

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOEY TOLBERT)
and DONNA TOLBERT,)
)
 Petitioners,)
)
vs.) Case No. 01-4218
)
DEPARTMENT OF CHILDREN)
AND FAMILY SERVICES,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 8 and 9, 2002, in Shalimar, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioners: Randall Were, Esquire
Post Office Box 856
Milton, Florida 32572

For Respondent: Eric D. Schurger, Esquire
Department of Children
and Family Services
106 Governmental Center, Suite 601
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

The issue in this proceeding is whether the Department of Children and Family Services should revoke the foster care license of Joey and Donna Tolbert.

PRELIMINARY STATEMENT

By letter dated August 24, 2001, the Department of Children and Family Services (Department) advised Petitioners, Joey and Donna Tolbert (the Tolberts), that the Department was revoking their foster care license. As grounds therefore, the Department alleged that the Tolberts failed to comply with Sections 65C-13.009(1)(e)5., 65C-13.020(1)(c)1., and 65C-13.010(4)(i), Florida Administrative Code. Additionally, the letter alleged that the Tolberts violated the Bilateral Services Agreement entered into by the Tolberts and the Department.

Petitioners disputed the revocation and timely requested an administrative hearing. The Department forwarded the request for hearing to the Division of Administrative Hearings on or about October 29, 2001. A formal hearing was scheduled for January 8 and 9, 2002. Petitioners filed an unopposed Motion for Continuance, which was granted. The hearing was rescheduled for February 25 and 26, 2002. The Department did not receive the Order Granting Continuance and Re-Scheduling Hearing in a timely fashion and, therefore, filed an unopposed Motion for Continuance which was granted. The hearing was rescheduled for April 8 and 9, 2002.

Prior to the hearing, the Department filed a Motion for Protective Order and to Quash Subpoena Directed to District Administrator Charles Bates. The motion was taken up at the

commencement of the hearing. After hearing arguments of counsel, a ruling on the motion was deferred until the conclusion of the other testimony.

At hearing, Petitioners presented the testimony of the Petitioners, Joey Tolbert and Donna Tolbert, and nine other witnesses, Mary Martin, Sally Townsend, Ruben Bryant, Janice Berry, Betty Franklin, Gerald Reese, Marianne Vance, Jane Crittenden, and Carolyn Sue Kimbro. Petitioners presented the testimony of Arlene Johnson by deposition. Petitioners' Exhibits 1 through 9 were admitted into evidence, including the deposition transcript of Arlene Johnson. Respondent presented the testimony of six witnesses, Carlita Bennett, Mary Martin, Sally Townsend, Kathi Guy, Patricia Franklin, and Richard Messerly. Respondent's Exhibits 1 through 8 were admitted into evidence. Official recognition was taken of pertinent provisions of the Florida Administrative Code and Florida Statutes.

At the conclusion of the testimony, the Department's Motion for Protective Order was denied and the parties were granted until April 23, 2002, to take Mr. Bates' deposition. By request of the parties during a subsequent telephone conference call, the time in which to conduct Mr. Bates' deposition was extended.

The transcript consisting of two volumes was filed on April 19, 2002. The deposition transcript of Charles Bates was

filed on May 21, 2002. The parties requested more than 10 days in which to file proposed recommended orders. That request was granted. Petitioners filed an unopposed Motion for Extension of Time to file proposed recommended orders which was granted. The parties timely filed Proposed Recommended Orders on June 7, 2002, and July 8, 2002, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this proceeding, the home of Joey and Donna Tolbert was licensed by the Department as a foster home. They were initially licensed provisionally in December of 1998 for one year. They received a regular license in 1999 and retained a regular license until December 1, 2000, when they were issued license number 1200-008-2, a child specific license with a capacity of two children.

The Relicensure Process

2. Prior to issuing the child specific license, two Department employees of the Department, Mary Martin, a relicensing counselor for foster homes, and Ann Brock, a family services counselor, conducted a relicensing visit to the Tolbert's home on October 12, 2000. Donna Tolbert was present but Joey Tolbert was out of town. During the home visit, a Bilateral Service Agreement (Agreement) was signed by

Mrs. Tolbert and Ms. Martin. The Agreement was signed and dated by Mr. Tolbert and again by Ms. Martin on October 17, 2000.

3. The relicensing visit resulted in a Foster Home Relicensing Summary written by Mary Martin. The Summary recommended that the Tolberts be issued a regular license effective December 1, 2000 through December 1, 2001, for the capacity of two children. The Summary was signed by Mary Martin on October 26, 2000, and read in pertinent part as follows:

The Tolbert family is an invaluable asset to this Department. They have made themselves available on a regular basis for the placement of children when needed. Both Mr. and Mrs. Tolbert are experienced in childcare and they have three (3) children with special needs whom they adopted prior. They should not be asked to take numerous children with severe behavioral problems or teenagers.

It appears Mr. and Mrs. Tolbert have satisfied the Florida Administrative Code, Chapter 65C-15, requirements. It is respectfully recommended that the Tolbert family be issued a REGULAR license, effective December 1, 2000, through December 1, 2001, for the a capacity of two (2) children, ages birth (0) through twelve (12) years of either gender. Children with severe behavioral problems and teenagers are not to be placed in the Tolbert home.

4. However, Ms. Martin later wrote an addendum to the licensing summary. According to Ms. Martin, she was asked by her supervisor, Jill Green, to write the addendum. The addendum is undated but references the October 12, 2000, home relicensing

visit that resulted in her original recommendation. There is also an entry dated October 16, 2000, which is a date prior in time to her signature to the original relicensure summary, and an entry dated November 17, 2000. The addendum relates to matters concerning the Tolberts and their adopted son, Mi.^{1/}

5. Richard Messerly has worked for the Department for approximately 22 years and works in protective investigations in Pensacola. From June 1999 through September 2001, he was the program operations administrator for the central licensing unit of the Department. In that position, he had authority over foster care licensure. He supervised Mary Martin and her supervisor, Jill Green. Mr. Messerly signed Ms. Martin's relicensure summary on December 4, 2000, and initialed both pages of her addendum. He also created a written history of the Tolbert foster home which concluded with a recommendation that the Tolberts' foster home license be revoked:

SUMMARY/RECOMMENDATIONS

The Tolbert family has a positive licensing history of capably caring for many of our foster children. However, a serious change has occurred in the family's willingness to work with our staff, including rebuffing our attempts to offer them assistance with the disruption of an adoptive placement. The Tolberts have attempted to convince others that they had been requesting assistance for M for a very long period of time and that this is flatly not borne out in licensing records. The matter was never brought to our attention

until the visit in October 2000, at which time the matter was promptly referred to the adoptions unit, who responded promptly. Since that time the family has not cooperated with any attempts to assist them in that matter, and they seem to be insensitive to M's plight, and are completely focused on regaining their prior licensed status, as if nothing had happened.

Contacts with Pat Franklin, Kathi Guy, Sally Townsend and others reflect the absence of any prompt attempts to get help dealing with M's behaviors, yet many requests were made regarding foster children in their care with similar problems during the same time frame. It appears the family was more focused on attending the needs of foster children to the exclusion of sensitivity to their own (adopted) child's cries for help. Even when the needs were identified, the family was unwilling to become involved in attempts to remedy the problems and appeared to have given up on the child.

I am very uncomfortable with the inappropriate position this family has taken in regard to our family safety staff, as well as licensing staff, and do not see how we can hope to interact positively with them given their recent radical behaviors and threats. I feel that they have violated the Bilateral Service Agreement and have failed to "Treat all members of the foster care team with respect and courtesy." I recommend that we revoke the license using the violation of the agreement in conjunction with their other oppositional behaviors, omissions, and misrepresentations reflected in family safety foster care and adoptions records.

6. On December 1, 2000, Mr. Messerly signed a letter on behalf of Charles Bates addressed to the Tolberts which read:

Dear Mr. And Mrs. Tolbert:

Your home has been relicensed for the continuance placement of D and M.R. only. No other placements or overcapacity requests will be authorized at this time.

A regular license is issued for twelve months pending the outcome of matters presently before the Circuit Court.

If you have questions or wish to discuss this further, please contact Jill Greene, Foster Care Licensing Supervisor at (850)-595-8451.

7. On June 4, 2001, Mrs. Tolbert met with Charles Bates, District Administrator for District 1 of the Department. This meeting was at Mrs. Tolbert's request regarding her foster care licensure status. During that meeting, Mrs. Tolbert complained to Mr. Bates about certain adoption case workers.

8. On August 24, 2001, Charles Bates sent a letter to the Tolberts notifying them of the revocation of their license. The letter reads in pertinent part as follows:

RE: Revocation of Foster Home License.

Dear Mr. and Mrs. Tolbert:

This letter is to inform you that the Department of Children and Families has made a decision to revoke your foster home license. The basis for this decision is your failure to comply with Florida Administrative Code 65C-13 and the Bilateral Service Agreement (form CF-FSP 5226) which you executed.

Florida Administrative Code
65C-13.009(1)(e)5. states:

Work in a partnership. Develop partnerships with children and youth, birth families, the department, and the community to develop and carry out plans for permanency.

Florida Administrative Code
65C-13.010(1)(c)1. states:

Substitute care parents are expected to work cooperatively with the counselor as a member of a treatment team in seeking counseling, participating in consultation, and preparing and implementing the performance agreement or permanent placement plan for each child.

Florida Administrative Code
65C-13.010(4)(i) states:

The substitute care parents must be able to accept supervision by 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.

As part of your foster care licensing, you executed a bilateral Service Agreement. The Bilateral Service Agreement that you signed enumerated the Administrative Code responsibilities and detailed responsibilities of foster parents. The paragraphs violated are listed below in pertinent part:

h. To notify the department immediately of a potential change in a family composition, significant health changes or any other condition that may affect the child's well-being.

o. Obtain authorization from the department prior to spending money for which repayment is expected.

p. To accept the direction and supervision given by department to assist in caring for the foster child.

q. To work cooperatively with the department to attend scheduled meetings to discuss the child and his family and to meet the needs of the child.

r. To treat all members of the foster care team (i.e., the department, child's family, and GALS) with respect and courtesy.

As stated in the service agreement, non-compliance with any of the above provisions can result in termination of the service agreement and may also result in the department revoking the home's license.

You have failed to comply with the above code citations and service agreement provisions in that you have accused departmental staff of failing to disclose complete information to you and of misrepresenting statements that you have made. You have not worked cooperatively with the department employees who offered to assist you and your child; and have not worked in partnership with the department.

Specifically, you have previously stated you were obtaining therapy for a child, didn't agree with the therapist's recommendation, and were obtaining a psychiatric evaluation and assessment for the child, when in fact you did not do any of those things. A review of the department records reflected concerns you mentioned to the department in October 2000, regarding your child's disruptive behavior. However you would accept no assistance even though the department offered extensive assistance. You surrendered your adopted child later that same month.

Further, you have stated to a department employee that Ms. Peggy Custred and Ms. Sally Townsend should not work for the department, have accused them of wrongdoing, and have stated that you "will have their jobs." You have failed to treat members of the department with respect and courtesy.

Given the above problems, I find that it would not be in the children's best interests to continue licensing your foster home and am permanently revoking your license.

The Tolberts as foster parents

9. The overwhelming evidence shows that the Tolberts were excellent foster parents. Jane Crittenden, licensing supervisor for the Department, who was a foster care supervisor at the times material to this proceeding, acknowledged that the Tolberts received the award of Foster Parents of the Year in May of 2000 for the year 1999. She also acknowledged that as far as she knew, the Tolberts excelled as far as their work as foster parents; the foster children in their care did quite well; the Tolberts always seemed to provide a loving, nurturing home to foster children placed there; the Tolberts were called on by the Department to take extra children beyond their cap, which they agreed to do; and the Tolberts cooperated with her and her case workers during the period of time she worked with them.

10. Arlene Johnson, a former guardian ad litem for a foster child in the Tolberts' home from December 1998 until July 1999, visited the Tolbert home about twice a week during that time. She has been in a lot of foster homes and described the Tolberts' home as "the best one I've been in."

11. Gerald Reese, a family service counselor for the Department, worked with the Tolberts over a period of 6 to 7 months in 1999 and 2000 while he was a case worker. During that time, Mr. Reese did not have problems dealing with the Tolberts, did not observe any instance in which the children were not adequately provided for, and observed that the foster children in the Tolberts' home were happy.

12. Richard Messerly acknowledged that the Tolberts were exemplary foster parents as far as the care they provided to the foster children in their care.

13. Mr. Messerly also acknowledged that the only staff the Tolberts had problems with were particular members of the adoption staff, not the Department's foster care staff.

The wallpaper expense

14. Carlita Bennett was employed by the Department from 1986 until March of 2002. When she was working for the Department in the capacity of a foster parent recruiter in May of 2001, she sent an e-mail message to Mary Martin regarding the Tolberts which contained the following:

11/04/99 A restitution claim form was submitted by Mrs. T for damage to wallpaper caused by 2 yr. Old. The bill total was \$1,151.04 to replace wallpaper in living room, dining room, kitchen and hall. PS Counselors were not made aware of the damage until repairs were made.

15. According to Ms. Bennett, it is regular procedure for someone from the department to go out to a foster home and look at damage before repairs are made. The Bilateral Services Agreement requires the foster parents to obtain authorization from the Department prior to spending money for which repayment is expected. According to Ms. Bennett, this policy was not followed in this instance. Ms. Bennett did not explain why she sent the e-mail message on May 30, 2001, to Mary Martin referencing an incident that took place two and one-half years earlier.

16. According to Mrs. Tolbert, a former two-year-old foster child in her care ripped the wallpaper in the dining room and the living room. Her dining room, kitchen, and hallway are all one color. According to Mrs. Tolbert, she gave an estimate of the repair work to Shiela Campbell, an employee of the Department.

17. Richard Messerly acknowledged that this matter of the expense for wallpaper would not in and of itself have resulted in the Department revoking the Tolberts' foster care license. At most, the Department would have only talked to the Tolberts

had there not been other issues about which the Department was concerned.

Notification to Department of change of condition

18. The August 24, 2001, revocation letter from Mr. Bates alleged that the Tolberts failed to notify the Department of a potential change in conditions in the home that might affect the well-being of foster care children in the home. This allegation relates to behavior problems of the Tolberts' adopted son, Mi.

19. The Tolberts adopted Mi. in September of 1998. They signed surrenders of Mi. in November of 2000. The Tolberts' surrender of Mi. was central to the Department's decision to revoke the Tolbert's foster care license.^{2/}

20. Mi. began having serious behavior problems in 1999. Mrs. Tolbert recalls telling Gerald Reese, the foster care worker assigned to the Tolberts at that time, about problems with Mi. Mr. Reese acknowledged that Mrs. Tolbert mentioned to him problems she was having with Mi. to which he responded that she should bring it to the attention of the adoption case worker.

21. The Tolberts' adoption case worker was Sally Townsend. Mrs. Townsend recalls that Mrs. Tolbert stopped by her office three times when Mrs. Tolbert was in the Ft. Walton Beach Service Center to see other department employees. Mrs. Townsend acknowledged that Mrs. Tolbert told her of behavior problems

with Mi. the first time she stopped by Mrs. Townsend's office. The second time Mrs. Townsend recalls that Mrs. Tolbert told her Mi.'s behavior problems were better. The third time, however, Mrs. Tolbert informed Mrs. Townsend that Mi.'s behavior was much worse.

22. Mrs. Tolbert remembers these encounters with Mrs. Townsend differently. According to Mrs. Tolbert, she met with Mrs. Townsend approximately 10 times during which she spoke to her about Mi.'s behavior problems.

23. According to Mrs. Townsend's case notes, Mrs. Tolbert told her on October 24, 2000, that Mi. was urinating all over the house, had gotten a butcher knife out of a drawer in the kitchen, and shoved a puppy's head under a piece of furniture.

24. Evidence was presented at hearing regarding whether or when the Tolberts received notice that Mi. had significant problems before he was adopted by the Tolberts. However, what is important for purposes of this proceeding is when was the Department notified of Mi.'s problems. The Department knew of Mi.'s previous problems prior in time to the Tolberts adopting Mi. and were told as early as 1999 that the Tolberts were experiencing behavior problems with Mi.

25. Kathi Guy is an adoption program specialist for the department. She met with the Tolberts immediately after Mrs. Tolbert met with Mr. Bates on June 4, 2001. On June 21,

2001, she wrote a memorandum to Charles Bates concerning the issues relating to the Tolberts. Regarding the issue of the Tolberts' responsibility of notifying the Department of Mi.'s behavior in relation to the foster children in the home, Ms. Guy wrote, "It is unclear what responsibility the Tolberts had to inform Central Licensing of M's behaviors that may have had injurious effects on foster children in their care."

Working in partnership

26. The June 24, 2001, revocation letter alleges that the Tolberts failed to work in partnership with the Department and did not obtain certain services for Mi. although they were offered. It is important to remember that the provisions to which Mr. Bates' revocation letter references are part of the Bilateral Services Agreement that pertained to the Tolberts' role as foster parents. However, Mi. was their adopted son, he was not a foster child at that time.

27. Further, there is ample evidence in the record that the Tolberts sought and received services for Mi. over time, although they were in disagreement with the Department regarding certain services during the time immediately preceding the surrender of Mi. Marianne Vance is a first grade teacher. Mi. was in her class for two years. According to Ms. Vance, Mi. received testing in school for learning disabilities and for "everything possible." When Mi.'s behavior problems became

worse during his second year in Ms. Vance's class, Mrs. Tolbert sought assistance from the school. The school counselor worked with Mi. and Mrs. Tolbert. According to Ms. Vance, the Tolberts did everything possible in seeking help or assistance.

CONCLUSIONS OF LAW

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

29. The Department of Children and Family Services is the agency charged with the responsibility of licensing foster homes in the state of Florida. Section 409.175, Florida Statutes.

30. The Department seeks the revocation of the Tolberts' license. Accordingly, as the party asserting the affirmative of an issue before this administrative tribunal, the Department has the burden of proof. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). However, in accordance with the definition of "license" contained in Section 409.175(2)(f), Florida Statutes, the licensure status previously awarded to the Tolberts is not a professional license and does not carry a property right. Therefore, the Department must establish facts which support its position of imposing administrative fines by a preponderance of the evidence rather than by the clear and convincing standard normally imposed in

professional license cases. Department of Banking and Finance v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996).

31. Paragraphs 409.175(8)(a) and (b) read as follows:

(8)(a) the department may deny, suspend, or revoke a license.

(b) Any of the following actions by a home or agency or its personnel is a ground for denial, suspension, or revocation of a license:

1. An intentional or negligent act materially affecting the health or safety of children in the home or agency.

2. A violation of the provisions of this section or of licensing rules promulgated pursuant to this section.

32. Rule 65C-13.009(1)(e)5., reads as follows:

(e) The goal of the Group Preparation and Selection Program is to prepare individuals and families to make an informed decision about becoming foster or adoptive families. The decision is made with the department and is based on the capability and willingness to take on the "role" and develop the skills needed to foster or adopt. Foster and adoptive families who make good decisions and grow in their new roles work best with the department, birth families and others. These partnerships help children and youth have stability and permanence with a family. As successful foster and adoptive parents you must be able to:

* * *

5. Work in partnership. Develop partnerships with children and youth, birth families, the department, and the community to develop and carry out plans for permanency.

33. Rule 65C-13.010(1)(c) and (4)(i), reads as follows:

(c) Substitute Parent Responsibilities.

1. Substitute care parents are expected to work cooperatively with the counselor as a member of a treatment team in seeking counseling, participating in consultation, and preparing and implementing the performance agreement or permanent placement plan for each child.

* * *

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

(i) The substitute care parents must be able to accept supervision by department staff and participate in and support case plans for children in their homes. Specifically, substitute care parents must be included in the carrying out of these plans.

34. The June 24, 2001, revocation letter cited violations of Rules 65C-13.009(1)(e)5, and 65C-13.010(1)(c)1. and(4)(i), Florida Administrative Code, as well as five provisions of the Bilateral Service Agreement for foster parents. Further, the letter referenced circumstances surrounding the Tolberts' surrender of Mi. The surrender was accepted by a court of competent jurisdiction and will not be second guessed or reevaluated.

35. As a threshold matter, Mi. was not a foster child. The Bilateral Service Agreement does not apply to issues relating to Mi. While there was evidence that there was a

technical violation of the agreement regarding a former foster child and the submission of the wallpaper expense, the Department acknowledged that this matter, in and of itself, does not constitute grounds for revocation.

36. The evidence presented does not support revocation of the Tolberts' foster care license for the reasons relied upon by the Department in the June 24, 2001, revocation letter. While the relationship between the Department's adoptive staff and the Tolberts is strained at best, it should not prevent the parties from making an effort to work together in the future regarding the Tolberts' provision of care to foster children.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Department of Children and Family Services enter a final order rescinding its revocation of the Tolberts' foster care license.

DONE AND ENTERED this 31st day of July, 2002, in
Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of July, 2002.

ENDNOTES

1/ Because two children with the same initials were referenced during the hearing, this child was designated "Mi." for the duration of the hearing to distinguish him from another child identified as "Me."

2/ In their opening statement and throughout the hearing, Petitioners objected strenuously to evidence concerning their adopted son, Mi., and circumstances surrounding his surrender being admitted into evidence. It is not within the purview of this tribunal to second guess the appropriateness of or the circumstances surrounding a surrender which was approved by the appropriate court. Accordingly, only those facts surrounding Mi. which are relevant to the issue of the foster care license revocation will be addressed here.

COPIES FURNISHED:

Randall Were, Esquire
Post Office Box 856
Milton, Florida 32572

Eric D. Schurger, Esquire
Department of Children
and Family Services
106 Governmental Center, Suite 601
Pensacola, Florida 32501

Paul F. Flounlacker, Jr., Agency Clerk
Department of Children
and Family Services
Building 2, Room 204B
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Josie Tomayo, General Counsel
Department of Children
and Family Services
1317 Winewood Boulevard
Building 2, Room 204
Tallahassee, Florida 32399-0700

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 issue the Final Order in this case.