

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)	
FAMILY SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 01-1810
)	
TROY AND REBECCA ALLEN,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on June 28, 2001, Lakeland, Florida.

APPEARANCES

For Petitioner: Jack Emory Farley, Esquire
Department of Children and
Family Services
4720 Old Highway 37
Lakeland, Florida 33813-2030

For Respondent: Troy and Rebecca Allen, pro se
4514 Scottswood Drive
Lakeland, Florida 33813

STATEMENT OF THE ISSUE

Should Respondents' application for annual renewal of their foster care license be denied?

PRELIMINARY STATEMENT

By letter dated February 20, 2001, the Department of Children and Family Services (Department) advised Respondents that their Application to Renew Foster Care License had been denied. As grounds therefor, the Department alleges that: (a) Respondents were in violation of Rule 65C-13.001(1)(a), Florida Administrative Code, in that the number of children in the home, which included both foster children and Respondent's children, was in excess of five children; (b) Respondents had failed to submit a report of an approved sanitation inspection from the Polk County Health Department in violation of Rule 65C-13.006(1), Florida Administrative Code; (c) Respondents failed to keep their yard free from objects, materials, and conditions which would constitute a danger to the children in violation of Rule 65C-13.00(11)(b), Florida Administrative Code; (d) Respondent Troy Allen had used corporal punishment on a foster child as a means of discipline in violation of Rule 65C-13.010(1)(f), Florida Administrative Code; (e) Respondents had allowed the foster children in the home to have contact with a 126 pound Rottweiler dog in violation of Rule 65C-13.011(14)(e), Florida Administrative Code; and (f) Respondents had failed to provide a proper barrier to the in-ground swimming pool located in Respondent's backyard in violation of Rule 65C-13.011(12)(b), Florida Administrative Code. By letter dated March 4, 2001,

Respondents requested a hearing on the denial of their renewal application. On April 2, 2001, the Department issued a Notice of Department's Intention to Dismiss Respondents' Request for Hearing Unless Additional Information is filed by Respondents' Within Twenty One Days. By letter dated April 6, 2001, Respondents furnished the additional information required by the Notice. By Notice dated May 8, 2001, the Department referred this matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a formal hearing.

At the hearing, the Department presented the testimony of Cheryl Dishong, Vicki Sweet, and Mazen Omari. The Department's Exhibits 1, 2, and 3 were admitted in evidence. Respondents presented the testimony of Troy Allen and Marla Sale. Respondents Exhibits 1 through 10, a series of photographs taken in Respondents' home on June 27, 2001, were admitted in evidence. Section 409.175(8), Florida Statutes, and Rules 65C-13.001(1)(a), 65C-13.006, 65C-13.010, and 65C-13.011, Florida Administrative Code, were officially recognized.

A Transcript of this proceeding was filed with the Division on July 5, 2001. The Department timely filed its Proposed Recommended Order. Respondents elected not to file a proposed recommended order.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Department is the Agency of the State of Florida charged with the responsibility of licensing family foster homes.

2. Respondents were first licensed as a foster home by the Department in February 1999.

3. At the time of the initial licensure in February 1999, the Department was aware that Respondents owned a large Rottweiler dog. However, the issue of the dog was resolved, and the Department issued Respondents their initial license and renewed their license in February 2000.

4. At the time of the initial licensure in February 1999, and the renewal in February 2000, Respondents had an in-ground swimming pool located in their backyard. Apparently, the lack of a proper barrier around the pool, as required by the Department rule, was not an issue since the Department issued the initial license in February 1999, and renewed that license in February 2000.

5. On November 6, 2000, Respondents filed an application with the Department for renewal of their foster home license.

6. On November 6, 2000, Cheryl Dishong, the Department's foster care licensing worker, visited Respondents' home and determined that Respondents were caring for nine children in their home which included: (a) four foster children placed in Respondents' home by the Department; (b) Respondents' two natural children; (c) Respondents' two adopted children; and (d) one child, no relation to Respondents, which they were caring for due to the child's mother having been incarcerated. However, this child is no longer in the home except for visiting.

7. Respondents never attempted to a seek waiver to exceed the "rule of five" set out in Rule 65C-13.001(a), Florida Administrative Code, for good cause as provided for in Rule 65C-13.011(1)(b), Florida Administrative Code.

8. On December 8, 2000, Mazen Omari, sanitation inspector with the Polk County Heath Department, inspected Respondents' home and found the following: (a) the carpet in the living room and the bedrooms needed cleaning and the kitchen needed cleaning (there were dirty dishes in kitchen sink); (b) the children's bedrooms needed cleaning and their clothes needed to be put in a proper place; and (c) the fire extinguisher needed an up-to-date inspection tag.

9. Respondents did not advise the Polk County Heath Department that the violations noted by Omari on

December 8, 2000, had been corrected. Therefore, the Polk County Health Department did not provide the Department with an approved Sanitation Report.

10. On January 3, 2001, Cheryl Dishong visited Respondents' home. During this visit, Dishong determined that Respondents had not corrected the sanitary violations cited by Omari on December 8, 2000. Dishong found that Respondents' fire extinguisher had been used but had not been recharged. Dishong observed: (a) dirt, dirty handprints, and crayon markings on the walls throughout the house; (b) dirty carpet throughout the house; and (c) general clutter, with piles of clothes on the floor in the laundry room.

11. Cheryl Dishong visited Respondents' home again on January 12, 2001, and observed that not all of the sanitary violations cited by Omari on December 8, 2000, had been corrected. Dishong also observed: (a) the house being in "general disarray;" (b) a bed frame in one of the rooms which needed to be stored where it would not constitute a danger to the children's safety; (c) zippy cups and clothing strewn about; and (d) debris, including chair cushions and "other things" scattered all over the yard, which could be considered as constituting a danger to the children's safety.

12. Dishong visited Respondents' home again on January 22, 2001, and observed that not all of the sanitary violations cited by Omari on December 8, 2000, had been corrected. Dishong also observed some hazardous household cleaning chemicals that were not locked up to prevent access by the children. However, Respondents had purchased a lock, and it appeared that they were in the process of installing the lock on the cabinet door to prevent access to the chemicals by the children. In the front yard, Dishong observed: (a) a garden hose lying across the walkway in two places; (b) a metal rectangular bar lying across the walkway which two of the boys were throwing back and forth; (c) a toy lawnmower under the family van; and (d) garbage items such as open bean cans and pieces of cement scattered "all about." In the backyard, Dishong observed: (a) a trampoline beside the swimming pool; (b) items scattered throughout the backyard, including chair cushions; (c) that there was no barrier around the swimming pool as required by Department rule; (d) and that the pool was covered by green algae. All of the things observed by Dishong at Respondents' home on January 22, 2001, could be considered as constituting a danger to the children's safety.

13. Respondent Troy Allen testified that there was a fence installed on three sides of the swimming pool and that the house served as a barrier on the fourth side. However, there were no

safety features, such as those listed in Rule 65C-13.01(12)(c), Florida Administrative Code, installed on the exits from the house to the swimming pool to prevent the children from having access to the swimming pool only when supervised. Therefore the swimming pool was readily accessible to the children from the house when unsupervised.

14. Respondents own a Rottweiler dog, and had owned such a dog from the beginning of their licensure in February 1999. The dog was present at Respondents home on each occasion that Dishong visited Respondents' home. An earlier safety plan, agreed to by Respondents, required that the dog be kept outside, or restricted from the children, unless supervised while in the presence of the children. There was no evidence that this agreement had been violated by Respondents. This dog might be what Dishong considers to be a "large pet." However, other than Dishong's description of the dog as being a "large dog" and estimating its weight to be 125 pounds, there was no evidence that the dog met the definition of "large" as anticipated by the Department's rule. Likewise, there was no evidence to show that this particular dog was potentially dangerous.

15. Shortly before the hearing, Respondents had new carpet installed through out the house where appropriate, the walls stripped and painted, tile installed in areas where carpet was not appropriate, and some new furniture installed, which

included a replacement for the bed frame that was noted as a violation.

16. By letter dated February 20, 2001, the Department notified Respondents that their application for renewal of their foster home licensure had been denied.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.57(1), Florida Statutes.

18. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). The Department has the burden of proof in this proceeding. To meet its burden, the Department must establish facts upon which its allegations are based by a preponderance of the evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932, Section 120.57(1)(h), Florida Statutes, and Section 409.175(1)(f), Florida Statutes.

19. Rule 65C-13.001(1)(a), Florida Administrative Code, limits the number of children in a family foster home to five, including the family's own children. However, Rule 65C-011(1)(b), Florida Administrative Code, provides an exception to that rule as follows:

(1) Family Composition

* * *

(b) Generally there should be no more than five children in a home, including the substitute care parents' own children. This criteria may be waived for good cause and with written approval of the Family Safety and Preservation program office. If a family has emotional and physical capacity to nurture more than five children, it is not against policy to establish a capacity above the rule of five. (Emphasis furnished.)

Respondents clearly exceeded the "rule of five" children allowed in a family foster home. However, Respondents did not have written approval of the Family Safety and Preservation program office to exceed the "rule of five" as required by Department rule.

20. Rule 65C-13.006(1)(9), Florida Administrative Code, provides as follows:

(1) The department must receive the report of an approved sanitation inspection from the local health program office.

* * *

(9) At least two weeks prior to the date for relicensure copies of all forms, including the sanitation inspection, must be submitted to the district office with a request for the issuance of a new license.

In accordance with Rule 65C-13.011(11)(c), Florida Administrative Code, Respondents' home was inspected by the Polk County Health Department on December 8, 2000, and Respondents

were given a copy of the Inspection Report prepared by Omari listing the violations found by Omari. It was Respondents' responsibility to advise the Polk County Health Department that the violations noted in the December 8, 2000, Inspection Report had been corrected in order for the Polk County Health Department to furnish the Department with an "approved sanitation report." Respondents failed to notify the Polk County Health Department that the violations had been corrected. Therefore, the Department did not receive an "approved sanitation inspection" as required by the Department rule.

21. Rule 65C-13.010(1)(b)5.f., Florida Administrative Code, provides:

(1) Responsibilities of the Substitute Parent to the Child.

* * *

(b) Family Care Activities.

* * *

5. Discipline.

* * *

(f) The substitute care parents must not use corporal punishment of any kind.

Respondent Troy Allen admitted to having used corporal punishment on one of the foster children under Respondents' care, notwithstanding that he was aware of the Department's policy prohibiting the use of corporal punishment on any foster child,

for any reason. Other than this incident of the use of corporal punishment by Respondent Troy Allen, there is no evidence that Respondents engaged in the use corporal punishment on any of the foster children under their care.

22. Rule 65C-13.011(11)(b), 12(c) and (14)(e), Florida Administrative Code, sets forth certain minimum standards for licensure of family foster homes as follows:

(11) Physical Environment.

* * *

(b) The home and premises must be free from objects, materials, and conditions which constitute a danger to children.

* * *

(12) Play Area and Equipment.

* * *

(c) Swimming pools must have a barrier on all four sides of at least four feet. The barrier may consist of a house plus a fence on the three remaining sides or a four-sided fence. All access through the barrier must have one of the following safety features: alarm, key lock, self-locking doors or a bolt lock that is not accessible to children. . . .

* * *

(14) Foster Home Safety.

* * *

(e) The substitute care parents must have a method to restrict children's access to large pets or potentially dangerous animals.

23. On the occasions of all visits by Dishong, there were objects and conditions existing in Respondents' home and yard that constituted a danger to the children's safety.

24. Respondent Troy Allen testified that a fence surrounded the swimming pool on three sides and that the house served as the fourth side of the barrier as allowed by rule.

However, the swimming pool was readily accessible to the children from the house due to the lack of one of those safety features listed in Rule 65C-13.011(12)(c), Florida Administrative Code.

25. The Department has shown that there was a Rottweiler dog in and around Respondents' home that the children played with from time to time. However, the Department has failed to prove that the dog was what the rule considered to be a large dog or was potentially dangerous.

26. Respondents made an appropriate attempt to correct the problems existing in the home with new carpet, new tile, painted walls, and some new furniture. This attempt to correct the existing problems was "too Little, too late." It appears that Respondents were simply unable, both physically and financially, to take care of the number of children for which they were responsible.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Department enter a final order denying Respondents application for the annual renewal of their foster care license.

DONE AND ENTERED this 24th day of September, 2001, in
Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of September, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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 issue the Final Order in this case.