

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HELENA MCINTYRE,)
)
 Petitioner,)
)
 vs.) Case Nos. 06-0347
) 06-0537
 DEPARTMENT OF CHILDREN)
 AND FAMILY SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held on September 7, 2006, by video teleconference with the parties appearing from Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Greer Davis Wallace, Esquire
Law Office of Greer Davis Wallace
1450 North Krome Avenue, Suite 101G
Florida City, Florida 33034-2400

For Respondent: Rosemarie Rinaldi, Esquire
Department of Children and Family Services
401 Northwest Second Avenue, N-1014
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STATEMENT OF THE ISSUES

The issue in DOAH Case No. 06-0347 is whether the Petitioner, Helena McIntyre (Petitioner) is entitled to the renewal of her foster care license.

The issue in DOAH Case No. 06-0537 is whether the Petitioner is entitled to adopt a child placed in her home previously under

a foster parent license that has since been denied for renewal (DOAH Case No. 06-0347).

PRELIMINARY STATEMENT

These cases were consolidated for hearing by Order entered February 28, 2006. On or about November 3, 2005, the Department of Children and Families (Respondent or Department) issued a Notice of Intent to Deny Adoption Application. The Petitioner's request to adopt was denied based upon the same factual information that had been asserted in a foster home non-renewal; that is: that the Petitioner had allowed a sexual offender with a history of sexual battery on a child under twelve years of age, to either reside in her home or to frequent the foster home. As to the foster home license (DOAH Case No. 06-0347), the Department had issued a Notice of Intent to Deny Foster Home License Renewal on or about May 20, 2005. As to both matters, the Respondent maintains that the Petitioner provided an inappropriate environment for any foster child placed in her care. Moreover, the Respondent averred that by having the sexual offender around the home the Petitioner showed a lack of concern for, and disregarded the welfare of, the children by putting them at risk.

The Petitioner timely challenged the Respondent's decisions and sought administrative hearings. DOAH Case No. 06-0347 was referred to the Division of Administrative Hearings on January 26, 2006. DOAH Case No. 06-0537 was referred on

February 10, 2006. The hearing in the matter was originally scheduled for April 3, 2006, but was continued at the parties' requests on three occasions. The matter was ultimately heard on September 7, 2006.

The Respondent presented testimony from Duray Smith, Ada Gonzalez, Ronnita Waters, Katrella Smalls, and Sylvia Diez. The Petitioner also testified. The Respondent's Exhibits 1-6 were admitted into evidence. A transcript of the proceedings was filed on December 26, 2006. Thereafter, the parties requested and were granted leave until January 19, 2007, to file proposed recommended orders.

The Respondent's Proposed Recommended Order was filed January 19, 2007. The Petitioner did not file a proposal. The findings of fact and conclusions of law that follow apply to all matters at issue in these consolidated cases.

FINDINGS OF FACT

1. The Petitioner has been a licensed foster care parent since 1993. Prior to the instant denial, the Petitioner's license has been renewed on every occasion.

2. P., a minor, was placed in the Petitioner's home in 2000. Also in the Petitioner's home at that time were minor twin brothers, M. and M.

3. In the fall of 2003, the Petitioner became friends with Jimmie Lee Hodgest, a convicted sex offender. Mr. Hodgest pled guilty to three counts of sexual battery on a seven-year old

girl. After serving his prison sentence, Mr. Hodgest was released and placed on parole.

4. At all times material to the allegations in these cases, Mr. Hodgest was required to report to his probation officer, Sylvia Diez.

5. According to Ms. Diez, when she became aware of the friendship between Mr. Hodgest and the Petitioner, she asked to meet the Petitioner so that she could explain the offender's criminal history. Basically, Ms. Diez wanted the Petitioner to understand that she would be checking on Mr. Hodgest to assure he was complying with the terms of his parole. Also, Ms. Diez wanted to verify that Mr. Hodgest would not be left unsupervised with children.

6. To that end Ms. Diez went to the Petitioner's home to warn the Petitioner about Mr. Hodgest. Ms. Diez saw Mr. Hodgest at the Petitioner's home on four or five occasions.

7. Most troubling to Ms. Diez, however, was an incident in June of 2004, when she dropped by the Petitioner's home at 8:21 p.m. and found him alone there.

8. Additionally, on September 29, 2004, at 9:47 p.m., Ms. Diez went to the Petitioner's home and found her in either a nightgown or housecoat with Mr. Hodgest upstairs in the bedroom area of the home. Mr. Hodgest came downstairs to speak with Ms. Diez. At that time no one represented that the Petitioner and Mr. Hodgest were painting the upstairs.

9. In 2004, Duray Smith conducted an investigation regarding an allegation that the Petitioner allowed a convicted sex offender in her home. Mr. Smith is a Child Protective Investigator employed by the Department.

10. When Mr. Smith interviewed the Petitioner regarding Mr. Hodgest, she admitted knowing the offender but stated that he was merely her yard man. Further, since from the neighbors, the children, and everyone he interviewed, Mr. Smith was unable to verify that the offender was in the home, the allegation was closed with no indicators.

11. Then, in 2005, Mr. Smith received a second allegation of similar conduct. The claim alleged that Mr. Hodgest was frequenting the home such that the children might be at risk.

12. When the 2005 investigation ensued, Mr. Smith interviewed a neighbor who represented that a male did frequent the Petitioner's home. Mr. Smith was later able to ascertain that the male was Mr. Hodgest. In fact, a child in the home advised Mr. Smith that Mr. Hodgest "naps" at the house. It cannot be determined if Mr. Hodgest did, in fact, take naps at the home.

13. When Mr. Smith confronted the Petitioner with the allegation, she stated that the offender was never at the home unsupervised. The Petitioner admitted that the offender cooked at the home but maintained that she was also in the home at the time (albeit in a different room).

14. From the admissions of the Petitioner (that the offender was inside the home), the comments of others, and his verification that the offender had been frequenting the home for approximately two weeks, Mr. Smith filed a petition to take action to protect the children in the Petitioner's home.

15. That action removed the foster children from the Petitioner's home.

16. Mr. Smith believed that all of the children in the Petitioner's home were at risk of being harmed.

17. There was never an allegation of, or evidence of, any actual physical abuse to the children in the Petitioner's home. All of the concerns raised by the Department were related to a risk of harm based upon the offender's past criminal conduct.

18. Mr. Smith's sole responsibility in this regard was to investigate an allegation and to report on it. Mr. Smith did not investigate the terms of Mr. Hodgest's probation. Similarly, Mr. Smith did not investigate whether or not the Petitioner's foster home license should be renewed.

19. Ada Gonzalez, however, was responsible for reviewing the foster home license. When Ms. Gonzalez learned of a second allegation regarding the Petitioner's home had been confirmed, a staffing was scheduled to consider the status of the Petitioner's foster home license.

20. According to Ms. Gonzalez, the Petitioner had an affirmative duty to notify the Department of persons within the

licensed home who may affect the foster child's welfare.

Ms. Gonzalez was concerned that the Petitioner had been less than candid in disclosing her relationship with the offender and his presence in the Petitioner's home.

21. The Bilateral Service Agreement between the Department and the Petitioner provided foster parent responsibilities owed to the Department. Those responsibilities included:

d. To notify the department immediately of a potential change in address, living arrangements, marital status, family composition (who is in the home), employment, significant health changes or any other condition that may affect the child's well being.

e. To notify the department promptly of all contacts the family or any member of the home has with the police or any law enforcement agencies.

22. The Bilateral Service Agreement also provided that:

Non-compliance with any of the above provisions may result in administrative action by the department which could include corrective action, suspension, revocation or denial of further licensure pursuant to Chapter 120, Florida Statutes.

23. The Petitioner did not notify the Department that someone who frequented her home was required to be monitored by law enforcement. The Petitioner also did not notify the Department that she had been contacted by Mr. Hodgest's probation officer. Ms. Gonzalez believed that the Petitioner had an affirmative duty to disclose the probation status of Mr. Hodgest since he was frequently at the home.

24. Following the action initiated by Mr. Smith, the minor children in the Petitioner's home were removed and a juvenile court judge adjudicated them dependent. The minor child, P., who is the subject of the instant adoption request was placed in another foster home.

25. The Petitioner has denied that the offender was her boyfriend and that he was left unsupervised in the home with the children. The Petitioner acknowledged that she did not notify anyone that Mr. Hodgest was frequently at the home.

26. The weight of the credible evidence dictates a finding that the Petitioner and Mr. Hodgest were not merely in an employer/employee relationship. The Petitioner's representation that Mr. Hodgest was "the yard man" is not credible. Moreover, the Petitioner knew or should have known that an individual with Mr. Hodgest's criminal record would be a concern to the Department. As early as 2004, the Petitioner was put on notice that an allegation of concern had been raised.

27. The Petitioner did not remove Mr. Hodgest from access to her home (in fact his visits became more frequent over time), did not acknowledge that Mr. Hodgest could pose a threat to the children in her care, and did not seek counsel from the foster care authorities regarding the offender's connection to the licensed home.

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. § 120.57(1), Fla. Stat. (2006). See also § 409.175, Fla. Stat. (2005).

29. As the applicant, the Petitioner bears the burden of proof with regard to her application for adoption. See Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Nevertheless, since the Department bears the burden of proof as to the denial of the renewal of the foster care license, the evidence has been reviewed in that context. It is, therefore, concluded that if the foster care license should not be renewed, the Petitioner cannot establish she is entitled to the approval of the adoption sought. This conclusion is reached as the only factual basis for the denial of the foster care renewal is identical to the factual basis for the denial of the Petitioner's request to adopt.

30. Section 409.175(9), Florida Statutes (2005), sets forth the following provisions regarding foster home licenses:

(9)(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.

3. Noncompliance with the requirements for good moral character as specified in paragraph (5)(a).

4. Failure to dismiss personnel found in noncompliance with requirements for good moral character.

31. Additionally, Florida Administrative Code Rule 65C-13.010, provides, in pertinent part:

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

(a) The substitute care parents are required to participate in 30 hours of GPS-MAPP training and at least eight hours of in-service training annually which is provided or approved by the department in order to develop and enhance their skills.

(b) The substitute care parents are required to participate with the department in relicensing studies and in ongoing monitoring of their home, and must provide sufficient information for the department to verify compliance with all rules and regulations.

* * *

(e) The substitute care parents must sign an agreement to provide foster care for dependent children for each child placed in their home.

* * *

(g) The substitute care parents must notify the department regarding changes which affect the life and circumstances of the shelter or foster family.

32. Section 409.175(6), Florida Statutes (2005), also states in part:

(c) A licensed family foster home, child-placing agency, or residential child-caring agency which applies for renewal of its license shall submit to the department a list of personnel who have worked on a continuous basis at the applicant family foster home or agency since submitting fingerprints to the department, identifying those for whom a written assurance of compliance was provided by the department and identifying those personnel who have recently begun working at the family foster home or agency and are awaiting the results of the required fingerprint check, along with the date of the submission of those fingerprints for processing. The department shall by rule determine the frequency of requests to the Department of Law Enforcement to run state criminal records checks for such personnel except for those personnel awaiting the results of initial fingerprint checks for employment at the applicant family foster home or agency.

(d)1. The department may pursue other remedies provided in this section in addition to denial or revocation of a license for failure to comply with the screening requirements. The disciplinary actions determination to be made by the department and the procedure for hearing for applicants and licensees shall be in accordance with chapter 120.

2. When the department has reasonable cause to believe that grounds for denial or termination of employment exist, it shall notify, in writing, the applicant, licensee, or summer or recreation camp, and the personnel affected, stating the specific record which indicates noncompliance with the screening requirements.

3. Procedures established for hearing under chapter 120 shall be available to the applicant, licensee, summer day camp, or summer 24-hour camp, and affected personnel, in order to present evidence relating either to the accuracy of the basis for exclusion or to the denial of an exemption from disqualification.

4. Refusal on the part of an applicant to dismiss personnel who have been found not to be in compliance with the requirements for good moral character of personnel shall result in automatic denial or revocation of license in addition to any other remedies provided in this section which may be pursued by the department.

33. In these cases, the Petitioner failed to notify the Department that Mr. Hodgest was frequently on the licensed premises. Whether Mr. Hodgest was present as a friend or employee, his physical occupation of the licensed premises is a valid concern. Mr. Hodgest is a convicted sex offender. If he was merely an employee (doing chores such as mowing the lawn, painting, or cooking food), his employment should have been disclosed to the Department. If he was, in fact, a friend to the Petitioner his frequent presence at the licensed home should have been disclosed to the Department. Either way the Petitioner failed to abide by the terms of her agreement with the Department.

34. More critical, however, is the fact that the Petitioner failed to appreciate the risk of harm that Mr. Hodgest posed to the foster family. Mr. Hodgest was on probation for a very serious offense. That the Petitioner could fail to remove Mr. Hodgest from access to her home indicates that she does not fully comprehend her responsibilities to the Department and to the foster children placed in her care. Best case suggests that this Petitioner used poor judgment. A less charitable review would suggest the Petitioner hoped to achieve the adoption of the

child before the Department realized that the convicted offender would be in proximity to the family. Although the latter conclusion is not reached, the severity of the Petitioner's lapse of judgment does pose valid concern. It is concluded that this Petitioner exercised very poor judgment in allowing the offender to come to her home.

35. In Florida adoption is a statutory privilege that is granted only if the adoption is in the best interest of the child to be adopted. See Fla. Admin. Code R. 65C-16.002. Among the criteria to be considered when evaluating a prospective adoptive parent is the history of the foster home. Instances of indicators for neglect, violations of licensing standards, or questions concerning the applicant's "good moral character," may jeopardize approval. See Rule 65C-16.005, F.A.C.

36. In these cases the Department has presented credible reasons for the denial of the Petitioner's application for adoption. The Petitioner's failure to comply with the foster home agreement, her failure to recognize the danger posed by the offender's presence at her home, and her continuing denial of the severity of the conduct in this matter, are sufficient to deny the application. A juvenile court sustained the removal of children from the Petitioner's home. Mr. Hodgest was not an acceptable candidate for either employment at the home or a suitor. The Petitioner's failure to comprehend that simple fact supports the Department's actions in these cases.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Family Services enter Final Orders that deny the renewal of the Petitioner's foster home license and deny the Petitioner's adoption application.

DONE AND ENTERED this 9th day of February, 2007, in Tallahassee, Leon County, Florida.

S

J. D. Parrish
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 9th day of February, 2007.

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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.