

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

CASE NO. 11-0916
RENDITION NO. DCF-12-046FO

v.

D. FAMILY DAY CARE HOME,

Respondent.

_____/

D. FAMILY DAY CARE HOME,

Petitioner,

v.

CASE NO. 11-2242

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

_____/

FINAL ORDER

THESE CONSOLIDATED CAUSES are before me for entry of a final order. The recommended order finds the Department proved the D. Family Day Care Home (petitioner¹) exceeded the maximum capacity for a family child care home as alleged in Case No. 11-0916, a Class I violation of section 402.313, Florida Statutes. The administrative law judge (ALJ) also found the Department proved several lesser violations of family child care home minimum standards in section 402.313, Florida Statutes, and chapter 65C-20, Florida Administrative

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Code. The ALJ found the Department did not establish an incident of child abuse/corporal punishment as alleged in Case No. 11-2242. The ALJ recommended the Department impose a \$500 fine for the capacity violation. The ALJ recommended the Department grant petitioner's application to renew her family day care home license, but place the license in probationary status. The ALJ recommended the Department issue petitioner a provisional large family child care home license in response to petitioner's initial application for such license. No exceptions to the recommended order were filed.

The recommended order is approved and adopted with some modification as set forth below.

I reject the ALJ's conclusion in recommended order paragraph 44 that "[t]he standard of proof with respect to . . . the denial of the large family [child] care application is by clear and convincing evidence." While there is some support for concluding a denial of license *renewal* based on misconduct during the prior license period must be supported by clear and convincing evidence, see *Coke v. Dep't of Children and Family Serv.*, 704 So. 2d 726 (Fla. 5th DCA 1998),² the Department was required to produce only competent substantial evidence to support its stated reasons for denying petitioner's *initial* application for a large family child care home license. *Department of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996)(in a license application proceeding, burden to present evidence may shift, but burden of persuasion remains with the

¹ The D. Family Day Care Home was actually the respondent in Case No. 11-0916 and the petitioner in Case No. 11-2242, but will be referred to as the petitioner in this order for sake of simplicity.

applicant); *Comprehensive Medical Access, Inc. v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008)(the issue **at the hearing** is whether the agency presents competent substantial evidence to support its stated reason for denying an application).

The Department's April 11, 2011, denial notification for petitioner's application for an initial large family child care home license alleged five bases for the denial – three instances of alleged abuse; one incident of lying to Department personnel concerning the number of children in the family day care home during an inspection; and one occurrence of the family day care home being over capacity. As the ALJ noted in the recommended order preliminary statement, the Department declined to present evidence on two of the three abuse reports referenced in the denial letter. The Department presented competent substantial evidence, and the ALJ entered findings of fact, on the third incident. See Rec. Order, ¶¶ 18-34. The ALJ found the child in question suffered physical injury that left marks, but found the evidence did not erase doubt as to who inflicted the injury or precisely when it occurred. *Id.* at ¶ 33. The ALJ, therefore, concluded the Department failed to persuade her that petitioner was responsible for the injury, not that the Department failed to present competent substantial evidence.

The Department also presented competent substantial evidence on the allegation petitioner lied to Department staff about the number of children in the home on December 2. The ALJ found petitioner did not intentionally

² *But see Rising Stars and Roslyn Smith v. Dep't of Children and Families*, Case No. 11-4315, ¶ 62 (DOAH Nov. 4, 2011).

misrepresent the number of children in the home because the ALJ chose to accept as credible petitioner's testimony that she forgot about an infant asleep in a crib and her own four-year-old son when identifying the children present. Although the Department did not persuade the fact-finder of this allegation, competent substantial evidence was presented. The Department, as noted above, actually proved the fifth allegation concerning petitioner being over capacity in August 2010, as alleged in the administrative complaint.

While I accept the ALJ's findings of fact, given my disagreement with the ALJ's assignment of the evidentiary burden on the initial application for a large family child care home, and my review of the entire record, I also reject the ALJ's recommendation the Department grant petitioner a provisional large family child care home license. Section 402.309, Florida Statutes, authorizes the Department to **issue a provisional** license to an applicant "who [is] unable to meet all the **standards provided** for in ss. 402.301-402.319." The Department typically utilizes **a provisional** license where an applicant (generally a renewal applicant) is unable **to meet** technical licensing standards in timely manner. An example might be when a renewal applicant's license is expiring and the licensee has not received final approval after a fire marshal's inspection. The Department generally does not issue a provisional license as a de facto probationary license, which appears to be what the ALJ contemplated in this case. See rule 65C-22.001(2)(d), F.A.C.

In order to be eligible for a large family child care home license under section 402.3131, Florida Statutes, an applicant must have operated a family

day care home for a minimum of two consecutive years. § 402.3131(1), Fla. Stat. A large family child care home operates out of the owner's residence, just as a family day care home does, but permits the owner to care for a greater number of children. The two-year consecutive experience requirement is intended to ensure a provider has professional child care experience prior to caring for the number of children authorized in section 402.302(11), Florida Statutes, and also permits the Department to evaluate the applicant's performance as a family day care home prior to issuing the large family child care home license. In the instant case, the ALJ determined petitioner's family day care home license should be placed in probationary status because of the capacity and other violations referenced in the recommended order. In my view, petitioner, at a minimum, must successfully complete the probationary period before the Department should consider increasing her responsibility by licensing her to "step up" to a large family day care home license.

I reject the second sentence of recommended order paragraph 53 to the extent the ALJ concludes the license denial letters were somehow defective because "[t]he Department failed to provide the facility with the option to pay the October 29, 2010, proposed fine in a manner that clearly the Department has utilized in the past". Neither the March 23 denial of petitioner's application to renew her family day care home license, nor the April 11 denial of petitioner's application for a large family day care home license imposed any fine on petitioner. Both denial letters referenced the August 3, 2010, incident where petitioner was over capacity, but the imposition of the fine for that violation was

addressed in the October 29, 2010, administrative complaint. Nothing in chapter 120, Florida Statutes, or chapter 28-106, Florida Administrative Code, moreover, requires an administrative complaint or a denial letter to address the methods by which a licensee may remit payment of a fine. See generally, *Cottril v. Dep't. of Ins.*, 685 So. 2d 1371 (Fla. 1st DCA 1996)(administrative complaint must allege specific facts to put the licensee on notice of the conduct the agency believes warrants disciplinary action). The Department's licensing counselor testified at the final hearing that sanctioned licensees must complete payment of fines "before their next license is due". Transcript at p. 131. This requirement simply reflects reality. The Department has no efficient means to compel payment of fines, other than by declining to process license renewal applications until outstanding fine are paid. The requirement is prominently displayed on the Department's license applications forms, which are incorporated by reference in chapters 65C-20 and 65C-22, Florida Administrative Code. The ALJ's conclusion the Department is required to specifically address this in an administrative complaint or license denial letter is incorrect.

With these modifications³, the recommended order is approved and adopted

Accordingly, a \$500 fine is imposed upon petitioner for the child care facility minimum standards violations described in the recommended order.

Petitioner's application to renew its family day care home license is granted, but

³ This case involves information taken and referencing reports of abuse or neglect under chapter 39, Florida Statutes. This information is made confidential by section 39.202, Florida Statutes. The recommended order must be redacted to remove information tending to identify persons named in such reports.

the license is placed in probationary status for a period of six months from the date of this final order. Petitioner's license shall be revoked if petitioner commits a Class I violation during the probationary period, or if petitioner is found to be operating in excess of the maximum capacity authorized by section 402.302(8), Florida Statutes. Petitioner's application for a large family child care home license is denied, but petitioner may re-apply following the successful completion of the probationary period imposed on the family day care home license.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 8th day of February, 2012.


David E. Wilkins, 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:

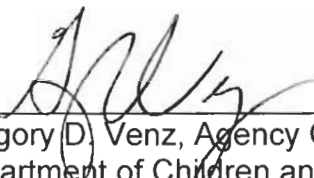
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CERTIFICATE OF SERVICE

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 8 day of February, 2012.



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