STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

M. B., d/b/a B. FAMILY DAY CARE HOME,

Petitioner,

CASE NO. 09-3515
RENDITION NO. DCF-10-101-FO

v.

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.
_____/

FINAL ORDER

THIS CAUSE is before me for entry of a final order. The recommended order concludes that petitioner M. B. did not establish that she met the minimum qualifications for licensure as a family day care home under section 402.313, Florida Statutes, and chapter 65C-20, Florida Administrative Code, and so recommends that the license application be denied. The administrative law judge (ALJ), however, rejected the Department's conclusion that petitioner's license application should be denied based upon an April 2006 event wherein the Department found that petitioner inadequately supervised her own child. The Department filed exceptions to portions of the recommended order that address the April 2006 event. Those exceptions merit discussion, which is provided below.

By notice dated May 8, 2009, the Department notified M. B. that her application for a license to operate a family day care home was denied. Although there were several stated bases for the denial, a major factor was that

> the Department has documented a verified [abuse/neglect] report whereby your then 3-year-old daughter was not supervised correctly on June 21 (sic), 2006. These actions allowed your child to w[a]nder outside to the family swimming pool where she was found after an undetermined amount of time under water and not breathing. During the investigation, it was determined that the lock to get access [to the pool] had been broken for a few days.

The ALJ found, in paragraph 62 of the recommended order, that the specific factual allegations in the subject abuse report were not supported by competent substantial evidence, such that the "verified" finding of neglect in the report was not established. Instead, the ALJ found that the facts pertaining to the incident were consistent with the law enforcement investigation and with the testimony provided by petitioner's husband. *See* RO ¶ 49. Those facts are set forth in paragraphs 51 through 60 of the recommended order.

The ALJ concluded, in paragraph 93 of the recommended order, that, because the Department's denial of the license application was based in part on the verified abuse report, the Department was required to prove the specific factual allegations in the abuse report by a preponderance of evidence. The ALJ further concluded that the Department was also required to demonstrate that those facts, once proven, were a reasonable basis on which to deny the license. The ALJ ultimately concluded that the Department did not meet that burden. In my view, the ALJ's conscientious effort to apply section 39.201(6), Florida Statutes, to adjudicate the impact of the 2006 incident on petitioners' license application produces the correct result in this case, but departs in some respects from the applicable case law and statutes.

Section 39.201(6), Florida Statutes, provides, in pertinent part, that "information in the abuse hotline and the department's automated abuse information system may be used by the department. . . . as part of the licensure or registration process pursuant to [sections] 402.301-402.319[, Florida Statutes]."[1] This statute authorizes the Department to screen child care license applicants against the Department's abuse/neglect records, but it does not mandate disqualification of any applicant based solely on the existence of such a record. Likewise, neither chapter 435 nor chapter 402, Florida Statutes, disqualify a child care license applicant based upon the existence of a report of abuse or neglect under chapter 39, Florida Statutes. The clear legislative intent of section 39.201(6), Florida Statutes, therefore, is to permit child care licensing entities to consult abuse/neglect records because those records may include information that is critical to deciding whether to grant a particular applicant a license that empowers that person to assume the care of young children for compensation. When the child care licensing official reviews abuse/neglect reports pertaining to a given license applicant, the ultimate determination by the protective investigator that abuse or neglect either did or did not occur within the meaning of chapter 39 is certainly important, but it is not dispositive as to whether the Department will grant or deny the license application. There may be instances when a protective investigator finds that an individual abused or neglected a child within the meaning of chapter 39, Florida Statutes, but the child care licensing official concludes, for any number of reasons, that the individual

[1] Section 39.302(7), Florida Statutes, places some limitations on the application of reports of institutional abuse or neglect in the licensing process.

does not pose a threat to children in her care and is qualified for a child care license. Conversely, there could be cases in which a protective investigator did not find that the statutory criteria for abuse or neglect were satisfied, but the facts and circumstances of the incident demonstrate that the individual should not be licensed to provide child care under chapter 402, Florida Statutes. The point is that, for child care licensing purposes, the abuse hotline records are properly considered simply as a source of information for the child care licensing official – the existence of a report, whether "verified" or not, does not control the licensing decision.

In my view, the ALJ, in paragraphs 62 and 93 of the recommended order, erroneously concluded that the abuse report in this case could serve as a legitimate basis for denying petitioner's license application only if the Department proved the specific factual narrative the protective investigator provided in the report itself. That conclusion is in error because the licensing decision and the protective investigator's abuse/neglect findings are separate decisions made at different times for distinct purposes. The instant administrative proceeding is a challenge to the child care licensing decision. The Department's burden, under *Department of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), is only to provide a legitimate reason for denying the license and to produce competent substantial evidence to support that reason. The Department is not required to sustain the protective investigator's decision to "verify" abuse or neglect. In this case, the license denial notice did reference the fact that the report was "verified", but the notice also specifically alleges the

critical facts upon which the denial was based: petitioner did not supervise her daughter correctly, which allowed the child to access the family pool, where she nearly drowned. *See* Respondent's Exhibit A. The material issue at the hearing was, therefore, whether there was competent substantial evidence that petitioner failed to adequately supervise her daughter. The fact that the protective investigator "verified" the abuse/neglect report of the incident based upon a narrative that differed in some respects from that provided in the law enforcement investigation of the event is irrelevant.

In my view, the ALJ also erred in concluding, in paragraph 81 of the recommended order, that "the Department has the burden to prove the specific acts or violation which it alleges are grounds for denial by a preponderance of evidence." This proceeding concerns the initial application for a business license. In *Department of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932, 934 (Fla. 1996), the court explained that, while an agency has the burden to present evidence to support its reasons for denying a license application, "an applicant for licensure bears the burden of ultimate persuasion *at each and every step of the licensure proceeding.*" (emphasis added). *See also, Comprehensive Medical Access, Inc. v. Office of Ins. Reg.*, 983 So. 2d 45, 46-47 (Fla. 1st DCA 2008). Thus, if the Department produced competent substantial evidence to support the contention that petitioner inadequately supervised her daughter such that the child almost drowned in the family swimming pool, the legal issue was limited to whether that was a legitimate reason for denying petitioner's child care license application. *See Id.*

The ALJ, in recommended order paragraphs 51 through 60, made specific findings concerning the events that led to the near-drowning of petitioner's daughter. The Department, in its exceptions, does not challenge any of those findings. Instead, the Department contends that these undisputed findings of fact establish that there was competent substantial evidence for the Department's determination that petitioner inadequately supervised her daughter, and that the near-drowning was the result of that inadequate supervision. In essence, the Department argues that the fact that petitioner's three-year-old daughter was able to access the family pool without being observed by petitioner or any adult in the home demonstrates inadequate supervision that warrants denial of petitioner's child care license application.

It is not necessary to decide whether the undisputed facts concerning this incident are sufficient to reject the ALJ's ultimate conclusion that it should not preclude petitioner's licensure as a child care provider. First, the ALJ recommended that the license be denied on other grounds, so the event with petitioner's daughter is not dispositive here. Perhaps more importantly, however, is that I agree with the ALJ that the undisputed facts surrounding the event suggest that it was a tragic accident that, while possibly preventable, was not indicative of a failure of judgment or supervision on petitioner's part that should preclude her from caring for children. The Department was justified in its concern over the incident and correctly demanded a full explanation of the event, including obtaining all of the law enforcement reports, investigation interview notes, and the like. The Department properly required strict adherence to child

care licensing rules concerning swimming pools, so as to minimize the potential for a future mishap. In my view, however, the facts of the 2006 incident involving petitioner's daughter do not establish that petitioner does not meet the minimum qualifications for licensure as a child care provider.

The recommended order is approved and adopted, with the exception of the objectionable conclusions in paragraphs 62, 81, and 93, discussed above.

Accordingly, petitioner's application for a child care facility license is DENIED for the reasons provided in the recommended order.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 7 day of June, 2010.

for George H. Sheldon, Secretary

RIGHT TO APPEAL

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF CHILDREN AND FAMILIES, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, IN THE DISTRICT COURT OF APPEAL WHERE THE APPELLANT RESIDES, OR IN THE FIRST DISTRICT COURT OF APPEAL. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA RULES OF APPELLATE PROCEDURE. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

Copies furnished to:

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J. B.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, by U.S. Mail, this 9 day of June, 2010.

Gregory D. Venz, Agency Clerk
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