

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN )  
AND FAMILY SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-0436  
 )  
PEARL WRIGHT, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On April 19, 2007, a hearing was held in Palatka, Florida, pursuant to the authority set forth in Sections 120.569 and 120.57(1), Florida Statutes. The case was considered by Lisa Shearer Nelson, Administrative Law Judge.

APPEARANCES

For Petitioner: Lucy Goddard-Teel, Esquire  
Department of Children  
and Family Services  
Post Office Box 390, Mail Sort 3  
Gainesville, Florida 32602-0390

For Respondent: Pearl Wright, pro se  
1826 Locust Avenue  
Palatka, Florida 32177

STATEMENT OF THE ISSUE

Whether the Respondent committed the acts charged in the Department of Children and Family Services' (Department's) letter of November 21, 2006, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On November 21, 2006, the Department notified Respondent of its intention to revoke her annual license to operate a family day care issued for April 26, 2006, through April 26, 2007. The Department indicated that the basis for its action was a report that on September 22, 2006, Respondent left the children in her care alone with no substitute or adult present; and that no enrollment information was on file for one of the children in her home. The Department alleged that this conduct violated Florida Administrative Code Rules 65C-20.009 and 65C-20.001(4).

On December 8, 2006, Respondent filed a Petition for Formal Hearing disputing some of the allegations in the Department's November 21, 2006, letter and requested a hearing pursuant to Section 120.57(1), Florida Statutes. On January 23, 2007, the case was filed with the Division of Administrative Hearings and assigned to the undersigned. The matter was noticed for hearing April 19, 2007, and proceeded to hearing as scheduled.

A transcript of the hearing was prepared but not transcribed. Petitioner presented the testimony of 3 witnesses and Petitioner's Exhibits numbered 1 and 2 were admitted into evidence. Respondent testified on her own behalf. At hearing, the parties were advised that proposed recommended orders would be due on or before April 30, 2007. Respondent timely filed a letter on that day, accompanied by what is described as a character reference. On May 1, 2007, the Department filed a

Motion to Accept Department's Untimely Proposed Recommended Order, asserting that the Proposed Recommended Order was not filed previously due to an oversight. In order to ameliorate any perceived prejudice to the Respondent from granting this Motion, the Department asserted that it is willing to agree that the hearsay document submitted with the Respondent's letter be considered as if it were submitted at hearing, to the extent that it supplements any testimony at the hearing. Accordingly, the Department's Proposed Recommended Order is accepted as timely filed and the letter attached to Petitioner's letter of April 30, 2007, is accepted as Respondent's Exhibit 1.

#### FINDINGS OF FACT

1. Pearl Wright holds Family Day Care Home License No. F03PU0037, issued by the Department on April 26, 2006, for the year ending April 26, 2007. Ms. Wright has worked with children for approximately 27 years.

2. On September 22, 2006, Ms. Wright had five children in her care. Three of those children are her grandchildren, who were 9, 11, and 13 years old. In addition to her grandchildren, Ms. Wright was caring for a 22-month-old named Talia and a 14-year-old named Jahlisa.

3. Jahlisa is deaf and has some behavioral problems. She previously attended the Florida School for the Deaf and Blind. However, when Jahlisa's mother, E.M. was notified that the school could not accommodate her any longer, Ms. M. was forced to place

Jahlisa in public school and find child care for her after school. According to Ms. M., Ms. Wright opened her doors when no one else would.

4. On the day in question, Ms. Wright's vehicle was at the dealership for repairs and had to be picked up before the shop closed. Ms. Wright arranged for the dealership to send a courtesy van to her home so that she could take all five children with her to pick up the car at the end of the day and return home with them.

5. When the van arrived at Ms. Wright's home, Jahlisa refused to board it. Her mother was expected any minute and Jahlisa wanted to wait for her.

6. When Jahlisa refused to get in the van, Ms. Wright instructed her grandsons to go to their rooms and stay there. She instructed her 13-year-old granddaughter Quashonda to watch Jahlisa and Talia until their parents came, which she anticipated to be no more than a few minutes. Ms. Wright took the courtesy van to the dealership, picked up her car and came straight back. She was gone approximately fifteen minutes.

7. During her absence, Ms. M. came to pick up Jahlisa. She saw her standing approximately one half block from the Ms. Wright's house, waiting for Ms. M. to pick her up. Jahlisa was not harmed.

8. Ms. M. was not upset with Ms. Wright and "understood that she had to do what she did." She appreciated the care that Ms. Wright gave her daughter, but did not want Jahlisa to be alone. She was more upset that her daughter was no longer attending the Florida School for the Deaf and Blind, and reported the events in this case because she wanted the school to be investigated.

9. T.P. is Talia's mother. Talia was 22 months old in September 2006. When Ms. P. came to pick her daughter up on September 22, Ms. Wright was in the front yard with Jahlisa, Jahlisa's mother and a policeman. Ms. P. picked up her child and left. She is aware of what occurred September 22, but remains steadfast in her support of Ms. Wright, who she refers to as "Miss Pearl." She does not feel Ms. Wright would ever put her child in danger, and considers Ms. Wright to be a blessing. Talia considers Miss Pearl to be like grandmother to her and has thrived under her care.

10. Ms. Wright accepts responsibility for her actions and states that it will never happen again. No evidence was presented at hearing to indicate that there have been any subsequent events with respect to appropriate supervision. The undersigned is persuaded that her remorse is genuine.

11. Ms. Wright has worked with local teachers in the public school system trying to make sure that the children in her care keep their grades up. Her testimony in that regard is consistent

with the letter supplied by Gladys Wade, a kindergarten teacher who indicated that Ms. Wright has been the day care provider for children in her classes for over five years. According to Ms. Wade, Ms. Wright calls to check on her students regularly, gives them "pep-talks" when needed and makes sure their homework is completed. Ms. Wright works with the children on skills identified by Ms. Wade to reinforce those skills in the daycare setting.

12. The Department presented testimony indicating that there had been past disciplinary actions for which Ms. Wright paid fines. However, no prior final orders were submitted with respect to any prior disciplinary history.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

14. Section 402.310, Florida Statutes, provides in pertinent part:

(1)(a) The department or local licensing agency may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder:

1. Impose an administrative fine not to exceed \$100 per violation, per day. However, if 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 in addition to or in lieu of any other

disciplinary action imposed under this section.

2. Convert a license or registration to probation status and require the licensee or registrant to comply with the terms of probation. A probation-status license or registration may not be issued for a period that exceeds 6 months and the probation-status license or registration may not be renewed. A probation-status license or registration may be suspended or revoked if periodic inspection by the department or local licensing agency finds that the probation-status licensee or registrant is not in compliance with the terms of probation or that the probation-status licensee or registrant is not making sufficient progress toward compliance with ss. 402.301 - 402.319.

3. Deny, suspend, or revoke a license or registration.

(b) In determining the appropriate disciplinary action to be taken for a violation as provided in paragraph (a), the following acts 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 action 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 or registrant to correct the violation or to remedy complaints.

3. Any previous violations of the licensee or registrant.

(c) The department shall adopt rules to:

1. Establish the grounds under which the department may deny, suspend, or revoke a license or registration or place a licensee or registrant on probation status for violations of ss. 402.301-402.319.

2. Establish a uniform system of procedures to impose disciplinary sanctions for violations of ss. 402.301-402.319. The uniform system of procedures must provide for the consistent application of disciplinary actions across districts and a progressively

increasing level of penalties from predisciplinary actions, such as efforts to assist licensees or registrants to correct the statutory or regulatory violations, and to severe disciplinary sanctions for actions that jeopardize the health and safety of children, such as for the deliberate misuse of medications. The department shall implement this subparagraph on January 1, 2007, and the implementation is not contingent upon a specific appropriation.

15. Because Section 402.310, Florida Statutes, is a penal statute, Petitioner must prove the allegations against Respondent by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). The "clear and convincing standard" is well settled in the law:

[T]he evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re: Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

16. The Department has adopted rules to address the staffing requirements for family day care licensees. Florida Administrative Code Rule 65C-20.009, as it existed at the time of this incident,<sup>1/</sup> provided in pertinent part:



65C-20.009 Staffing Requirements.

(1) Personnel.

(a) The family day care license shall be issued in the name of the operator who must be at least 18 years of age and a resident of the family home. The operator of a family day care home may not work out of the home during the hours when the family day care home is operating. In the event of rental or leased property the operator shall be the individual who occupies the residence.

\* \* \*

(4) Supervision.

(a) At all times, which includes when the children are sleeping, the operator shall remain responsible for the supervision of the children in care and capable of responding to the emergencies and needs of children. During the daytime hours of operation, children shall have adult supervision which means watching and directing children's activities, both indoors and outdoors, and responding to each child's needs.

17. The Department has proven by clear and convincing evidence that Respondent violated Florida Administrative Code 65C-20.009(4)(a) when she left the children in her day care unattended by an adult on September 22, 2006, while she went to pick up her vehicle.

18. The Department's letter of November 21, 2006, also charged Respondent with violating Florida Administrative Code Rule 65C-20.011(4), which requires the operator to maintain enrollment information for each child in her care. This charge has not been demonstrated by clear and convincing evidence, and the Department has not recommended finding such a violation in its Proposed Recommended Order.

19. Section 402.310(1)(c)2., Florida Statutes, directs the Department to establish a uniform system of procedures to impose disciplinary sanctions, which must provide for the consistent application for disciplinary actions. No such rule has been cited by the Department in this case.

20. In the absence of such a rule, the undersigned is guided by the factors outlined in Section 402.310(1)(b), i.e., the severity of the violation, including the probability that death or serious harm has or could result; actions taken by the licensee to correct the violation; and any previous violations of the licensee or registrant.

21. In this case, no child was injured as a result of Ms. Wright's conduct. There was no evidence that her actions created a probability, rather than a possibility that death or serious harm would occur. However, leaving the children alone even for the short time identified in this case represented a serious lapse in judgment.

22. With respect to actions taken by the licensee to correct the violation, the evidence indicated that this was a one-time occurrence, and not likely to be repeated. Ms. Wright was forthright and took full responsibility for her actions. Moreover, the evidence indicates that she is a caring provider who has sought to not only address the physical needs of the children under her care, but the educational needs as well, going

the extra mile to make sure the children she cares for progress in school.

23. The Department presented testimony that Ms. Wright had been the subject of minor infractions in the past and had paid fines for those infractions. No case numbers were identified and no final orders of discipline were entered into evidence. Reference to unidentified past infractions does not provide sufficient evidence of previous violations to be useful in this case. Moreover, the Department indicated that its recommendation would be the same with or without any past violations.

24. As stated above, Section 402.310(1)(c)2. required the Department to establish a uniform system of guidelines for imposition of disciplinary sanctions. Those guidelines would not have been in place at the time of the infraction here and apparently are not in place now. It is clear, however, that the Legislature intends for licensees and the public to have some notice as to how sanctions will be imposed and to have some uniformity in the applications of those sanctions.

25. While the Department stated at hearing that it intended to seek revocation in similar cases, it did not cite to any other case similar to Respondent's where revocation had been imposed. After consideration of the evidence presented and the factors identified in Section 402.310, Florida Statutes, the decision most similar to the present case is Scurry v. Department of Children and Family Services, DOAH Case No. 04-0713 (Final Order

issued January 12, 2005). In Scurry, the operator of a family day care left the children in her care with her 15-year-old daughter. The length of time the children were left with the 15-year-old is not stated. The administrative law judge recommended setting aside the revocation imposed by the Department, imposing a \$250 fine and issuing a six-month provisional license.<sup>2/</sup> The Department adopted the recommendation. Given the similarities of the violations committed, a similar penalty is appropriate here.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered which finds that Respondent violated the provisions of Florida Administrative Code Rule 65C-20.009(4)(a), for which violation Respondent is fined \$100 and her license is placed on probation status.

DONE AND ENTERED this 14th day of May, 2007, in Tallahassee, Leon County, Florida.

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LISA SHEARER NELSON  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of May, 2007.

ENDNOTES

<sup>1/</sup> Rule 65C-20.009 was amended effective April 12, 2007. None of the amendments to the Rule are relevant to the issues in this proceeding.

<sup>2/</sup> Section 402.310(1)(a)2. has changed the terminology from a provisional license to a probation-status license.

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.