

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TARSHA SEAY, d/b/a SEAY FAMILY)
DAY CARE HOME,)
)
Petitioner,)
)
vs.) Case No. 05-3375
)
DEPARTMENT OF CHILDREN AND)
FAMILY SERVICES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, and in accordance with Section 120.57, Florida Statutes (2005), a final hearing was held in this case on November 7, 2005, in Lakeland, Florida, before Fred L. Buckine, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tarsha Seay, pro se
Seay Family Day Care Home
7354 Beaumont Drive
Lakeland, Florida 33810

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

STATEMENT OF THE ISSUE

The issue is whether the renewal application for a family day care home license filed by Petitioner should be denied based upon alleged violations of Florida Administrative Code Rule 65C-20.10(1)(f), stated in Respondent's letter of proposed denial dated August 3, 2005.

PRELIMINARY STATEMENT

By letter dated August 3, 2005, Respondent, Department of Children and Family Services, notified Petitioner, Tarsha Seay, d/b/a/ Seay Family Day Care Home, located at 2829 Kathryn Avenue, Lakeland, Florida, of the proposed denial of her application based upon her inability to ensure the safety of children in her care. Respondent alleged that the family day care home of Petitioner located at 2829 Kathryn Avenue, Lakeland, Florida, was found to be out of compliance in regard to the fencing requirements as stated in Florida Administrative Code Rule 65C-20.10(1)(f) on July 28, 2003; March 22, 2004; January 12, 2005; and June 10, 2005. Petitioner timely disputed the allegations and petitioned for a final administrative hearing involving disputed issues of material fact.

On September 19, 2005, this case was referred to the Division of Administrative Hearings, and, on September 20, 2005, the Initial Order was entered. On September 23, 2005, the Joint Response to the Initial Order was filed. On September 29, 2005,

a Notice of Hearing, scheduling the final hearing for November 7, 2005, in Lakeland, Florida, and an Order of Pre-hearing Instructions were entered.

At the final hearing on November 7, 2005, Respondent presented the testimony of three witnesses: William Wright, child care licensing inspector; Sheila Novels, certified child protection investigator; and Patricia Hamilton, child care licensing supervisor. Respondent offered ten exhibits in evidence, of which seven exhibits (1 and 5 through 10) were received in evidence.¹ The request of Respondent for official recognition of Sections 402.301 through 402.319, Florida Statutes (2005), and Florida Administrative Code Chapter 65C-20 was granted.

Petitioner appeared pro se, did not give sworn testimony, and offered testimony of one character witness, Barbara Giles. On November 22, 2005, the one-volume Transcript was filed. On November 28, 2005, Petitioner filed a Notice of Change of Address to 7354 Beaumont Drive, Lakeland, Florida, and Respondent filed its Proposed Recommended Order. On November 30, 2005, Petitioner filed a request for extension of time to file proposed recommended order. On December 1, 2005, an Order extending the filing date to December 23, 2005, was entered. Petitioner filed a Proposed Recommended Order on

December 21, 2005. The Proposed Recommended Orders filed by the parties were considered by the undersigned.

FINDINGS OF FACT

Based upon the observation of and the demeanor of the witnesses while testifying, documentary materials in evidence, stipulations of the parties, and evidentiary rulings during the hearing, the following relevant, material, and substantial facts are determined:

1. Petitioner was initially granted her first family day care home license to operate a family day care home at 2829 Kathryn Drive, Lakeland, Florida 33805, on August 3, 2003, and her family day care home license was renewed by Respondent for operation at the above address for one additional year on August 3, 2004. At the time of the 2004 family day care home license renewal, Petitioner was in compliance, with no noncompliant items noted in her record from 2003 through 2004 that would have justified denial of the license renewal.

2. On an unspecified date prior to August 3, 2005, Petitioner made an application to renew her family day care home license. On August 3, 2005, Respondent notified Petitioner by letter of the proposal to deny her application for renewal of her family day care home license. Petitioner contested the proposed denial resulting in this administrative hearing on November 7, 2005.

3. The denial letter of Respondent indicated that the decision was based upon, "[y]our inability to ensure the safety of children in your care."

4. The letter continued stating: "Your Family Day Care Home was found to be out of compliance in regards to the fencing requirements as stated in 65C-20.10(1)(f), Florida Administrative Code (F.A.C.), on 07/28/03, 03/22/04, 01/12/05, 01/20/05, and 06/10/05." Petitioner acknowledged that the fence was missing a few boards during the above period.

5. It is undisputed that the January 12, 2005, inspection by Timothy Graddy, child care licensing inspector, found numerous violations. Upon reinspection by Mr. Graddy on January 20, 2005, the violations noted during his January 12, 2005, inspection were corrected, but for repair of the fence around the home and the undated fire extinguisher inspection certification. Mr. Graddy was not called to testify regarding the severity of the noncompliance violations, the probability of harm to health or safety of the children nor actions taken by Petitioner to correct the cited violations. No other witness testified regarding these mandatory items.

6. It is likewise undisputed that Respondent imposed an administrative fine on Petitioner for noncompliance items identified during an undated inspection in 2004. Petitioner, without requesting a Chapter 120, Florida Statutes, hearing,

paid the administrative fine of \$100 on December 9, 2004, for violations noted in compliance inspections that occurred between January and December of 2004.

7. It is likewise undisputed that the Department imposed a second administrative fine on Petitioner for those violations noted from inspections that occurred between January 1, 2005, and June 21, 2005. Again, and without requesting a Chapter 120, Florida Statutes, hearing, Petitioner paid the administrative fine of \$250 on June 1, 2005.

8. William Wright, child care licensing inspector and a member of the license application review committee, reviewed the relicensing application filed by Petitioner, voiced as his primary concern a July 2005 central abuse hotline report of an incident that occurred July 11, 2005. In the abuse report, a two-year-old male child was reported to have had bruises on both facial cheeks. The allegations narrative reflected the child received the bruises by falling/tripping over his shoes. Petitioner called the father of the child, who came by, observed the bruise on his child's cheeks, signed an incident statement prepared by Petitioner, and took his child home. The father did not return his child to Petitioner's family day care home. During the subsequent investigation of the abuse incident, bruises were found on the child's thigh(s).

9. Two or three days after the July 11, 2005, incident report, a subsequent investigation by local law enforcement and follow-up investigation by Respondent's personnel resulted in conflicting and unresolved accounts of how the child received the bruises, where the child received the bruises, and who was at fault for the bruises. It was unclear to the investigators where and how the child received the bruises on his thighs. What is clear is that the child did not receive thigh bruises while in Petitioner's family day care home. Respondent closed the abuse report with "[S]ome indicator of bruises, welts and marks. No intervention services were needed." There is insufficient evidence to conclude, infer or establish that while in Petitioner's care the child sustained bruises on his thighs that were discovered several days after the July 11, 2005, abuse report and, thus, to conclude the child's safety was at risk while in Petitioner's family day care home.

10. Another review committee member, Patricia Hamilton, child care licensing supervisor, opined the proposed denial was based upon "the Department's belief" that Petitioner was not able to operate a day care without violating one or more Florida Administrative Code rules. It is her belief that children in Petitioner's family day care home would not be safe because the historical inspection record compiled by Respondent, in her opinion, demonstrated Petitioner could not consistently comply

with the rules of operating a safe family day care home. This is a reasonable inference drawn from a historical review of Petitioner's family day care home inspection record.

11. Petitioner, as of November 28, 2005, filed a Notice of Change of Address. Petitioner now resides at 7354 Beaumont Drive, Lakeland, Florida. By moving to a new residence, Petitioner effectively withdrew the family day care home license application for license of the residence at 2829 Kathryn Avenue, Lakeland, Florida 33805, the subject of this case.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. § 120.57(1), Fla. Stat. (2005).

13. Section 402.310, Florida Statutes (2005), states:

(1)(a) The department or local licensing agency may deny, suspend, or revoke a license or impose an administrative fine not to exceed \$100 per violation, per day, for the violation of any provision of ss. 402.301-402.319 or rules adopted there under. However, where the violation could or does cause death or serious harm, the department or local licensing agency may impose an administrative fine, not to exceed \$500 per violation per day.

(b) In determining the appropriate disciplinary action to be taken for a violation as provided in paragraph (a), the following factors shall be considered:

1. The severity of the violation, including the probability that death or

serious harm to the health or safety of any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of ss. 402.301-402.319 have been violated.

2. Actions taken by the licensee to correct the violation or to remedy complaints.

3. Any previous violations of the licensee.

(2) When the department has reasonable cause to believe that grounds for the denial, suspension, or revocation of a license or imposition of an administrative fine exist, it shall determine the matter in accordance with procedures prescribed in chapter 120. When the local licensing agency has reasonable cause to believe that grounds for the denial, suspension, or revocation of a license or imposition of an administrative fine exist, it shall notify the applicant or licensee in writing, stating the grounds upon which the license is being denied, suspended, or revoked or an administrative fine is being imposed. If the applicant or licensee makes no written request for a hearing to the local licensing agency within 15 days from receipt of such notice, the license shall be deemed denied, suspended, or revoked or an administrative fine shall be imposed.

14. The party asserting the affirmative of an issue has the burden of proof. Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977).

15. The denial of an application for a family day care home license is met by a preponderance of substantial evidence in the record.

16. Respondent provided a preponderance of substantial evidence supporting the stated reasons for denying Petitioner's application for family day care home relicensure.

17. Pursuant to Florida Administrative Code Rule 65C-13.004(4), "A license is issued for a specific location, is not transferable, and is valid for one year from the date of issuance." Petitioner, by moving to a new residence after commencing this proceeding, effectively withdrew her renewal application and her challenge to the denial by Respondent, which is the subject of this proceeding.

RECOMMENDATION

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

RECOMMENDED that the Department of Children and Family Services enter a final order dismissing the petition filed by Tarsha Seay, d/b/a Seay Family Day Care Home.

DONE AND ENTERED this 24th day of February, 2006, in
Tallahassee, Leon County, Florida.



FRED L. BUCKINE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of February, 2006.

ENDNOTE

1/ Exhibit 1 is a copy of the denial letter. Exhibits 2, 3, and 4 are charts compiled from records of violations from years past of which there is no information regarding the inspectors who conducted the inspection and noted the violation, the outcome of each inspection, the correction of noted violations, the severity of the violation, or the impact on the care of children to each subsequent family day care license renewals in 2003 and 2004 and to the application for the 2005 renewal. These charts were not self authenticating, were not required by law to be kept, the information source for each document was not identified, and contained unsupported hearsay upon hearsay intended to establish fact not based upon any promulgated rule or specified criteria in effect at the time such information was compiled or when the denial letter was posted. Simply put, a Petitioner licensee would have no means to challenge allegations the Department maintains "establish a pattern" for future violations when the inspectors, of necessity, make subjective determination whether an item is in compliance or not. Respondent's counsel did not provide a copy of Exhibit 10, i.e. a second abuse report on an unidentified two-year-old child in Petitioner's family day care home.

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.