

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND	)	
FAMILY SERVICES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-5002
	)	
TRACEANN HANDY FAMILY DAY CARE	)	
HOME AND TRACEANN HANDY,	)	
	)	
Respondents.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on October 27 and December 10, 2009, in Ft. Myers, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Eugenie G. Rehak, Esquire Department of Children and Family Services Post Office Box 60085 Fort Myers, Florida 33901
For Respondents:	Traceann Handy, <u>pro se</u> Traceann Handy Family Daycare Home 4423 32nd Avenue Southwest Naples, Florida 34116

STATEMENT OF THE ISSUE

The issue in this case is whether Respondents violated provisions of Chapter 402, Florida Statutes,<sup>1</sup> and Florida

Administrative Code Chapter 65C-20, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

Petitioner, Department of Children and Family Services (hereinafter the "Department"), filed an Administrative Complaint on July 29, 2009. The Administrative Complaint alleged violations of regulations governing the operation of family day care homes and imposed an administrative fine of one thousand dollars (\$1,000.00). Respondents, Traceann Handy and Traceann Handy Family Day Care Home (hereinafter jointly referred to as "Respondent"), filed a response to the Administrative Complaint which was accepted by the Department as a Petition for Formal Administrative Hearing. The Administrative Complaint and response were forwarded to the Division of Administrative Hearings ("DOAH") and assigned to the undersigned Administrative Law Judge. Pursuant to notice, a final hearing was commenced on October 27, 2009, in Fort Myers, Florida. Due to issues concerning Respondent's schedule, the hearing was adjourned prior to its completion and then rescheduled for completion on December 10, 2009. The final hearing was concluded on that date.

At the final hearing, Respondent represented herself and called the following witnesses: Shawn Burger, Respondent's

husband; and Traceann Handy, Respondent. No exhibits were accepted into evidence from Respondent.

The Department called six witnesses: Bonny Wolbach, child care licensing counselor; James Palmer, child care licensing section; Dayna Provost, child protection investigator; Bruce Alexander, criminal background screening section; Donnette Anderson, certified child protection investigator; and Alice Parrish, child care licensing supervisor. Alice Parrish was called again for rebuttal. The Department offered Exhibits 1 through 14, all of which were admitted.

The undersigned was advised that no transcript would be ordered. The parties agreed to file their proposed findings of fact and conclusions of law by December 21, 2009. Respondent timely submitted a Proposed Recommended Order; the Department's Proposed Recommended Order was received on December 30, 2009.<sup>2</sup> Each was duly considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Respondent Traceann Handy owns and operates Traceann Handy Family Day Care Home, a child care facility licensed by the Department. On May 26, 2009, the facility had been inspected by the Department and found to be in compliance with the rules of operation. Due to some missing documentation (CPR and first aid certificates), the facility was issued a

Provisional License. As of the date the final hearing in this matter was concluded, the documentation had been submitted, and the facility had a valid license to operate.<sup>3</sup>

2. The Department is responsible for inspecting, licensing, and monitoring child care facilities such as the one operated by Handy. It is the Department's responsibility to ensure that all such facilities are safe and secure for the protection of children utilizing the facility.

3. On Friday, June 5, 2009, the Department received a complaint concerning Handy's facility. The complaint alleged that two older children were asked to supervise a younger child without adult supervision and that transportation of the children had been provided without prior authorization. Based upon these complaints and in accordance with its rules, the Department commenced an investigation of the facility.

4. Investigator Anderson (who was on call for the weekend) went to the facility the next day, Saturday, June 6, 2009. She knocked on the front door (although the entrance to the child care facility portion of the home was located on the side of the house). No one answered her knock, but a young man later came out of the house and advised Anderson that the facility was closed and that Handy was not home.<sup>4</sup> Anderson called the investigator assigned to the case (Dayna Prevost) to report her findings. While Anderson was making the telephone call, the

same young man came out to her car, banged on the car window and loudly repeated that Handy was not home. Anderson smelled an odor which she believed was marijuana while talking with the young man. (The young man was later identified as Handy's adult son, Trauquece Handy.) Anderson then left the premises.

5. The investigation was recommenced on Monday, June 8, 2009. On that date, Investigators Wolbach and Prevost went to the Handy home and knocked on the side door of the home. When there was no answer to the knock, the investigators went to the front door and knocked. Again there was no answer, but they could hear what sounded like children inside the house. The investigators called Handy (who was not at home) and were told by Handy that she would have someone inside the house open the door.

6. Despite the phone call and promise from Handy, no one opened the door, so the investigators called the police for assistance. When the police arrived, a man opened the front door, but the investigators were granted only limited access to the house. An adult female was seen inside the house, along with two small children. The female was questioned and said that she was a housekeeper and that the children inside the home at that time were her children. Upon receiving that information, the investigators again left the premises.

7. On the next day, Tuesday, June 9, 2009, a team of investigators went back to the facility. This time Handy was present, and the team was allowed into the house. Handy's husband was also present at that time. While the team was inspecting the facility, Handy's son came into the house and went directly upstairs.

8. The team reviewed Handy's records concerning attendance at the facility by various children. Handy was interviewed, and due to the previous suspicion of marijuana usage at the home, asked to provide a urine specimen for the purpose of conducting a drug screening test. (There was considerable discussion at final hearing as to how the urine specimen was taken, but that is not an issue in the present proceeding and will not be discussed further.)

9. At one point during the investigative review at the home, a team member approached the inside stairwell and pushed open the gate located at the bottom of the stairs. The gate had been placed there by Handy in response to prior concerns by the Department about children having access to the upstairs portion of the house. The gate was apparently unlatched, although there were no children present at that time near the stairwell. (There was one child present in the home, but that child was in another part of the house.) As the investigator started up the stairs, Handy's husband said that Handy would likely not

appreciate them going into her private quarters. As the investigator continued up the stairs, Handy came into the room and voiced her opposition to anyone going upstairs.

10. Handy had been previously advised by the Department that if a gate was in place to keep children from going upstairs, it would be unnecessary for the Department to inspect that area during every regular inspection. It is unclear from the testimony whether Handy misunderstood the Department or whether the Department was only talking about its annual licensure inspection. No matter, Handy told the investigator that she did not want the investigator to go upstairs. The investigator took that remark as a direct order that she not go upstairs, so she did not do so.

11. Instead, the Department sought injunctive relief in Circuit Court to gain access to the upstairs portion of the house. A hearing on the Department's motion was held the next day, Wednesday, June 10, 2009. Handy received notice of the hearing less than an hour before the hearing was scheduled to commence. She called the Circuit Court Judge's assistant to seek a continuance, but was told that the hearing must proceed. The court gave Handy the option of appearing via telephone, if she so desired.

12. Handy wanted to attend the hearing in person, so she went to the courthouse. There was one child at the day care

facility at that time. Handy could not find her approved substitute on such short notice, so she called the child's parent (who was Handy's cousin) and asked if it would be okay for Handy's husband to watch the child while Handy attended the hearing. The parent approved that arrangement.

13. The Circuit Court entered an Order requiring Handy to allow the Department "a one[-]time inspection . . . of the private part of [the] home." Based upon that Order, the Department sent a team of investigators back to the facility on June 10, 2009, to complete its inspection.

14. Upon completion of its investigation, the Department issued the Administrative Complaint relevant to this proceeding. The Administrative Complaint addresses two alleged violations by Handy: First, that Handy refused to allow the Department access to the entire home during the inspection. Second, that Handy allowed a person who was not currently screened to supervise a child in her care. An administrative fine of five hundred dollars (\$500.00) was proposed for each of the two violations.<sup>5</sup>

15. Handy does not believe she instructed the investigator not to go upstairs during the June 9, 2009, inspection. She remembers only telling them she did not want them to go upstairs, that it was unnecessary, and that her understanding from prior discussions was that the upstairs would not be inspected. The investigator believes she was specifically and



forcefully told not to go up the stairs. In either case, it is clear a court order was obtained to gain access. (At the hearing in Circuit Court, Handy had reiterated that she did not want the investigators to go upstairs.)

16. The gate in question was put in place to prevent children from having access to the upstairs portion of the house. However, the gate was either broken or unlatched (the testimony on this issue is not clear) when there was a child present in the house.

17. Handy's husband did not have a valid background screening in place on June 10, 2009, that would allow him to act as a provider of child care services in the facility. He had been previously screened, but had not had his background screening updated when it expired in June 2008. He had not been re-screened because he and Handy were separated, and he did not intend to be at her house to supervise children any longer. The two are still married, but he only visits the house to do maintenance and repairs as needed.

18. It is clear that Handy's husband was watching the child only due to the exigent circumstances surrounding the court hearing and the unavailability of Handy's approved substitute. Further, the child's parent was made aware of the fact and had acquiesced to this arrangement. Nonetheless,

Handy's husband was not technically qualified to watch children attending the child care center at that time.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2009).

20. Where the Department makes allegations that the applicant engaged in wrongdoing, the burden is on the Department to prove wrongdoing. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996). Factual findings based on record evidence must be made indicating how the conduct alleged violates the statutes or rules or otherwise justifies the proposed sanctions. Mayes v. Department of Children and Family Services, 801 So. 2d 980, 982 (Fla. 1st DCA 2001).

21. The standard of proof in this case is clear and convincing evidence, because the Department is seeking to discipline the license of Respondent. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

22. Clear and convincing evidence has been described as follows:

[C]lear and convincing evidence requires that the 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 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

The Department met its burden of proof in this matter by clear and convincing evidence. It is clear that the Department was denied access to all portions of the house where the child day care facility was located. The Department's testimony as to what transpired in the stairwell is most credible. It is further true that Handy's husband did not have the requisite background screening in place at the time he watched the minor child.

23. Section 402.305, Florida Statutes, states in pertinent part:

(2) PERSONNEL.--Minimum standards for child care personnel shall include minimum requirements as to:

(a) Good moral character based upon screening. This screening shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter.

\* \* \*

(5) PHYSICAL FACILITIES.--Minimum standards shall include requirements for building conditions, indoor play space,

outdoor play space, napping space, bathroom facilities, food preparation facilities, outdoor equipment, and indoor equipment. Because of the nature and duration of drop-in child care, outdoor play space and outdoor equipment shall not be required for licensure; however, if such play space and equipment are provided, then the minimum standards shall apply to drop-in child care. With respect to minimum standards for physical facilities of a child care program for school-age children which is operated in a public school facility, the department shall adopt the State Uniform Building Code for Public Educational Facilities Construction as the minimum standards, regardless of the operator of the program. The Legislature intends that if a child care program for school-age children is operated in a public school, the program need not conform to standards for physical facilities other than the standards adopted by the Commissioner of Education.

\* \* \*

(16) EVENING AND WEEKEND CHILD CARE.-- Minimum standards shall be developed by the department to provide for reasonable, affordable, and safe evening and weekend child care. Each facility offering evening or weekend child care must meet these minimum standards, regardless of the origin or source of the fees used to operate the facility or the type of children served by the facility. The department may modify by rule the licensing standards contained in this section to accommodate evening child care. . . .

24. Florida Administrative Code Rule 65C-20.008(4) states  
in pertinent part:

A screening conducted under this rule is valid for five (5) years, at which time a five (5) year re-screen must be conducted.

(a) The five (5) year re-screen is required for the operator/applicant and all other household members, including juveniles and substitutes, and must be maintained in the department's licensing file.

(b) The five (5) year re-screen must include, at a minimum, statewide criminal records checks through the Florida Department of Law Enforcement and a local criminal records check.

(c) An operator/applicant must be re-screened following a break in operation of the family day care home that exceeds 90 days. A person in this category must undergo the same level of screening that was required at the time of initial operation of the family day care home. If operator/applicant takes a leave of absence, such as maternity leave, extended sick leave, etc., re-screening is not required unless the five (5) year re-screen has come due during the leave of absence.

25. Florida Administrative Code Rule 65C-20.012(4)

provides:

Access. The family day care operator must allow access to the entire premises of the family day care home to inspect for compliance with family day care home minimum standards. Access to the family day care home also includes access by the parent, legal guardian, and/or custodian, to their child(ren) while in care.

26. Section 402.310, Florida Statutes, addresses discipline for failure to conform to licensing requirements and states 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 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 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.

(d) The disciplinary sanctions set forth in this section apply to licensed child care facilities, licensed large family child care homes, and licensed or registered family day care homes.

27. Florida Administrative Code Rule 65C-20.012 identifies the Department's treatment of Class I violations of its licensing rules for child care facilities. The Rule states in pertinent part:

(1) Definitions.

\* \* \*

(d) "Violation" means a finding of noncompliance by the department or local licensing agency with a licensing standard.

1. "Class I Violation" is an incidence of noncompliance with a Class I standard as described on CF-FSP Form 5318 and CF-FSP Form 5317. Class I violations are the most serious in nature, pose an imminent threat to a child including abuse or neglect and which could or do result in death or serious harm to the health, safety or well-being of a child.

\* \* \*

(3) Disciplinary Sanctions.

(a) Enforcement of disciplinary sanctions shall be applied progressively for each standard violation. In addition, providers will be offered technical assistance in conjunction with any disciplinary sanction. The department shall take into consideration the actions taken by the facility to correct the violation when determining the appropriate disciplinary sanction.

(b) Each standard violation has an assigned classification based on the nature or severity of the violation(s) as identified within CF-FSP Form 5318, October 2007, Family Day Care Home Standards Classification Summary, and CF-FSP Form 5317, October 2007, Large Family Child Care Home Standards Classification Summary.

(c) A violation of a Class II standard that results in death or serious harm to a child shall escalate to a Class I violation.



(d) Disciplinary sanctions for licensing violations that occur within a two (2) year period shall be progressively enforced as follows:

1. Class I Violations.

a. For the first and second Class I violation, the department shall, upon applying the factors in Section 402.310(1), F.S., issue an administrative complaint imposing a fine not less than \$100 nor more than \$500 per day for each violation and may impose other disciplinary sanctions in addition to the fine.

b. For the third and subsequent Class I violations, the department shall issue an administrative complaint to suspend, deny or revoke the license. The department, upon applying the factors in Section 402.310(1), F.S., may also levy a fine not less than \$100 nor more than \$500 per day for each violation in addition to any other disciplinary sanction.

28. The Department has deemed that an unscreened individual left alone to supervise children in care constitutes a Class I level of violation. Likewise, failure of an operator to allow the Department access to all parts of the home used as a child care facility constitutes a Class I violation. See CF-FSP Form 5318.

29. While it is true the two violations occurred, there are very reasonable explanations which mitigate the seriousness of the offenses. Handy believed the Department had given her assurances that the upstairs would not be inspected. When an inspection commenced, Handy felt as if the Department had

reneged on its promise, thus making Handy angry. Her remonstrations were somewhat justified, even if her understanding of the situation was in error.

30. Handy attempted to find an appropriate caregiver for the minor child and felt justified that the child's parent had acquiesced to let Handy's husband provide that care. Again, even though Handy was wrong in her understanding of what was allowed, her actions seemed just under the circumstances. Thus, the violations warrant imposition of the minimum fine amounts, rather than the maximum monetary fine.

31. Handy's refusal to acknowledge wrongdoing, even in face of the evidence, is of some concern. She may be in need of some remedial training as to the requirements for operating a child care facility.

#### RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Children and Family Services imposing an administrative fine of \$200 against Respondent, Traceann Handy. It is further

RECOMMENDED that Handy be ordered to attend remedial classes on the operation and management of a child care facility.

DONE AND ENTERED this 13th day of January, 2010, in  
Tallahassee, Leon County, Florida.



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R. BRUCE MCKIBBEN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 13th day of January, 2010.

ENDNOTES

<sup>1/</sup> All statutory references are to Florida Statutes (2008),  
unless otherwise noted.

<sup>2/</sup> Respondent's Proposed Recommended Order had nine exhibits  
attached to it. Those exhibits, which were not accepted into  
evidence during the final hearing in this matter, will not be  
relied upon to make any finding of fact in this Recommended  
Order.

<sup>3/</sup> Handy stated at the final hearing that the facility was not  
currently operating. However, there is no pending order or  
directive from the Department requiring closure of the facility.  
The decision to close the facility was apparently done for  
personal financial reasons.

<sup>4/</sup> The facility is licensed to operate 24 hours per day for six  
days a week. The facility is closed on Sunday.

<sup>5/</sup> Neither of the two issues for which the investigation was  
initially begun was addressed in the Administrative Complaint.  
No competent testimony was presented at final hearing as to  
those issues.

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.