family.

(a) The substitute care parents must present a positive image of and demonstrate respect for the child's own family and must agree to maintain a working relationship with the child's family members as indicated in the performance agreement or permanent placement plan.

(b) The substitute care parents must participate in planning visits for the child with his parents and family members.

(c) The substitute care parents must allow children and their family members to communicate by mail and by telephone in

accordance with the child's performance agreement, or permanent placement plan.

(d) The substitute care parents are expected to share as many parenting experiences as possible with the child's own family, for example, participating in school conferences and activities, buying clothing, and attending birthday parties.

(e) The substitute care parents must never be openly critical of the child's biological family to the child or to others. Negative experiences and feelings should be shared with the counselor in a private setting.

(4) Responsibilities of the Substitute Care Parents to the Department.

(j) The substitute care parents must be able to accept supervision by the department staff and participate in and support case plans for children in their homes. Specifically[,] substitute care parents must be included in the development of performance agreements or permanent placement plans, and in the carrying out of these plans.

(k) The substitute care parents are accountable to the department for their work with the child.

19. Applying the facts established at hearing to the above provisions, it is clear that paragraphs (2)(c) and (d) have no application to this case, while paragraph (2)(b) has marginal, if any, application at all. Further, if the word "work" is interpreted to mean "conduct," then paragraph (4)(k) is applicable since it goes without saying that "substitute care parents are accountable to the department for their work [conduct] with the child." In this case, however, there was no evidence from any witness to support this interpretation or to

tie any proven conduct to a specific provision within the rule. Thus, it is concluded that Jocelyn's actions on July 16, 1997, equated to a violation of paragraphs (2)(a) and (e) and (4)(j) by her failure to present a positive image of, and demonstrate respect for, the child's own family, to share negative feelings about the child's biological family in a private setting, and to accept supervision by the department staff.

20. Notwithstanding the foregoing violations, the underlying event occurred some 30 months ago and is the single blemish on Jocelyn's record. Otherwise, Jocelyn's record with children is commendable, as evidenced by her service as a guardian ad litem, which indicates her ability to work as a "team player" in the court system. Except for the isolated incident, Jocelyn provided commendable care for T. H. over a two-year period, and her actions in July 1997 were taken in the mistaken belief that she was acting in the best interests of the child. There was no evidence that Petitioners would pose any sort of threat to foster children.

21. In light of the foregoing considerations, denial of the license is too harsh. This is not a case where multiple rule violations occurred over a period of time, DCFS v. Albert and Estoria Walker, Case No. 99-0225 (Recommended Order, August 18, 1999), where the child has been abused, DCFS v. Wanda T. and H. Ronald Barker, Case No. 99-0011 (Recommended Order, July 19, 1999), or where minimum qualifications have not been maintained

by the applicant, Bingham v. DCFS, Case No. 98-5590 (DCFS, July 12, 1999). This being so, the application should be approved.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Department of Children and Family Services enter a final order granting the application of Petitioners for a foster home license.

DONE AND ENTERED this 10th day of January, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of January, 2000.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will enter a final order in this case.