STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BETTY BAUMSTARK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-0987
	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on June 10, 2002, in Brooksville, Florida, before Carolyn S. Holifield, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: David P. Rankin, Esquire
14502 North Dale Mabry Boulevard
Suite 300
Tampa, Florida 33618

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 in this case is whether Petitioner is entitled to have her home licensed and registered as a family day care home under the provision of Chapters 402 and 435, Florida Statutes.

PRELIMINARY STATEMENT

On October 17, 2001, Petitioner, Betty Baumstark, submitted an application for a license to operate a family day care home pursuant to the provisions of Chapter 402, Florida Statutes. In a letter issued February 8, 2002, Respondent, the Department of Children and Family Services (Department) denied Petitioner's application. According to the letter, the application was denied for the following four reasons: (1) Abuse Report 2000-045218 indicated that Petitioner gave temporary custody of her son to friends on or about August 8, 1999, and her friends stated that Petitioner could not and would not care for him; (2) Abuse Report 1999-095828 was closed with some indicators of inadequate supervision with caretaker present; (3) a Florida Law Enforcement check showed a 1997 domestic violence injunction against Petitioner's fiancé; and (4) a 1998 report stated that Petitioner had experimented with drugs in the past. Petitioner requested a formal hearing to contest the Department's decision. The request was forwarded to the Division of Administrative Hearings on March 12, 2002.

At hearing, Petitioner testified on her own behalf and called two witnesses, Michael Canty and Greg Davis. Petitioner had four exhibits received into evidence. The Department called two witnesses, Donna Stucchio, a protective investigation supervisor with the Department, and JoAnne K. Fuller, the

Department's day care licensing counselor for Hernando County. The Department had four exhibits received into evidence.

A Transcript of the hearing was filed on June 28, 2002. Both parties submitted proposed recommended orders which have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. On October 17, 2001, Petitioner, Betty Baumstark, submitted an application for a license to operate a family day care home at her residence.

2. On November 29, 2001, the Department conducted an institutional staffing meeting to consider Petitioner's application. During the institutional staffing, the staff recommended that Petitioner's application for a license to operate a family day care home at her residence be denied.

3. Although the institutional staffing committee made a recommendation regarding Petitioner's application, the Department's licensing specialist and supervisor made the final decision regarding the family day care home license.

4. More than two months after the Department's institutional staffing, on February 8, 2002, the Department notified Petitioner by letter that her application to operate a family day care home was denied.

5. The denial letter advised Petitioner that the family day care home license was denied based on the following grounds:

(a) Abuse Report 2000-045218 indicated that Petitioner gave temporary custody of her son to friends on or about August 8, 1999, and that Petitioner's friends stated that they asked for the child because Petitioner "could not and would not care" for him; (b) Abuse Report 1999-095828 was closed with some indicators of inadequate supervision with caretaker present; (c) a domestic violence injunction was issued in 1997 against Petitioner's fiancé, Michael Canty; and (d) Petitioner had stated that she had experimented with drugs. The Department does not allege any other basis for denial of the license. Accordingly, it is found that, except for any requirements and minimum standards covered by those allegations, Petitioner met all the requirements and minimum standards necessary for licensure as a family day care home.

6. With regard to the allegations in the 2000 Abuse Report, Petitioner did, in fact, give temporary custody of her son to Greg Davis in August 1999, while she was pregnant with her second child. The reason Petitioner gave Mr. Davis temporary custody was because her son acted out his hostility and became unmanageable. Concerned about her son, Petitioner actively sought assistance from various community resources to help her son, but was unsuccessful in doing so. After becoming aware of the situation with Petitioner's son, Mr. Davis, a friend of Petitioner and Michael Canty, offered to allow

Petitioner’s son to live with him in an effort to improve the boy’s behavior and performance is school.

7. Because Petitioner had been unsuccessful in obtaining any assistance to address her son's problems, she agreed to allow him to stay with Mr. Davis because she believed it was in her son’s best interests. In fact, during the time Petitioner’s son has lived with Mr. Davis, there has been a significant and positive improvement in the boy’s behavior and his grades in school. Petitioner's son is still living with Mr. Davis and has continued to do well in that setting. Given her son's progress and improvement, Petitioner has allowed him to remain with Mr. Davis. However, Petitioner has not abandoned her son and is still very involved in his life. Petitioner has a good relationship with her son and has maintained contact with him through regular visits and telephone conversations.

8. Petitioner never stated that she could not and would not care for her son.

9. The 1999 Abuse Report of inadequate supervision is based on a limited portion of the investigation which reported that Petitioner was called to pick up her son from a treatment facility and that she failed to pick up her child. This report makes no claim that anyone from the Department or the treatment facility ever spoke to Petitioner and told her to pick up her son from the treatment facility. Moreover, the credible

testimony of Petitioner is that she was never contacted and told her that her son was being discharged from the facility and needed to be picked up. During the time period covered in the 1999 Abuse Report, as noted in that report, Petitioner's son was in the custody of his father and stepmother and not in the custody of Petitioner.

10. The domestic violence injunction referenced in the denial letter names Michael Canty as a party in that proceeding. Mr. Canty was Petitioner's fiancé at the time of the hearing and, in the event the license was issued, Mr. Canty, who lived with Petitioner, was listed as the person who would be present at the family day care home to assist in Petitioner's absence.

11. As alleged in the denial letter, a domestic injunction was issued against Mr. Canty in 1997. However, there is no indication of the underlying factual basis for issuance of that injunction. Nothing in the domestic violence injunction, dated November 6, 1997, mentions that any violence had occurred or that the interests of the children in question had been harmed. Moreover, in a subsequently issued order in that case, it is noted that Mr. Canty's ex-fiancée, the person who initiated the injunction proceedings, withdrew her supporting affidavit.

12. According to the credible testimony of Mr. Canty, his ex-fiancée obtained an injunction so that she could take the couple's children to another city and not because he had

committed an act of violence against her. During the years Mr. Canty and his ex-fiancée lived together, there were never any complaints filed with the police that indicate that Mr. Canty engaged in conduct that constitutes domestic violence nor were the police ever called to their home. The Department presented no evidence to the contrary.

13. At some point during one of the investigations, there was an accusation that Petitioner used drugs. In response to a question from someone from "HRS" who talked to her, Petitioner told the person that she had experimented with drugs.

14. Petitioner's experimentation with drugs was limited to smoking marijuana when she was fourteen years old, twelve or thirteen years prior to the hearing in this proceeding. Since that time, Petitioner has not experimented with or used illegal drugs.

15. In 1999, Petitioner submitted to drug testing as a condition of employment with the YMCA and both of the tests were negative.

16. The Department’s notification of denial of Petitioner’s application was more than ninety (90) days from the date the Department received Petitioner's application.

17. The Department made no written request to Petitioner for any additional information concerning her application, but claims that the request for additional information was made by a

Department employee during a conversation that employee had with Petitioner. However, the Department employee who allegedly requested that Petitioner provide additional information on the domestic violence injunction involving Mr. Canty did not testify at hearing. Moreover, the Department employees who testified at hearing had not requested any additional information from Petitioner and did not know whether any other Department employee had requested such information from Petitioner.

18. Contrary to the Department's claim, the credible testimony of Petitioner was that the Department never requested or asked her to provide additional information to supplement her application.

19. The Department failed to act on Petitioner’s application within ninety days of receiving it. This statutory time period was not extended because the Department did not request that Petitioner provide additional information regarding her application. Having failed to timely act on Petitioner’s application, the Department is required to grant a family day care home license to Petitioner.

20. Even if the Department had timely acted on Petitioner's application, the substantive bases upon which it seeks to deny the family day care home have not been established in this record.

CONCLUSIONS OF LAW

21. The Division of Administration Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sections 120.569 and 120.57, Florida Statutes.

22. Chapter 402, Florida Statutes, governs licensure and registration of child care facilities, including family day care homes. Subsections 402.308(3) and 402.313(1), Florida Statutes.

23. The Department seeks to deny Petitioner's application for a family child care home license on the grounds stated in the denial letter and in paragraph 5 above. However, the denial letter does not indicate the statute or rule that proscribes the alleged conduct or actions and/or constitutes a proper basis for the denial.

24. Subsection 402.305(1), Florida Statutes, requires the Department to establish minimum standards that all child care facilities must meet. These licensing standards include minimum standards for child care personnel as enunciated in Section 402.305(2), Florida Statutes, which provides the following:

> Minimum standards for child care personnel shall include minimum requirements as to:
>
> (a) Good moral character based upon screening. This screening shall be conducted as provided in Chapter 435, using level 2 standards for screening set forth in that chapter.

25. Section 402.313, Florida Statutes, authorizes the Department to license family day care homes and to conduct appropriate background screenings to determine if child care personnel meet the requisite qualifications to work with children.

26. Subsection 402.313(3), Florida Statutes, reads as follows:

> (3) Child care personnel in family day care homes shall be subject to the applicable screening provisions contained in ss. 402.305(2) and 402.3055. For purposes of screening in family day care homes, the term includes any member over the age of 12 years of a family day care home operator's family, or persons over the age 12 years residing with the operator in the family day care home. Members of the operator's family, or persons residing with the operator, who are between the ages of 12 and 18 years shall not be required to be fingerprinted, but shall be screened for delinquency records.

27. Chapter 435, Florida Statutes, Level 1 and 2 screening standards disqualify anyone as a child care provider who has committed an act that constitutes domestic violence as defined in Section 741.30, Florida Statutes. See Subsections 435.03(3)(b) and 435.04(4)(b), Florida Statutes. Section 741.30, Florida Statutes, does not define domestic violence, but creates a cause of action for an injunction for protection against domestic violence. The term "domestic violence" is defined in Subsection 741.28(1), Florida Statutes.

28. Subsection 741.28(1), Florida Statutes, defines domestic violence as follows:

> [A]ny assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another who is or was residing in the same single dwelling.

29. Because Petitioner's fiancé, Mr. Canty, resides in the home and is listed as a person who will serve as a child care provider on an emergency basis and in her absence, he is subject to the applicable screening standards in Chapter 235, Florida Statutes, pursuant to Sections 402.305, Florida Statutes.

30. Petitioner established that Mr. Canty never committed an act of domestic violence and, accordingly, should not be disqualified as a child care provider. The Department failed to present any evidence to the contrary. Thus, the allegation that Mr. Canty committed such acts can not be the basis of the Department's denying Petitioner's application for licensure.

31. In this case, the Department also alleged as grounds for denial of Petitioner's application limited parts of two abuse reports. First, it was alleged that, based on the 2000 Abuse Report, Petitioner gave custody of her son to a friend and said she would not and could not keep and/or care for her son. Second, it is alleged that, based on the 1999 Abuse Report,

Petitioner refused to pick up her son from a treatment center, once he was discharged.

32. Section 39.202(2)(a)4., Florida Statutes, allows the Department's employees to have access to abuse reports in that they are responsible for licensure or approval of child care facilities. Pursuant to that provision, the Department may consider abuse reports and their underlying facts in deciding whether to issue a license to operate a family day care home.

33. Similarly, Section 39.202(2)(j), Florida Statutes, allows the Division of Administrative Hearings to have access to the reports for purposes for any administrative challenge. However, the statute does not provide authority for an administrative law judge to treat such reports as sufficient in themselves to support findings of fact. Section 120.57(1)(c), Florida Statutes.

34. The Department properly considered the abuse reports in reviewing Petitioner's application. However, in this proceeding, Petitioner established that the allegations relative to the abuse reports were not true.

35. With regard to the 2000 Abuse Report, the undisputed evidence was that Petitioner never said that she could not and would not care for her son. While the evidence established that Petitioner made the difficult decision to give temporary custody of her son to a friend, it was established that she did so

because it was in her son's best interest. Likewise, the evidence established Petitioner did not refuse to pick up her son from the treatment facility as alleged in the denial letter. The undisputed evidence established that Petitioner was never contacted and told that her son was discharged and ready to be picked up from the facility.

36. The factual allegations in the denial letter relative to the 1999 Abuse Report and the 2000 Abuse Report were not established. Therefore, the grounds for denial associated with those abuse reports cannot be the basis for denial of Petitioner's application.

37. Finally, the Department alleges that another basis for denial of Petitioner's license is that at some time in the past, Petitioner stated she had experimented with drugs. The undisputed evidence established that Petitioner's experimentation and experience with illegal drugs was limited to Petitioner's smoking marijuana when she was about 14 years old and that she has not used drugs since that time.

38. Given that Petitioner's experimentation with drugs occurred when she was only fourteen and that she has not used them since that time, Petitioner's statement that she experimented with or used drugs cannot be the basis of denying her license to operate a family day care home.

39. The grounds for which the Department denied Petitioner's license were successfully refuted by the evidence presented at hearing. Accordingly, the allegations in the denial letter can not properly serve as the basis for denying Petitioner's license.

40. In addition to the foregoing reasons, in this case, the Department is required to approve the application based on mandate in Section 120.60(1), Florida Statutes.

41. Subsection 120.60(1), Florida Statutes, governs the processing of licensing applications by an agency and provides for the circumstances under which a "default" license must be issued. That provision states:

> (1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. An application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57. An

> application for a license must be approved or denied within the 90-day or shorter time period, within 15 days after the conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever is later. The agency must approve any application for a license or for an examination required for licensure if the agency has not approved or denied the application within the time periods prescribed by this subsection.

42. Subsection 120.60(1), Florida Statues, provides a 90-day time frame within which after receipt of an application for a license, the agency must examine the application, notify the applicant of any apparent omissions or errors, request additional information permitted by law, and either approve or deny the application. According to that provision, within 30 days after the agency receives the application, the agency must notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require.

43. Pursuant to Subsection 120.60(1), Florida Statutes, the agency "shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period." An application submitted to an agency is considered complete when the requested information and corrections have been received by the agency or when the time for such notification

has expired. If the agency does not approve or deny the application within the time period prescribed by statute, the agency must approve the application for a license.

44. The evidence established that the Department received Petitioner's application on October 17, 2001, held an institutional staffing on the application on November 29, 2001, and during that meeting, Department staff decided to recommend that Petitioner's application be denied. The evidence also established that the Department employees attending the institutional staffing did not make the final decision relative to Petitioner's application, but that decision was made by others in the Department. The undisputed evidence established that the Department notified Petitioner of its decision to deny her application in a Notice of Denial of License dated February 8, 2002, more than 90 days after it received her application.

45. The Department claims that the 90-day time period established in Subsection 120.60(1), Florida Statutes, is extended because it requested additional information from Petitioner. However, that assertion is not supported by the record. In order for the time period to be extended, the Department has to establish that it, in fact, requested additional information from Petitioner and that it did so within 30 days after receiving the application. The Department has

failed to establish that such a request was made and/or when it was made.

46. Having failed to notify Petitioner of any apparent errors or omissions or to request any additional information, in accordance with Subsection 120.60(1), Florida Statutes, the Department was required to approve or deny the application for licensure within 90 days of receiving it. Because the Department did not act on the application within the statutorily prescribed time period, it is required to approve Petitioner's application.

RECOMMENDATION

Base on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED:

That the Department of Children and Family Services enter a final order granting Petitioner a license to operate a family day care home.

DONE AND ENTERED this 30th day of August, 2002, in Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2002.

COPIES FURNISHED:

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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 issue the final order in this case.