

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

|                            |   |                  |
|----------------------------|---|------------------|
| ROBERT'S LARGE FAMILY      | ) |                  |
| DAYCARE HOME,              | ) |                  |
|                            | ) |                  |
| Petitioner,                | ) |                  |
|                            | ) |                  |
| vs.                        | ) | Case No. 08-3027 |
|                            | ) |                  |
| DEPARTMENT OF CHILDREN AND | ) |                  |
| FAMILY SERVICES,           | ) |                  |
|                            | ) |                  |
| Respondent.                | ) |                  |
| _____                      | ) |                  |

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on August 15, 2008, in Wildwood, Florida.

APPEARANCES

|                 |   |
|-----------------|---|
| For Petitioner: | Kathleen Smith-Belton<br>611 Willard Avenue<br>Fruitland Park, Florida 34731  |
| For Respondent: | Joyce L. Miller, Esquire<br>Ralph J. McMurphy, Esquire<br>Department of Children<br>and Family Services<br>1601 West Gulf Atlantic Highway<br>Wildwood, Florida 34785 |

STATEMENT OF THE ISSUE

The issue is whether Petitioner's large family day care home license should be renewed.

PRELIMINARY STATEMENT

By letter dated May 5, 2008, the Department of Children and Family Services (Department) gave notice of its intent to deny Petitioner's application for a renewal license. Petitioner disputed the facts upon which the denial was based and timely requested a hearing.

On June 11, 2008, the Department referred this case to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner. The referral was received by DOAH on June 20, 2008.

The final hearing was scheduled for and held on August 15, 2008. Petitioner was represented at the hearing by Kathleen Smith-Belton, a non-lawyer. Ms. Smith-Belton was authorized in an Order entered on July 25, 2008, to appear as Petitioner's qualified representative.

The Department was twice permitted to amend the letter denying Petitioner's renewal license, and Petitioner was given an opportunity to respond to the amended letters. The case proceeded to final hearing on the second amended letter dated August 7, 2008.

At the final hearing, Petitioner presented the testimony of Clarissa Roberts, and the Department presented the testimony of Voncia Council, John DeLong, Lorna Susan Rominger, Leighton Edwards, Glenda McDonald, and Marsha Carpenter. Exhibits DCF-1

through DCF-5, DCF-7, DCF-8, DCF-12, and DCF-13 were received into evidence. Official recognition was taken of Florida Administrative Code Rule Chapter 65-20.<sup>1/</sup>

No Transcript of the final hearing was filed. The parties were given 10 days from the date of the hearing to file proposed recommended orders (PROs). Petitioner filed a PRO on August 21, 2008, and the Department filed a PRO on August 25, 2008. The PROs have been given due consideration.

#### FINDINGS OF FACT

1. Petitioner is a large family day care home owned and operated by Clarissa Roberts since 2000.

2. Petitioner's license number is L05LA001. The license was issued on June 7, 2007, and expired on June 6, 2008.

3. Petitioner timely submitted an application for a renewal license, and after the Department gave notice of its intent to deny the renewal license, Petitioner was issued a provisional license pending the outcome of this proceeding.

4. Petitioner's licensed capacity is 12 children. The maximum number of children that can be present at the facility at any given time depends upon the children's ages and the number of staff present, but in no event can there ever be more than 12 children at the facility.

5. Ms. Roberts or her designated substitute, and one other staff person are required to be present at the facility during

all hours of operation. Additional staff may be required to maintain the staff-to-child ratio, which varies based upon the ages of the children present.

6. If only one staff person is present at a large family day care home, it must be the owner or her designated substitute, and the facility is limited to 10 children.

7. The Department conducted a routine inspection of Petitioner on November 20, 2007. A number of areas of "noncompliance" were observed during the inspection.

8. First, Ms. Roberts was not present at the facility, nor was her designated substitute, Kathleen Smith-Belton. Ms. Roberts had left town on an emergency that morning, and the only staff person present at the facility was Ms. Roberts' adult daughter, Christy Troupe.

9. Second, Petitioner was "over capacity" since there were 11 children and only one staff person at the facility.

10. Third, Petitioner did not have documentation of any fire drills having been conducted since April 2007. Monthly fire drills are required.

11. Fourth, almost half of the children's files were missing current immunization records and/or current physical records.

12. The Department's inspector required Ms. Troupe to contact parents to arrange for children to be picked up. Two

children were picked up while the inspector was present, which resolved the capacity issue.

13. The Department issued a "warning letter" to Petitioner based upon the violations documented during the November 20, 2007, inspection. The letter, dated December 14, 2007, advised Petitioner that further violations "will result in the imposition of an administrative fine."

14. Childhood Development Services, Inc. (CDS) conducted a routine inspection of Petitioner on January 30, 2008. CDS administers a federal-state program through which Petitioner receives money for providing meals to eligible children at the facility.

15. Petitioner was over its licensed capacity at the time of the CDS inspection. There were 13 children at the facility.

16. CDS conducted a follow-up inspection on February 25, 2008.

17. Petitioner was again over its licensed capacity at the time of the follow-up inspection. There were 17 children at the facility.

18. CDS reported these findings to the Department as it was required to do. The Department treated the report as a "complaint."

19. The Department conducted an inspection of Petitioner on February 28, 2008, in response to the complaint from CDS.

20. Petitioner was found to be over its licensed capacity at this inspection. There were 15 children at the facility.

21. The Department issued an Administrative Complaint for this violation. Petitioner did not contest the violation, and paid a \$100 fine.

22. The Department conducted another inspection of Petitioner on March 19, 2008. This inspection was conducted as a result of a complaint received by the Department alleging that Petitioner was routinely over capacity and that some of the children were being kept at a nearby house owned by Ms. Roberts.

23. Petitioner was found to be over its licensed capacity at this inspection. There were 17 children at the facility, including an infant in a stroller. There were also four other "attempted drop-offs" of children during the time that the Department's inspectors were present.

24. A number of other areas of "noncompliance" were also observed during this inspection.

25. First, one staff person, Lorna Susan Rominger, had not undergone the required background screening even though she had been working at the facility for well over a year.

26. Second, there were cleaning supplies on a counter that the children could reach.

27. Third, the house "reaked" of smoke and Ms. Roberts admitted to smoking in the house when the children were not

present, but the children's files did not include the required documentation showing that the parents had been notified that someone living in the home smokes.

28. Fourth, the immunization records of one of the children had expired.

29. Fifth, Petitioner did not have the required transportation log for the van used to transport the children. Five of the children were in the van when the Department's inspectors arrived, and none were in appropriate child restraint seats.

30. Petitioner was also cited for keeping children at an unlicensed facility, even though no children were observed during the inspection at the nearby home owned by Ms. Roberts.

31. Petitioner fired Ms. Rominger on March 19, 2008, the day of the Department's inspection. Ms. Rominger claimed that she was fired for reporting Petitioner to the Department. Ms. Roberts claimed that Ms. Rominger was fired for her continuing failure to submit the documentation necessary for the background screening. Ms. Rominger's testimony was more persuasive on this issue, even taking into account the ongoing dispute between her and Petitioner concerning unemployment compensation.

32. Ms. Roberts acknowledged in her testimony that it was her responsibility as Petitioner's owner-operator to ensure that

all employees were screened. She also acknowledged that she allowed Ms. Rominger to work for Petitioner for well over a year without being screened even though she understood that the law required employees who were not timely screened to be fired.

33. Ms. Roberts denied the allegations that she kept children at the home that she owned near the licensed facility, and no persuasive evidence was presented to corroborate Ms. Rominger's testimony on this issue.<sup>2/</sup>

34. The Department conducted an inspection of Petitioner on April 30, 2008, as part of the license renewal process.

35. Petitioner was within its licensed capacity at the time of this inspection, and except for the notice to the parents concerning smoking in the home, the areas of "noncompliance" documented during the prior inspections had been corrected.

36. Ms. Roberts credibly testified that she prepared a form and provided written notice to the parents about the smoking in the home subsequent to the re-licensure inspection.

37. Ms. Roberts acknowledged in her testimony that Petitioner was over its licensed capacity on those occasions where more than 12 children were present at the facility.

38. Ms. Roberts testified that the over capacity issues only occurred during "transition periods" involving the voluntary pre-kindergarten program that she operated out of her



home and/or the school age kids that she took to school in the mornings. This testimony was not persuasive.

39. The "transition periods" described by Ms. Roberts were around 8:30 a.m. and around 11:30 a.m., but contrary to her testimony, all of the inspections did not occur during those periods. For example, the November 20, 2007, inspection occurred between 1:27 p.m. and 3:02 p.m., and the February 28, 2008, inspection occurred between 12:10 p.m. and 12:57 p.m.

40. Ms. Roberts acknowledged in her testimony that it was her responsibility as Petitioner's owner-operator to be familiar with the statutes and rules governing the operation of large family day care homes.

41. The Department considers capacity and background screening violations to be "serious" because they involve issues of safety and supervision of the children at the facility. Violations of these requirements put the children at risk of harm.

#### CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).<sup>3/</sup>

43. The Department is the state agency responsible for licensing and regulating large family day care homes and other child care facilities. See §§ 402.301-402.319, Fla. Stat.

44. Section 402.308, Florida Statutes, provides in pertinent part:

(1) ANNUAL LICENSING.-- Every child care facility in the state shall have a license which shall be renewed annually.

\* \* \*

(3) STATE ADMINISTRATION OF LICENSING.-- In any county in which the department has the authority to issue licenses, the following procedures shall be applied.

\* \* \*

(b) Prior to the renewal of a license, the department shall reexamine the child care facility . . . to determine that minimum standards for licensing continue to be met.

\* \* \*

(d) The department shall . . . renew a license upon receipt of the license fee and upon being satisfied that all standards required by §§ 402.301-402.319 have been met

45. Section 402.310(1)(a)3., Florida Statutes, authorizes the Department to deny a license "for a violation of any provision of §§ 402.301-402.319, or the rules adopted thereunder."

46. Generally, a license applicant has the burden to prove that he or she is entitled to the license. See Dept. of Banking & Finance v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996).

47. However, where, as here, the licensing agency proposes to deny a renewal license based upon specific statutory and rule violations, it has the burden to prove the violations. See Osborne Stern & Co., 670 So. 2d at 934; Coke v. Dept. of Children & Family Servs., 704 So. 2d 726 (Fla. 5th DCA 1998); Dubin v. Dept. of Business Regulation, 262 So. 2d 273, 274 (Fla. 1st DCA 1972) (explaining that the "refusal to renew a license to a person who has once demonstrated that he possesses the statutory prerequisites to licensure cannot be used as a substitute for a license revocation proceeding").

48. The Department argues in its PRO (at ¶¶ 23-24) that it must prove the violations by a preponderance of the evidence, rather than clear and convincing evidence as it stipulated in a prior case involving the renewal of a family day care home license. See Coke, 704 So. 2d at 726 ("The Department agrees that in this proceeding it had the burden of proving [the family day care home's] lack of entitlement to a renewal . . . license and that the evidence needed to be clear and convincing.").

49. The Department's reliance on Haines v. Department of Children and Family Services, 983 So. 2d 602 (Fla. 5th DCA 2008), and M.H. v. Department of Children and Family Services, 977 So. 2d 755 (Fla. 2d DCA 2008), to support this argument is misplaced. Those cases involve foster care licenses, which are not entitled to the same protections as professional licenses

such as the license at issue in this case. See Haines, 683 So. 2d at 604-06; § 409.175(2)(f), Fla. Stat.

50. That said, and even though Coke involved a renewal license and Osborne Stern & Co. involved an initial license, the undersigned agrees with the Department's argument that the stipulation referenced by the Court in Coke is inconsistent with the unequivocal statement by the Florida Supreme Court in Osborne Stern & Co., 670 So. 2d at 934, that "we decline to extend the clear and convincing evidence standard to license application proceedings." Therefore, consistent with the Department's argument in its PRO, the undersigned agrees that the preponderance of the evidence standard applies in this case.

51. The Department met its burden of proof. Indeed, although the preponderance of the evidence standard applies, the evidence clearly and convincingly establishes the violations discussed below.

52. A large family day care home must have at least two full-time child care personnel at the facility during all hours of operation. See § 402.302(8), Fla. Stat.

53. One of the child care personnel must be the owner or occupant of the home in which the facility is operated, or the owner's designated substitute. See § 402.302(8), Fla. Stat.; Fla. Admin. Code R. 65C-20.009(2), 65C-20.013(1), (4)(a).

54. The capacity of a large family day care home depends upon the ages of the children at the facility, but in no event can the facility have more than 12 children. See § 402.302(8), Fla. Stat. (allowing for a maximum of eight children under the age of two or a maximum of 12 children, with no more than four under the age of two).

55. A large family day care home that only has one staff person present is subject to the limitations imposed upon family day care homes. The maximum capacity of a family day care home is 10 children, although a lower number may apply depending upon the ages of the children. See § 402.302(7), Fla. Stat.

56. Petitioner violated these requirements on November 20, 2007, in three separate, but related respects. First, Petitioner's owner, Ms. Roberts, was not present, nor was her designated substitute, Ms. Smith-Belton. Second, Petitioner did not have two child care personnel present as required for a large family day care home. Third, Petitioner was over the capacity for a family day care home since there were 11 children and only one staff person present.

57. Petitioner also violated these requirements on the four other occasions that it was found to be "over capacity": January 30, 2008, when there were 13 children at the facility; February 25, 2008, when there were 17 children at the facility;

February 28, 2008, when there were 15 children at the facility; and March 19, 2008, when there were 17 children at the facility.

58. Ms. Roberts did not dispute the number of children at the facility on these dates, but rather argued at the hearing that Section 402.305(15), Florida Statutes, allowed Petitioner to be over capacity during "transition periods." Ms. Roberts' reliance on this statute is misplaced, as she effectively concedes in her PRO.<sup>4/</sup>

59. Section 402.305(15), Florida Statutes, states:

TRANSITION PERIODS.-- During the periods of time in which children are arriving and departmenting from the child care facility, . . . the provisions of subsection (6) are suspended for a period of time not to exceed 30 minutes. (Emphasis supplied)

60. The subsection referred to in this statute establishes the minimum square footage standards for child care facilities. See § 402.305(6), Fla. Stat. That subsection has nothing to do with a facility's capacity or the required staff-to-child ratio, and those requirements are not affected during "transition periods."

61. Section 402.305(2), Florida Statutes, requires all child care personnel to undergo background screening in accordance with Chapter 435, Florida Statutes.

62. Section 435.05(1), Florida Statutes, requires that any person subject to background screening must submit the required

information to his or her employer within five days after starting work, and requires the employer to submit the information to the Florida Department of Law Enforcement within five days after receiving it.

63. Petitioner violated these requirements by allowing Ms. Rominger to supervise children at the facility for well over a year without being screened. Ms. Roberts' testimony that she tried to unsuccessfully to get the necessary information from Ms. Rominger does not excuse the violation because Section 435.06(3), Florida Statutes, requires the employer to fire any employee who refuses to submit the information necessary for background screening or fails to cooperate in the screening.

64. Florida Administrative Code Rule 65C-20.010 provides in pertinent part:

(1) General Requirements.

\* \* \*

(b) All areas and surfaces accessible to children shall be free from toxic substances and hazardous materials. All potentially harmful items including cleaning supplies, flammable products, poisonous, toxic, and hazardous materials must be labeled. These items, as well as knives, sharp tools and other potentially dangerous hazards, shall be stored separately and locked or out of a child's reach.

(c) All family day care home operators shall inform custodial parents or legal guardian in writing, if someone living in the home smokes. Pursuant to Chapter 386,

F.S., while children are in care, smoking is prohibited within the family day care home, on all outdoor play areas and in vehicles when transporting children.

\* \* \*

(3) First Aid Kit and Emergency Procedures.

\* \* \*

(b) Emergency Procedures and Notification.

\* \* \*

4. Fire drills shall be conducted monthly and shall be conducted at various times when children are in care. A written record shall be maintained showing the date, time, number of children in attendance and time taken to evacuate the home. This record shall be maintained for six (6) months.

65. Florida Administrative Code Rule 65C-20.011 provides in pertinent part:

(1) Children's Health Requirements.

(a) The family day care home provider is responsible for obtaining, for each child in care, a current, complete and properly executed Florida Certification of Immunization form . . . from the custodial parent or legal guardian. . . .-

(b) The family day care home operator is responsible for obtaining, for each child in care, a current, complete and properly executed Student Health Examination form . . . or a signed statement by an authorized professional that indicates the results of the components of the form are included in the health examination from the custodial



parent or legal guardian, within 30 days of enrollment.

(c) The Student Health Examination form or signed statement is valid for two (2) years from the date the physical was performed and must be on file as long as the child is in care.

(d) School-aged children attending public or nonpublic schools are not required to have student health examination and immunization records on file at the family day care home as such records are on file at the school where the child is enrolled.

\* \* \*

(f) Medical records in this section are the property of the custodial parent or legal guardian and must be returned when the child is no longer in care. . . . .

66. Florida Administrative Code Rule 65C-20.013(11)(d)2. requires large family day care homes to "maintain and retain a record of monthly fire drills as specified in subparagraph 65C-20.010(3)(b)4., F.A.C."

67. Petitioner was in violation of these rule requirements at the time of the Department's inspections on November 20, 2007, and March 19, 2008, as detailed in the Findings of Fact.

68. These violations had been corrected as of the time of the Department's re-licensure inspection on April 30, 2008, with the exception of the violation concerning notice to the parents about the smoking in the home, and as to that violation,

Ms. Roberts credibly testified that she subsequently provided the required written notice to each parent.

69. Florida Administrative Code Rule 65C-20.013(8) provides in pertinent part:

(8) Transportation.

(a) When any vehicle is regularly used by a large family child care home to provide transportation, the driver shall have a current Florida driver's license in accordance with Sections 322.01-.70, F.S.

\* \* \*

(d) Each child, when transported, must be in an individual factory installed seat belt or federally approved child safety restraint, unless the vehicle is excluded from this requirement by Florida Statute.

\* \* \*

(f) Prior to transporting children and upon the vehicle(s) arrival at its destination the following shall be conducted by the driver(s) of the vehicle(s) used to transport the children:

1. Driver's Log. A log shall be maintained for all children being transported in the vehicle. The log shall be retained for a minimum of six (6) months. The log shall include each child's name, date, time of departure and time of arrival, signature of driver and signature of second staff member to verify driver's log and the fact that all children have left the vehicle.

\* \* \*

(g) Smoking is prohibited in all vehicles being used to transport children.

70. These requirements apply to any vehicle regularly used to transport the children at the facility, and not just vehicles of a certain size or seating capacity (e.g., 15-passenger vans) as Petitioner seemed to believe.

71. Petitioner was in violation of these requirements at the time of the Department's inspection on March 19, 2008, as detailed in the Findings of Fact.

72. Section 402.310(1)(b), Florida Statutes, requires the Department to consider the following factors in determining what action to take for violations of the statutes and rules governing child care facilities:

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 or registrant to correct the violation or to remedy complaints.

3. Any previous violations of the licensee or registrant.

73. Denial of Petitioner's application for a renewal license is appropriate based upon these factors due to the numerous and repeated violations committed by Petitioner during the past year; the seriousness of the capacity and background

screening violations; and the fact that the capacity violations continued to occur notwithstanding the progressive discipline imposed by the Department through the written warning issued in December 2007 and the \$100 fine imposed in February 2008.<sup>5/</sup>

74. Petitioner argues in its PRO (at pages 1-2) that Ms. Roberts has "a long history of compliance," that she "has learned from her mistakes," that she "has worked diligently to rectify and prevent any further ratio issues," that she "has come a long way in better understanding the statutes that govern her business," and that "[o]nly by virtue of being out of compliance did she know what was required or needed to be rectified." These considerations have not been overlooked, but under the circumstances, the undersigned agrees with the argument in the Department's PRO (at ¶ 27) that Ms. Roberts' assurances of future compliance are not sufficient to overcome the clear and repeated violations established in this case.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department issue a final order denying Petitioner's application for a renewal license.

DONE AND ENTERED this 5th day of September, 2008, in  
Tallahassee, Leon County, Florida.



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T. KENT WETHERELL, II  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of September, 2008.

ENDNOTES

<sup>1/</sup> All references to rules are to the version filed by the Department pursuant to the Order entered on August 21, 2008, except for the reference in Endnote 5, which is to the current version of the Department's rules.

<sup>2/</sup> In making this finding, the undersigned did not overlook the testimony of Department witness Glenda McDonald that Ms. Roberts was observed with four children at that home during an inspection on August 8, 2008. That inspection is not referenced in the second amended letter that framed the issues for this proceeding, and insufficient evidence was presented to contradict Ms. Roberts' testimony that the children observed by Ms. McDonald were her grandchildren and nephews.

<sup>3/</sup> All statutory references are to the 2007 version of the Florida Statutes.

<sup>4/</sup> See Petitioner's PRO, at 2 ("Until late in the hearing on 8/15/08, we felt our understanding of the statute was solid. . . . I was able to call and reach a man that explained it in a way it should have been written. Ratio is never waived. The misunderstanding of the statutes [sic] intent is fairly common. We apologize for our misunderstanding of this statute.").

<sup>5/</sup> The progressive discipline approach followed by the Department with Petitioner is consistent with the rules adopted by the Department to implement Section 402.310(1)(c), Florida Statutes, even though those rules did not take effect until May 1, 2008. See Fla. Admin. Code R. 65C-20.012(3).

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.