STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY C. JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-0271
	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon due notice, this cause came on for a disputed-fact hearing on March 19, 2004, in Ocala, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary C. Johnson, pro se
1620 Northwest 17th Place
Ocala, Florida 34475

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

STATEMENT OF THE ISSUE

Whether Petitioner may be granted a family day care home registration/license.

PRELIMINARY STATEMENT

On or about January 22, 2003, the Department of Children and Family Services (DCF) notified Petitioner that her application to operate a family day care home had been denied for disqualifying information found in the background screening process. This letter was admitted into evidence as Exhibit ALJ-A. In relation thereto, Petitioner timely requested a disputed-fact hearing. Petitioner contended that a second denial notice was sent on October 22, 2003, but it was not placed in evidence. In either case, the matter was not referred to the Division of Administrative Hearings until January 22, 2004, and there is no dispute that Petitioner's request for hearing was timely.

By Notices of Hearing issued February 12 and 17, 2004, the case was scheduled for hearing before the Division on March 19, 2004.

At the disputed-fact hearing, the parties stipulated that because the only impediment to granting Petitioner a family day care home registration was the background screening, it was expedient for DCF to present its case first. Pursuant to Osborne-Stern & Co. v. Dept. of Banking and Finance, 670 So. 2d 932 (Fla. 1996), the undersigned ruled orally that prior offenses, if any, must be proven by clear and convincing evidence.

Official recognition was taken of Section 402.313, Florida Statutes.

DCF presented the oral testimony of Glenda McDonald and had five exhibits admitted in evidence. Petitioner presented the oral testimony of Albert Johnson, Jr., and testified on her own behalf.

No transcript was provided, and neither party submitted a post-hearing proposal.

FINDINGS OF FACTS

1. Petitioner operated a licensed family day care home from 1992 until June 2002, when she ceased to operate a home.

2. In late 2002 or early 2003, Petitioner applied to DCF for a new license.

3. Petitioner's new application was denied solely because of information found during the background screening, including information from her prior licensure file.

4. Glenda McDonald was Petitioner's day care supervisor during Petitioner's prior licensure. In that capacity, Ms. McDonald conducted regular inspections of Petitioner's day care home.

5. On August 25, 1992, Ms. McDonald's superior sent Petitioner a letter stating that Petitioner was operating a day care facility in excess of its licensed capacity and requiring Petitioner to come into compliance by August 28, 1992.

Petitioner credibly denied that she received this letter. The letter was not sent to Petitioner's address of record and no proof of the allegations in the letter were presented.

6. During Petitioner's prior licensure, DCF generated four abuse/neglect reports related to Petitioner's day care home. None of these reports were written by Ms. McDonald, who was never a child protection investigator (CPI). Copies of these reports were included in Petitioner's old licensure file.[1/]

7. Abuse/neglect Report 1998-050246 relates to a child who wandered away from Petitioner's day care home on May 1, 1998. The report was verified for "inadequate supervision: neglect" against Petitioner.

8. As a result of the events giving rise to the May 1, 1998 abuse/neglect report, Ms. McDonald cited Petitioner's day care home on June 4, 1998, with one count of "Class II non-compliance: lack of direct supervision," pursuant to Florida Administrative Code Rules 10M-12.020(5)(a) and 65C-22.001(5)(a). Since this exhibit was a carbon copy in Ms. McDonald's possession, it is inferred that Petitioner actually received a copy of this informal citation. Ms. McDonald also issued a warning letter to Petitioner on June 4, 1998, citing only Rule 10M-12.0202(5)(a), and saying that Petitioner could appeal after she received a subsequent fine letter for either $50.00 or $100.00. In connection with the May 1, 1998 incident,

Ms. McDonald had interviewed Petitioner, who had made various admissions. After her investigation, Ms. McDonald was satisfied that a child entrusted to Petitioner's care had walked out of Petitioner's enclosed yard and further had walked beside a busy road, without Petitioner's knowledge, and that the child had been picked up by the police after nearly two hours' absence, near a busy intersection. In the course of Ms. McDonald's investigation, Petitioner had admitted her caretaker responsibility for the child but had denied that he was a paying day care client. At the hearing in the instant case, Petitioner maintained essentially the same position.

9. Abuse/neglect Report 1999-105502 relates to allegations, arising on August 19, 1999, that Petitioner had locked day care children in a time-out room or "cubby" and that day care children had been beaten. No indicators were found by the CPI against Petitioner for corporal punishment. The report was eventually closed with "some indicators" against Petitioner as the caretaker responsible for confinement and bizarre punishment, constituting neglect. However, DCF did not classify or close this report at all until January 25, 2002. As a result, the report refers to "prior reports," but lists reports for both previous and subsequent years: 98-505246, 99-105502, 99-118736, 00-128236, and 02-006119. Because the classification of abuse/neglect report 99-105502 depended upon reports after

its date of commencement, some of which cannot be assessed as to status,[2/] and because no competent, credible evidence concerning the underlying August 19, 1999, event alleged in the report was presented in the instant hearing, report 1999-105502 is discounted in its entirety as evidence of any wrong-doing, abuse, or neglect by Petitioner.[3/]

10. Abuse/neglect Report 1999-118736 relates to allegations of bite marks found on a nine-month-old child in Petitioner's day care home on September 17, 1999. Petitioner was listed therein as a "significant other." The report was "closed with no on-going care needed."

11. Abuse/neglect report 2000-128236 relates to bite marks found on one two-year-old child inflicted by another two-year old child, both of whom were in Petitioner's day care home on August 16, 2000. This report was classified only as "investigation complete," and further stated that Petitioner was the caretaker responsible. The report further noted that the CPI wanted DCF to consider "removing" Petitioner's license due to the number of abuse/neglect reports with "verified" allegations and some indicators. Yet as of the closure of this report, there appears to have been only the 1998 verified report. (See Findings of Fact 7 and 8).

12. Due to all of the inconsistencies within the 1999 and 2000 reports, due to there being only one report (No. 98-050246)

ever actually classified as "verified," and due to the legally indefinite nature of the classifications assigned by CPIs in 1999 and 2000, it is apparent that the CPIs who completed the 1999 and 2000 abuse/neglect reports had no clear understanding of the terms required by law for classifying them. Because of the vague classifications assigned to the 1999 and 2000 reports, it may be inferred that Petitioner was never provided a timely opportunity to contest them. (See also Finding of Fact 17.) Therefore, these reports cannot be called either "verified," "confirmed," "upheld," or "uncontested." (See Conclusion of Law 27).

13. On November 24, 1999, Ms. McDonald wrote Petitioner to express DCF's concern, pursuant to Florida Administrative Code Rule 65C-22.001(5)(a), after the CPI's investigation and her own independent inspection arising from "the repeated abuse reports". Ms. McDonald's use of the plural for "abuse reports" is noted. However, her letter stated no "concern" other than the incident of September 17, 1999, on which investigation had been closed, naming Petitioner only as a "significant other." The letter was sent certified mail to inform Petitioner that the violation was being classified as a Class II violation with a $25.00 fine for each day of violation and she could appeal when she got a subsequent fine letter. No return of certified mail receipt was offered in evidence.

14. Ms. McDonald testified in the instant case that she was contemporaneously aware of the bites on the nine-month-old who was in Petitioner's day care on September 17, 1999, and that she also was contemporaneously aware of another child who had been bitten while in Petitioner's day care. It is inferred from her testimony that Ms. McDonald was familiar, from her regular inspections, with the events surrounding the August 16, 2000, abuse/neglect report of a two-year-old child suffering bite marks from another two-year-old child, because Ms. McDonald further testified that it was upon the second biting incident that DCF began to seriously consider revoking Petitioner's first license. (See Findings of Fact 10-11).

15. On or about December 11, 2000, a DCF attorney drafted an administrative complaint against Petitioner. The administrative complaint sought only to impose administrative fines for violations as follows: one 65C-20.009(3)(a) violation, Class I, inadequate supervision, with a fine of $100.00; one 65C-20.009(3)(a), Class II violation, inadequate supervision, with a fine of $50.00; and one 65C-20.009(3)(a) violation, Class II, inadequate supervision, with a fine of $50.00. The administrative complaint contained no prayer to revoke Petitioner's license. The charges contained therein apparently were solely the result of the abuse/neglect reports arising from incidents on May 1, 1998 (the wandering child

incident); September 17, 1999, (the bites on the nine-month-old child); and August 16, 2000, (the bites on the two-year-old child). An administrative complaint is merely an allegation. Of itself, it proves none of the charges contained therein. Moreover, there is no clear evidence that Petitioner ever received the foregoing administrative complaint so as to have an opportunity to contest the charges. However, the administrative complaint suggests, contrary to some testimony, that Petitioner had not previously been fined for these dates. It also clearly demonstrates that, as of December 11, 2000, DCF did not view the wandering child or the two incidents of biting children biting each other as Code violations worthy of revoking Petitioner's license.

16. Ms. McDonald testified that in 2002, as a result of the foregoing administrative complaint, she told Petitioner that DCF would not renew Petitioner's license when it came up for renewal, and that consequently, Petitioner agreed to retire and never reapply for a day care license, rather than suffer administrative prosecution. Petitioner credibly denied that such a scenario had ever occurred. Petitioner testified that she had never signed anything, did not know there were charges pending against her, and only "retired" in 2002 because she had been hospitalized and unable to work for a period of time. Her husband credibly corroborated her desire to retire after

hospitalization. Because the 2000 administrative complaint was apparently never served on Petitioner; because of the greater weight of Petitioner's and her husband's combined testimony; because DCF seems to have repeatedly intended to assess different degrees of noncompliance and different amounts of fines for the same alleged events; because DCF introduced warnings and citations but no fine letters containing the opportunity to appeal/contest; and because it is not credible that someone licensed for 10 years would retire and guarantee never to reapply, only to avoid what, at worst, would be a $200 fine, Petitioner and her husband are found to be the more credible witnesses on why Petitioner surrendered her first license, and it is accordingly found that Petitioner surrendered her first license without coercion by DCF and without giving DCF any promise not to reapply.

17. Petitioner is also found credible that she did not know there were any continuing problems as a result of any of the oral or written warnings she had received. Her testimony in this respect is understood to mean that she never received a notice permitting her to contest any of the four abuse/neglect reports discussed, supra., or any formal notices to pay fines.

CONCLUSIONS OF LAW

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

19. Petitioner was previously licensed for 10 years, during which time DCF investigated her and her day care home on at least four occasions. Of those four child protection investigations, DCF's abuse/neglect reporting system verified only one report of neglect against Petitioner. That was the May 1, 1998, wandering-off of a non-day care child. Petitioner should have been given the opportunity in a timely manner to contest that report in an evidentiary hearing. Apparently, DCF did not give her that opportunity until the present case arose. In this proceeding, DCF was required to carry the higher burden of clear and convincing evidence to prove-up both the events cited in the report and the classification of the report. However, Petitioner has now been offered her due process rights in the hearing of this instant case, and herein report 98-050246 has been contested and found to be verified/confirmed. Likewise, the underlying facts of that report, which were proven-up in this proceeding, may be considered independently of the abuse/neglect report for purposes of Petitioner's present licensing application.

20. The same due process opportunity, previously not afforded Petitioner, was afforded Petitioner in the instant case with regard to the other three reports.

21. Upon the foregoing findings of fact, report 99-105502 should be purged and Petitioner's name should be removed from the abuse/neglect registry in connection therewith.

22. Reports 1999-118736 and 2000-12836 were proven-up to the extent that the biting events occurred while the children were in Petitioner's day care home and that Petitioner was a caretaker of those children at the material time. However, on the basis of the sparse evidence adduced herein and DCF's long-held position that both these events merely constituted Class II violations, Petitioner's personal involvement or responsibility for the biting events cannot be verified/confirmed. Children biting one another is not necessarily a preventable occurrence. That the two biting events occurred eleven months apart does not demonstrate a chronic problem, either. Petitioner may have been "a significant other" and there may have been "some indicators," but just as DCF's CPIs did not verify either of these reports, neither can the undersigned classify them as verified or confirmed upon the evidence presented herein. Petitioner is entitled to have those reports clearly labeled "not confirmed."

23. The only law cited by DCF to support its denial of Petitioner's license application was Sections 402.301 through 402.319, Florida Statutes, including but not limited to 402.305(2) and 402.3055, Florida Statutes, and Florida Administrative Code Rules 10M-12.020(5)(a),[4/] 65C-22.001(5)(a), and 65C-20.009(3)(a).[5/] DCF provided no proposed recommended order.

24. Section 402.302(3), Florida Statutes, defines "child care personnel" to include Petitioner as the owner-operator of a day care home.

25. Section 402.302(13), Florida Statutes, defines "screening," in pertinent part, as follows:

> "Screening" means the act of assessing the background of child care personnel and includes, but is not limited to, employment history checks, local criminal records checks through local law enforcement agencies, fingerprinting for all purposes and checks in this subsection, statewide criminal records checks through the Department of Law Enforcement, and Federal Bureau of Investigation; . . .

26. See also Section 402.305 Licensing standards; child care facilities.

> (1) Licensing standards. The department shall establish licensing standards that each licensed child care facility must meet regardless of the origin or source of the fees used to operate the facility or the type of children served by the facility.
>
> * * *

(2) PERSONNEL. 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 the level 2 standards for screening set forth in that chapter.

27. Section 435.04 Level 2 screening standards provides, in pertinent part:

* * *

(2) The security background investigations under this section must ensure that no persons subject to the provisions of this section have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited under any of the following provisions of the Florida Statutes or under any similar statute of another jurisdiction:

* * *

(cc) Section 827.03, relating to child abuse, aggravated child abuse, or neglect of a child.

* * *

(4) Standards must also ensure that the person:

(a) For employees or employers licensed or registered pursuant to chapter 400, does not have a confirmed report of abuse, neglect, or exploitation as defined in Section 415.102(6), which has been uncontested or upheld in Section 415.103.

28. Section 402.308(3)(d), Florida Statutes, provides in pertinent part:

> . . . a license may not be issued or renewed if any of the child care personnel at the applicant facility have failed the screening required by Sections 402.305(2) and 402.3055.

29. Section 827.03(3)(a)(1), Florida Statutes, contains a definition akin to the wandering child incident. However, the provisions of Section 435.04(2)(cc) may not be employed herein because Petitioner has never been found guilty, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited, including but not limited to Section 827.03, Florida Statutes. The provisions of Section 435.04(4), Florida Statutes, may not be employed with regard to the only verified report in this case because Petitioner was not previously licensed pursuant to Chapter 400 and is not seeking to be licensed pursuant to that statute.

30. Likewise, Section 402.3055, Florida Statutes, requires a license applicant to disclose prior license suspensions, revocations, disciplinary actions, or fines against the applicant. It also permits DCF to deny an application if, upon review of these prior situations, DCF finds the granting of the license application is not in the best interest of the state. Because there have been only proposed disciplinary actions against Petitioner's prior license, any failure of Petitioner to

disclose them cannot work against her here. It is reasonable to interpret Section 402.3055, Florida Statutes, to place broad discretion in the agency to determine whether granting a new license is in the best interests of the state regardless of how word of prior disciplinary actions reach it, but once again all that was proven herein were proposed disciplinary actions. No suspensions, no revocations, and no fines were proven to have been imposed.

31. On the other hand, Section 39.201(6), Florida Statutes, is instructive. It provides, in pertinent part:

> . . . Information in the central abuse hotline and the department's automated abuse information system may be used by the department, its authorized agents or contract providers, the Department of Health, or county agencies as part of the licensure or registration process pursuant to Sections 401.301 -- 402.319 and 409.175 -- 409.176.

32. Therefore, it is concluded that DCF is entitled to consider the single verified abuse report within its system as part of its licensing review. See also Highland v. Dept. of Children and Family Services, DOAH Case No. 02-4598 (RO: April 21, 2003; FO rejecting the RO entered July 14, 2003) and B. C. v. Dept. of Children and Family Services, DOAH Case No. 02-3398 (RO: March 4, 2003; FO: June 3, 2003.)

33. It is clear that Ms. McDonald erroneously believed that all the abuse/neglect reports were true and proven when she

made, or advised in, DCF's 2003 decision to deny Petitioner's pending day care home application. However, not all the reports were verified. All the reports still are not verified. Only one 1998 incident was verified then and proven-up herein. The underlying incident occurred six years ago. The potential for the wandering child to have been hurt in 1998 was substantial, but he was not, in fact, hurt in that incident, and despite the report and underlying circumstances, DCF saw fit to allow Petitioner to remain licensed from 1998 until 2002. It is also clear that Ms. McDonald believed that a single verified abuse report was sufficient to deny Petitioner's license application. Research does not indicate that still to be the case, either. DCF has cited no statute which requires that a person whose name has been placed in the abuse/neglect registry in connection with a normal child must secure an exemption to work in child care. Moreover, the evidence in this case does not equate with prior cases where qualified DCF personnel have testified that DCF has a blanket policy or continuing procedure to never license any applicant for whom there is so much as one verified case of child abuse or neglect in the applicant's history.

34. The evidence falls short of good cause to deny the current license application.

RECOMMENDATION

Upon 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 Petitioner registration for licensing as a day care home, subject to her fulfilling all the other requirements for a new license applicant.

DONE AND ENTERED this 7th day of June, 2004, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2004.

ENDNOTES

[1/] By statute, the abuse/neglect reports may be considered by the licensing agency and may be admitted in this proceeding. However, Ms. McDonald was the only witness for DCF. She did not perform any of the abuse/neglect investigations, as such, or author any of the reports produced by DCF's Child Protection Investigators (CPIs). None of the investigators nor any

witnesses named in the abuse/neglect reports were called to testify. Therefore, the abuse reports cannot "speak for themselves" so as to prove-up any part of their contents. Accordingly, the findings of facts herein are based upon other appropriate evidence and the first-hand (not hearsay) testimony of Ms. McDonald. For instance, Ms. McDonald's recitation of admissions by Petitioner has been accepted, where credible, but not Ms. McDonald's recitation of what was "said" by CPIs, neighbors, or law enforcement officers who did not testify. The written police report reciting interview answers from third parties likewise has not been relied upon for findings of fact. None of the foregoing hearsay statements meets even the relaxed approach to hearsay permitted by Section 120.57(1)(c), Florida Statutes.

[2/] DCF did not put Report No. 2002-006119 in evidence, so that report and underlying incident cannot be used in this proceeding. The CPI for Report No. 1999-105502 apparently telescoped that subsequent 2002 incident and several other investigations together, using one or more unproven and unverified reports to support each other and to support 1999-105502, all without any clear evidence.

[3/] See Endnote 1, above.

[4/] After research, the undersigned can only conclude that this rule has been superseded by newer, renumbered rule(s), but that the new rules replaced it so long ago that the old rule cannot now be reconstructed.

[5/] These rules define daycare home staffing and direct supervision requirements and would have been applicable to whether or not Petitioner's earlier license should or should not have been disciplined under the alleged conditions.

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.