STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RISING STARS AND ROSLYN SMITH,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-4315
	)	
DEPARTMENT OF CHILDREN AND FAMILIES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 23, 2011, by video teleconference at sites in Tallahassee, Florida and Daytona Beach, Florida, before E. Gary Early, the Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Paul Kwilecki, Jr., Esquire
327 South Palmetto Avenue
Daytona Beach, Florida 32114

For Respondent: Jane Almy-Loewinger, Esquire
Department of Children and Families
210 North Palmetto Avenue
Suite 430
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner should have her application to renew her childcare facility license denied

by Respondent, Department of Children and Families ("Department"), for the reasons set forth in the Amended Denial of Application to Renew Child Care Facility License.

PRELIMINARY STATEMENT

This case arose upon the denial of the application of Petitioner to renew her childcare facility license, No. C07V00140, to operate the Rising Stars child care facility at 711 Revere Street, Daytona Beach, Florida.

The procedural history of this case leading to the point at which it was referred to the Division is recited in the Department's July 25, 2011 Order Relinquishing Jurisdiction. In that Order, the Department's informal Hearing Officer determined that Petitioner had raised disputed issues of fact with regard to the Department's December 8, 2010 Denial of Application to Renew Child Care Facility License, and relinquished jurisdiction so that the case could be referred to the Division for a formal hearing.

After the informal Hearing Officer relinquished jurisdiction of the matter to the Department, the Department amended its notice of denial. It is that August 2, 2011 Amended Denial of Application to Renew Child Care Facility License that forms the basis for this proceeding. The stated grounds for denial were the following:

> 1. At the inspection of your facility, dated November 3, 2010, you were cited for training violations. You were cited for not having documentation that Veronica Dickson had started her 40-clock-hour training within 90 days of employment and you were cited for Alicia Thomas not having started her 40-clock-hour training within 90 days. Alicia Thomas started in the childcare industry on 4/5/2010 and thus should have started her training no later than 7/5/2010. At the time of the November 3, 2010 inspection, Ms. Thomas had still not begun her 40-clock-hour training.
>
> 2. You have not completed the Guide to Record Keeping online course or the CEU assessment as mandated in the [September 20, 2010 settlement] agreement.
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> 3. You did not meet with Susan Liebee until October 8, 2010 which violated the ten days agreed upon in the settlement.
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> Subsequent to the denial issued on December 8, 2010, Rising Stars has been cited for a background screening violation. On February 2, 2011, the facility was cited for missing documentation of the affidavit of Good Moral Character for Quinetta Edwards. Ms. Edwards was hired at the facility February 1, 2011 and there was no good moral character form in her file.

Petitioner timely filed a petition disputing the denial of the license. The petition, the informal Hearing Officer's July 25, 2011 Order Relinquishing Jurisdiction, and the August 2, 2011 Amended Denial of Application to Renew Child Care Facility License were forwarded by the Department to the Division of Administrative Hearings on August 18, 2011. The

matter was noticed for hearing on September 23, 2011, and was held as noticed.

At the formal hearing, Petitioner testified in her own behalf, and presented the testimony of her husband, Charles Lee Smith, Jr. Petitioner introduced Petitioner's Exhibits 1 through 7 into evidence.

The Department presented the testimony of Patricia Medico, a childcare inspection specialist for the Department, and Jennifer Adams, a family services counselor and inspector supervisor for the Department. The Department introduced Respondent's Exhibits 1 through 6 into evidence.

The two-volume Transcript was filed on October 11, 2011. The parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Roslyn Smith, holds license No. C07V00140, by which she is licensed to operate the Rising Stars childcare facility pursuant to chapter 402, Florida Statutes, and Florida Administrative Code Chapter 65C-22.

2. Petitioner has operated the Rising Stars childcare facility for 12 years. She serves very low-income children in the Daytona Beach area. There is no question but that Petitioner offers superior service to the children under her

care. Petitioner maintains a clothing bank to ensure that the children in her care are adequately clothed. Petitioner prepares wholesome, homemade, nutritious meals for the children, eschewing the more common chicken nuggets and corn dogs offered up at other facilities. The children are encouraged in their classrooms, with appropriate and well-kept educational materials. The facility is clean and well maintained. Petitioner's husband frequents the facility to perform maintenance and upkeep. The children in her care love Petitioner, a feeling that she returns in kind.

3. On September 20, 2010, Petitioner and the Department entered into a Settlement Agreement to resolve several background screening and training violations. The agreement resulted in Petitioner's license being placed on probationary status for a period of six months.

4. The Department's denial of Petitioner's license renewal was based solely on alleged violations discovered during an inspection conducted on November 3, 2010, and on an alleged violation discovered on February 2, 2011.

5. The November 3, 2011 inspection was conducted by Patricia Medico. Ms. Medico began working for the Department on May 18, 2010. The November 3, 2010 inspection was her first at Rising Stars. Despite having been trained since her hire, and having had a small caseload in DeLand, Ms. Medico considered

herself to be "a very new counselor starting at [Petitioner's] place in November."

6. Ms. Medico made it a practice to inspect facilities without first reviewing any information or previous Department inspection reports, a common practice with other inspectors. She believed that by going out "cold," it allowed her to be more objective, and to have no preconceived notions or prejudices.

7. On November 18, 2010, a re-inspection of the facility was performed by Ms. Medico. All deficiencies identified during the November 3, 2010 inspection had been resolved, and no further violations were discovered.

8. Since the November 3, 2010 inspection, Rising Stars has been in substantial -- if not almost perfect -- compliance with all childcare facility standards. From November 3, 2010 through the August 26, 2011 inspection, the only violations discovered were Quinetta Edwards' missing affidavit of good moral character discussed below, one classroom without a posted lesson plan in March 2011, a minor attendance roster discrepancy in March 2011 that was corrected during the inspection, and one time when the posted lunch menu was not dated.

9. The evidence demonstrates that Petitioner made substantial, effective, and sufficient progress toward compliance since the entry of the settlement agreement on September 20, 2010, and it is so found.

10. The specific violations that form the basis for the denial of Petitioner's license renewal are as follows:

Training Violations

Veronica Dickson

11. The Department listed, as a basis for the denial of Petitioner's license renewal, that Petitioner did not have documentation in the employment file of Veronica Dickson showing that she had started her 40-clock-hour training within 90 days of commencement of her employment at Rising Stars.

12. The evidence suggests that the documentation of Ms. Dickson's training was in her file since at least October 8, 2010, and another copy was printed from the Daytona State College website and provided to Ms. Medico during the inspection.

13. Ms. Medico stated that she had no recollection of having seen Ms. Dickson's training records during the inspection. At various times, Ms. Medico admitted that due to her large caseload, she was unclear as to the specifics of any given inspection. However, she indicated that the inspection report is her contemporaneous statement of the facts. She further indicated that it was her practice to print out a copy of the report and go over it with the licensee before having the licensee sign it.

14. When Ms. Medico left a facility, the inspection report provided to the licensee "isn't necessarily the written in stone inspection." Rather, it is subject to review, occasionally with items that were found to be non-compliant changed to being compliant, and items that were found to be compliant changed to being non-compliant. If items were changed, Ms. Medico would call the licensee to advise them of the change.

15. Contrary to Ms. Medico's description of the process, Petitioner testified that, as the normal practice, Ms. Medico did not go over the inspection reports point-by-point. Rather, she indicated that she would receive an unsigned report from Ms. Medico after having accompanied her during the inspection and having discussed -- and oftentimes resolved -- problems at the time. She would sign the computerized signature block without reviewing the report, relying on the earlier discussions. If necessary, she would review the report after the inspection.

16. Having personally provided Ms. Dickson's training records to Ms. Medico, Petitioner did not realize that the training records were identified as a violation on November 3, 2010. Petitioner would have disputed the violation had she known at the time that she was being cited.

17. The evidence as to whether the training documentation was in Ms. Dickson's file is contradictory. However, the more

persuasive evidence supports a finding of fact that the documentation was provided at the time of the inspection, but was either overlooked or forgotten by Ms. Medico. Therefore, there was no violation of any childcare standard associated with Ms. Dickson's training records.

Alicia Thomas

18. The Department listed, as a basis for the denial of Petitioner's license renewal, that Alicia Thomas had not started her 40-hour training within 90 days of having started employment in the childcare industry.

19. According to the Department's personnel records, Ms. Thomas was first employed in the childcare industry on April 5, 2010. There is no evidence to indicate by whom she was employed on that date. The Department provided no information as to how a licensee is to know when a person is employed "in the industry." However, it is clear that a candidate for employment at a child care facility is to commence training within 90 days of employment at any licensed childcare facility, and that the employing childcare facility is responsible for obtaining documentation from childcare personnel.

20. The evidence is undisputed that Ms. Thomas's background screening was complete and clear. Furthermore, Ms. Thomas had completed her required in-service training by June 30, 2010.

21. The Department personnel summary sheet indicates that Ms. Thomas started her employment at Rising Stars on May 5, 2010. However, the greater weight of the evidence indicates that Ms. Thomas was hired by Petitioner in July, 2010.

22. From July through November, 2010, which was the period of Ms. Thomas's employment at Rising Stars, she worked fewer than 30 days due to various medical issues.

23. The evidence indicates that Ms. Thomas's failure to commence her 40-hour training was not cited by the Department as a violation on November 3, 2010. The unsigned inspection report provided by Ms. Medico for Petitioner's review did not list a violation related to Ms. Thomas's training. Ms. Medico testified that she did not cite Petitioner for a violation related to Ms. Thomas on November 3, 2010. Rather, she indicated that "all I did was tell her in notes that Alisca needed to get this," and that "the next time I went out, she would be cited if she did not correct that." (emphasis added). Ms. Adams testified that "technically, [Petitioner] should have been cited additionally for Alisca Thomas not starting her training on time," but that "I overlooked it, and I don't know what [Ms. Medico's] rationale was [for not citing], but I overlooked it." Petitioner testified that Alisca Thomas never appeared on any inspection report that she received.

24. The greater weight of the evidence demonstrates that Petitioner was not cited for a violation related to Ms. Thomas's training status, and that the deficiency would be considered to be a violation only if it was not corrected by the November 18, 2010 re-inspection.

25. By the time of the November 18, 2010 re-inspection, Ms. Thomas had commenced her training, documentation of which was in her file. Thus, Petitioner made sufficient progress toward compliance, and in fact completely resolved the issue, by the time Ms. Medico went back to the facility.

26. Despite having come into compliance with her training requirements, Ms. Thomas was let go shortly after November 18, 2010 due to her ongoing health issues.

27. Based on the foregoing, Ms. Thomas's training status, having been completely resolved prior to it being cited as a violation, and its having had no proven effect on the health, safety, or child development needs of the children in Petitioner's care, is not a sufficient basis for denial of the renewal license.

Record-Keeping Course Violation

28. The Department listed, as a basis for the denial of Petitioner's license renewal, that Petitioner did not complete the Guide to Record Keeping online course or the CEU assessment as required by the September 20, 2010 settlement agreement.

29. As part of the settlement agreement, Petitioner was required by the Department to take and pass the course, and get credit for the Continuing Education Units (CEUs).

30. Petitioner had taken the course in 2009, and had received a certificate of completion. The certificate had not expired.

31. Petitioner attempted to take the Guide to Record Keeping online course as required by the settlement agreement. When Petitioner tried to enroll for the course, the course provider refused to allow her to pay the fee or enroll. Such refusal is consistent with the warning on the course registration home page, which states that "[y]ou can only earn one certificate for each course, and you may not earn CEUs for a course you have previously taken."

32. Petitioner testified that she advised Ms. Medico and Ms. Adams of the problem with taking the online course. Ms. Adams had a recollection of meeting Petitioner in the lobby of the DCF building, and discussing Ms. Dickson's and Ms. Thomas's training issues with her, but did not mention discussing Petitioner's difficulty in taking the record keeping class. Whether Ms. Adams was told of the problem or not is immaterial. The evidence is sufficient to demonstrate, at the very least, that Petitioner advised Ms. Medico, a representative of the Department, of the problem in taking the course.

33. The Department should have known of the restriction on retaking the course at the time it imposed that requirement on Petitioner. Petitioner had no reason to expect that the Department's required settlement condition could not be performed, and did not know of the restriction until she attempted to comply. Petitioner made a good faith effort to comply with the condition but, since the course provider prohibited Petitioner from retaking the course and receiving CEU credit, performance of that element of the settlement agreement was impossible.

34. Based on the foregoing, Petitioner's failure to take, complete, and receive CEU credit for the Guide to Record Keeping course, in light of the impossibility of doing so, is not a sufficient basis for denial of the renewal license.

Untimely Meeting Violation

35. The Department listed, as a basis for the denial of Petitioner's license renewal, that Petitioner failed to meet with Susan Liebee, a coordinator at the Daytona State College, within 10 days of the date of the settlement agreement to discuss staff training requirements. The meeting was to have been held by September 30, 2010, but did not take place until October 8, 2010.

36. Petitioner testified that she went to Ms. Liebee's office to meet with her, but that she was not there. She

subsequently called and made an appointment with Ms. Liebee to meet on October 8, 2010, and met as scheduled. Petitioner made every reasonable effort to meet the time frame for the meeting established in the settlement agreement, but due to reasons outside of her control was not able to meet until Ms. Liebee was available on October 8, 2010. Petitioner's testimony on that point was credible, and there was no evidence to the contrary.

37. Based on the foregoing, Petitioner's failure to meet with Ms. Liebee due to circumstances involving Ms. Liebee's schedule that were out of Petitioner's control, is not a sufficient basis for denial of the renewal license.

Affidavit of Good Moral Character Violation

38. The Department listed, as a basis for the denial of Petitioner's license renewal, that an Affidavit of Good Moral Character was not in the file of new hire Quinetta Edwards. Ms. Edwards was hired effective February 1, 2010. The inspection during which Ms. Edward's employment file was reviewed was conducted on February 2, 2010.

39. As stated by Ms. Medico, a new employee's background investigation consists of the level 2 background screening required in Chapter 435, the Affidavit of Good Moral Character signed by the employee, the signed and notarized Child Abuse Reporting Form, the employee's employment history, checked references for two years, and a supplemental statement that the

employee has not had a child care license denied or revoked in the past. All of the screening requirements listed by Ms. Medico, and established in rule 65C-22.006(4), had been met but for the affidavit.

40. Due to a simple oversight, Ms. Edwards failed to execute the Affidavit of Good Moral Character prior to her employment with Petitioner. Upon learning of the oversight, Ms. Edwards executed the Affidavit on February 8, 2010. Petitioner thereupon submitted the affidavit to the Department by facsimile on that date. There was no attempt to backdate the form, or to do anything other than honestly correct the oversight.

41. Ms. Edwards has cleared all screening, meets all employee standards, and remains on the staff of Rising Stars without any problems to this day.

42. The simple and unintentional oversight in having Ms. Edwards execute her affidavit one week after commencement of employment, given that all other background screening was completed without incident, had no effect on the health or safety of the children attending Rising Stars. That oversight was not a material violation of the Department's licensing standards or of the settlement agreement, and is not a sufficient factual basis for the denial of Petitioner's license renewal.

Other Violations Not Pled

43. In addition to the issues pled as reasons for denial in the Department's Amended Denial of Application to Renew Child Care Facility License, the parties introduced testimony and documentary evidence regarding a number of alleged minor deficiencies at the Rising Stars facility discovered during the November 3, 2010 inspection. Both Ms. Medico and Ms. Adams admitted that the deficiencies did not form the basis for the Department's proposed action.

44. As to the facility violations -- which included among other minor deficiencies, a missing lesson plan; exposed "S" hooks on the swing set; worn electrical outlet covers; an exposed, but generally inaccessible screw point underneath a bench; uneven boards on a deck; and two forks in a drawer accessible but off-limits to children -- the evidence demonstrates conclusively that those deficiencies are "common problems" and that "those things, they happen everywhere." The evidence further demonstrates that Petitioner's husband keeps the facility well kept and maintained, and that Petitioner does a "wonderful job" with the Rising Stars facility. The evidence is undisputed that each of the alleged violations identified in the November 3, 2010 inspection report were either corrected on the spot during the inspection, or were corrected by the November 18, 2010 re-inspection. They have not recurred.

45. To the extent that those alleged deficiencies are considered in the final decision regarding renewal of Petitioner's license, despite having not been pled by the Department, it is found that the alleged deficiencies, have had no adverse effect on the health, sanitation, safety, and adequate physical surroundings for the children in Petitioner's care, have had no adverse effect on the health and nutrition of the children in Petitioner's care, and have had no adverse effect on the child development needs of the children in Petitioner's care. Therefore, those alleged deficiencies do not form a sufficient basis for denial of Petitioner's license renewal.

46. Finally, evidence was received regarding the employment of Jennifer Geier by Petitioner during a period that she was disqualified from employment. Petitioner was not aware that Ms. Geier was subject to disqualification, especially since she had received a letter from the Department of Corrections dated September 9, 2009, stating that "there are no stipulations in her order that prevents her from employment in a child care facility."[1/] Upon discovering that the offense was, in fact, disqualifying, Ms. Geier was terminated. It is clear that at the time the Department issued its Amended Denial of Application to Renew Child Care Facility License on August 2, 2011, the Department was well aware of Ms. Geier and her relationship with

Petitioner, with all aspects of her employment at Rising Stars having been resolved in the September 20, 2010 Settlement Agreement, and with her having received a Final Order from the Department granting an exemption from disqualification on January 3, 2011. Since all aspects of Ms. Geier's employment were resolved by the settlement agreement, and since Ms. Geier's employment by Petitioner was not pled by the Department, her previous employment does not form a sufficient basis for denial of Petitioner's license renewal.

CONCLUSIONS OF LAW

A. Jurisdiction

47. The Division of Administrative Hearings has jurisdiction over the subject matter and parties pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).

48. The Department is the administrative agency of the State of Florida, charged with the duty to enforce and administer the provisions of chapter 402, Florida Statutes. The Department has jurisdiction over the licensing of childcare facilities pursuant to sections 402.301-402.319, Florida Statutes, and Florida Administrative Code Rule 65C-22.

49. Petitioner is the owner of the Rising Stars childcare facility and is subject to the Department's childcare facility standards.

B. Standards

50. Section 402.305 establishes the standards for licensing of childcare facilities. Subsection (1) of section 402.305 provides that:

> (1) LICENSING STANDARDS. — The department shall establish licensing standards that each licensed child care facility must meet regardless of the origin or source of the fees used to operate the facility or the type of children served by the facility.
>
> (a) The standards shall be designed to address the following areas:
>
> 1. The health, sanitation, safety, and adequate physical surroundings for all children in child care.
>
> 2. The health and nutrition of all children in child care.
>
> 3. The child development needs of all children in child care.

51. Section 402.308, Florida Statutes, deals with the issuance of licenses for childcare facilities, including the requirement of annual renewal, and states:

> (1) ANNUAL LICENSING.--Every childcare 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:
>
> (a) Application for a license or for a renewal of a license to operate a childcare

> facility shall be made in the manner and on the forms prescribed by the department....
>
> (b) Prior to the renewal of a license, the department shall reexamine the child care facility, including in that process the examination of the premises and those records of the facility as required under s. 402.305, to determine that minimum standards for licensing continue to be met.
>
> * * *
>
> (d) The department shall issue or renew a license upon receipt of the license fee and upon being satisfied that all standards required by ss. 402.301-402.319 have been met. A license may be issued if all the screening materials have been timely submitted; however, a license may not be issued or renewed if any of the childcare personnel at the applicant facility have failed the screening required by ss. 402.305(2) and 402.3055. (emphasis added).

A failure of screening was not a basis for the proposed denial of Petitioner's license renewal.

52. Section 402.310 offers establishes the factors and procedures to be applied when a license denial is based upon violations of childcare facility standards and thus used in lieu of disciplinary proceedings as a sanction for such violations. That section provides, in pertinent part, that:

> 402.310 Disciplinary actions; hearings upon denial, suspension, or revocation of license or registration; administrative fines.—
>
> (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 pre-disciplinary 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 childcare facilities, licensed large family childcare homes, and licensed or registered family day care homes. (emphasis added).

53. Rule 65C-22.003 was promulgated by the Department to establish the training standards to be applied to employees of childcare facilities. As to when training is to commence, rule 65C-22.003(1)(c) provides that:

> (c) "Begin training for child care personnel" refers to a candidate's commencement of at least one of the child care training courses listed in Section 402.305(2)(d), F.S. This may be accomplished by classroom attendance in a department-approved training course, acquiring an educational exemption from a department-approved training course, beginning a department-approved online child care training course, or by receiving results from a department-approved competency examination within the first 90 days of employment in the child care industry in any licensed Florida child care facility. The child care facility is responsible for obtaining documentation from child care personnel.

C. The Burden and Standard of Proof

54. The allegations of fact set forth in the charging document are the facts upon which this license denial proceeding is predicated. M. H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008); Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); see also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). The Amended Denial of Application to Renew Child Care Facility License was based solely on alleged violations of childcare facility standards identified during the November 3, 2010, and February 2, 2011 inspections. Therefore, the reasons for denial are limited to those reasons pled by the Department.

55. Petitioner has applied for the renewal of a license to operate a childcare facility, and challenges the Department's

decision to deny licensure. As the party asserting the affirmative, Petitioner has the burden of proof to demonstrate, by a preponderance of the evidence, that she satisfied the requirements for licensure and was entitled to receive the license. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996); N. W. v. Dep't of Child. & Fam. Servs., 981 So. 2d 599, 601 (Fla. 3d DCA 2008); Fla. Dept. of Transportation v. J. W. C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

56. The Department has based its licensing decision on instances of wrongdoing on the part of Petitioner. Therefore, even though the ultimate burden of proof remains with Petitioner to demonstrate entitlement to the renewal of her license, the burden in this proceeding shifts to the Department to prove up those incidents upon which it relies for its decision to deny the license. In evaluating the burden in the licensing component of a dual licensing/enforcement proceeding, the Supreme Court has held that:

> . . . while the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove her entitlement to the license. The denial of registration . . . is not a sanction for the applicant's violation of the statute, but rather the application of a regulatory measure. . . . The clear and convincing evidence standard is also inconsistent with the discretionary

> authority granted by the Florida legislature to administrative agencies responsible for regulating professions under the State's police power. In this case, the Department was required to determine whether the respondents had demonstrated worthiness to transact business in Florida before approving their application. (citations omitted).

Dep't of Banking & Fin. v. Osborne Stern and Co., at 934

57. The Second District Court of Appeal has agreed with the rationale of the shifting burden, and the application of the preponderance of the evidence standard in a license renewal proceeding. In a comprehensive analysis of the burden of proof in a renewal case, which includes significant discussion of the First District Court of Appeal and Supreme Court opinions in Osborne Stern and Co., the court held that:

> On appeal from the final administrative order, the First District agreed that the agency had the burden of proving that the applicants had committed the alleged violations in order to deny registration on that ground. Id. Notably, the First District concluded that the burden of proof shifted between the parties in the registration proceeding, and its ruling on this point is instructive:
>
> > The hearing officer correctly ruled that an applicant for licensure or registration to engage in a particular profession or occupation bears the burden of showing entitlement thereto by a preponderance of the evidence. However, that does not mean that the applicant must disprove that violations occurred as alleged by the Department; the Department had the burden of

> proving the alleged violations actually occurred if the registration is to be denied on that ground.

Id. However, the First District reversed the final administrative order because the court concluded that the agency was required to satisfy the clear and convincing standard of proof on this issue rather than the preponderance of the evidence standard. Id. at 248-49. The First District also certified a question of great public importance concerning whether the Department's evidentiary burden in a registration proceeding is governed by the clear and convincing standard. Id. at 249.

On review of the certified question in the Supreme Court of Florida, that court reaffirmed the rule that an administrative agency's burden of proof in a license application proceeding is governed by the preponderance of the evidence standard. Osborne Stern & Co. II, 670 So. 2d at 934-35. Accordingly, the supreme court quashed that portion of the First District's decision that had extended the clear and convincing standard to license application proceedings. Id. at 935.

* * *

Osborne Stern & Co. II stands for the proposition that in a license application proceeding, the agency has the burden of proving specific acts of misconduct by a preponderance of the evidence if it seeks to deny a license application on that ground. *Id.* at 935 ("Nothing about this case shows that the [preponderance of the evidence] standard invites an abuse of discretion by the Department in denying registration applications, or results in the denial of licenses which otherwise should or would be granted if the Department were put to a higher burden of proof." (emphasis added).

M. H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 760-761 (Fla. 2d DCA 2008). The court then proceeded to summarize its decision as follows:

> Without question, an applicant for a license has the initial burden of demonstrating his or her fitness to be licensed. Osborne Stern & Co. I, 647 So. 2d at 248. But if the licensing agency proposes to deny the requested license based on specific acts of misconduct, then the agency assumes the burden of proving the specific acts of misconduct that it claims demonstrate the applicant's lack of fitness to be licensed. Osborne Stern & Co. II, 670 So. 2d at 934.

Id. at 761.

58. The evidentiary burden on the Department has been described by the First District Court of Appeal as follows:

> Despite the fact that the applicant continuously has the burden of persuasion to prove entitlement, however, the agency denying the license has the burden to produce evidence to support a denial. . . . While the agency is not required to prove its allegations by clear and convincing evidence, it may not deny a license application unless the decision is supported by competent substantial evidence. . . . Competent substantial evidence is such evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

Comprehensive Med. Access, Inc. v. Office of Ins. Regulation, 983 So. 2d 45, 46 (Fla. 1st DCA 2008) (citing Dep't of Banking & Fin. v. Osborne Stern and Co., supra).

59. In a case that bears significant similarities to that before the undersigned, the Third District Court of Appeal has addressed a situation in which the Department denied an application for renewal of a foster care license. In N. W. v. Department of Children & Family Services, 981 So. 2d 599 (Fla. 3d DCA 2008), the applicant had been licensed to operate a foster home from 1996 through 2003. She applied for renewal, and was denied based on allegations that she violated foster home standards. Having acknowledged that the application was for renewal, the court held that:

> Because N.W. applied for a foster home license, she had the burden of proving by a preponderance of the evidence that she satisfied all the requirements for licensure and was entitled to receive the license. See § 120.57(1)(j), Fla. Stat. (2007). ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute."); Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). The ALJ correctly acknowledged that N.W. had the ultimate burden of proof in this license application proceeding. It was the Department's burden to provide specific reasons for the denial and to produce competent, substantial evidence to support those reasons. Mayes v. Dep't of Child. & Family Servs., 801 So. 2d 980 (Fla. 1st DCA 2001).

Id. at 601.

60. Despite language in Mayes v. Department of Children & Family Services, 801 So. 2d 980 (Fla. 1st DCA 2001)(language that was cited in N. W. v. Dep't of Child. & Fam. Servs., supra) that suggested a lesser competent substantial evidence standard, the court in M. H. v. Department of Children & Family Services, supra, concluded that the burden on the agency is one of preponderance. The court noted that the statement in Mayes may have been confusing since it did not identify the stage in the proceeding to which the competent, substantial evidence statement applied, i.e. the burden of proof stage for the administrative proceeding versus the standard of review stage for the appellate proceeding. M. H. v. Dep't of Child. & Fam. Servs., at 761.

61. Providing a degree of uncertainty to the issue of the appropriate burden of proof in a license renewal proceeding is the case of Coke v. Department of Children & Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998), in which the Fifth District Court of Appeal held that the agency bears the burden of proving allegations of wrongdoing by an applicant by clear and convincing evidence. The court did not perform an extensive analysis of the issue, but did note that "[t]he Department agrees that in this proceeding it had the burden of proving her lack of entitlement to a renewal of her license and that the evidence needed to be clear and convincing." Id. The

undersigned notes that the Department in this case similarly stated that "[t]he standard of proof in this case is clear and convincing evidence, because the Department is seeking to discipline the license of the Respondent." The Department's position is understandable since section 402.310(1)(a) couches license denial as a disciplinary sanction for a violation of sections 402.301-402.319.

62. Despite the opinion in Coke v. Department of Children & Family Services, supra, and the Department's effort to impose upon itself a higher burden of proof, the undersigned concludes that since this case involves the denial of an application for renewal of a license, Petitioner has the overall burden to prove entitlement, but that the Department must prove up the incidents of wrongdoing that support its decision that Petitioner does not meet child care facility standards by a preponderance of the evidence.

D. Analysis

63. Applying the law to the facts of this case, Petitioner established that she meets the standards to receive a renewal of her childcare facility license.

64. The allegations regarding the training records of Ms. Dickson and Petitioner's meeting with Ms. Liebee were not proven by the Department to have been violations of any

childcare facility standard, and cannot form the basis for the denial of the license.

65. Petitioner's failure to take the Guide to Record Keeping online course and obtain credit for the Continuing Education Units (CEUs) cannot be considered to be a violation, due to the fact that the provider would not allow Petitioner to retake the course or receive CEU credit due to her having taken the course previously. The impossibility of performance of an obligation, as has been proven in this case, is a defense to performance. Ellingham v. Dep't of Child. and Fam. Servs., 896 So. 2d 926 (Fla. 1st DCA 2005).

66. As to Ms. Thomas's training, the evidence demonstrates that the Department did not cite Petitioner for a violation of the training standard on November 3, 2010, but rather granted Petitioner until the November 18, 2010 re-inspection to correct the matter. By the November 18, 2011 re-inspection, the training matter, along with each of the other deficiencies identified on November 3, were resolved. Thus, although there was a deficiency related to training, the Department declined to cite Petitioner for a violation. In addition, Petitioner proved that she was making sufficient progress toward compliance with sections 402.301-402.319, and had taken effective action to correct the non-compliance. For the reasons herein, denial of

Petitioner's license renewal for Ms. Thomas's training deficiency is not an appropriate action under section 402.310.

67. Finally, the allegation as to the background screening of Ms. Edwards is an insufficient basis for the denial of Petitioner's license. Ms. Edwards completed all other background-screening requirements, including her FDLE screening and her Child Abuse Reporting form. There was clearly no effort or intent to avoid screening. Rather, the failure to complete the Affidavit of Good Moral Character was a simple, unintentional oversight that was rectified almost immediately. It exposed no child to any potential for harm. Chapter 402 contains no express "substantial compliance" standard applicable to licensure. However, there must be some recognition of the reality that there are occasions where perfect compliance has not been achieved, not due to any intent to subvert the standards of compliance, but due to the practical realities involved in coordinating the governmentally required flow of paper. Cf. Beverly Healthcare Kissimmee v. Ag. for Health Care Admin., 870 So. 2d 208, 211 (Fla. 5th DCA 2004). In addition, Petitioner proved that she made sufficient progress toward compliance with sections 402.301-402.319, and had taken effective action to correct the non-compliance.

E. Ultimate Conclusion

68. In this case, it has not been proven by a preponderance of the evidence that the grounds for denial listed in the Department's August 2, 2011 Amended Denial of Application to Renew Child Care Facility License constituted material violations of child care facility standards or the settlement agreement. There was no demonstrated likelihood of harm to the health and safety of the children in Petitioner's care given the nature of the alleged incidents. None of the incidents identified in the November 3, 2010 or February 2, 2011 inspections warrants the decision to deny renewal of Petitioners' childcare facility license.

RECOMMENDATION

Upon the consideration of the facts found and the conclusions of law reached, it is RECOMMENDED that the Department of Children and Family Services enter a Final Order granting the renewal of license, No. C07V00140, to Petitioner Roslyn Smith for the operation the Rising Stars childcare facility.

DONE AND ENTERED this 4th day of November, 2011, in Tallahassee, Leon County, Florida.

E. GARY EARLY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of November, 2011.

ENDNOTE

[1/] Although Petitioner, on questioning, stated that the dates of employment were in 2010, it is clear from a review of all of the evidence in context, and therefore found, that the period of employment at issue was from September 2009, after Petitioner received the DOC letter, until December 2009. That timeframe is also consistent with that set forth in the Recommended Order in J. G. v. Dep't of Child. & Fam. Servs., Case No. 10-3189 (Fla. DOAH Sept. 13, 2010; Fla. DCF Jan. 3, 2011).

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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.