STATE OF FLORIDA
AGENCY FOR PERSONS WITH DISABILITIES

Jane Milsap,
Owner and Operator,
Our House Too,

Petitioner,

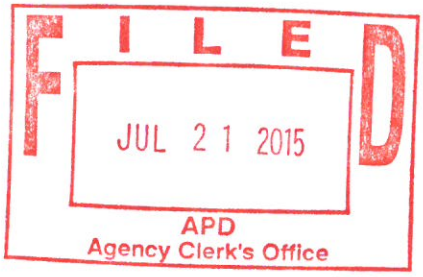
vs.

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.
_____/

DOAH Case No. 14-2652APD

RENDITION No. APD-14-15-0518-FO



FINAL ORDER

THIS CAUSE is before the Agency for Persons with Disabilities (Agency or APD) for consideration and final agency action concerning the Agency's denial of Petitioner's application for license to operate a group home facility. Following a video teleconference administrative hearing at DOAH on February 11, 2015, the Administrative Law Judge (ALJ) issued a Recommended Order concluding that Petitioner did not meet the burden of proof to support an approval of Petitioner's request for license. On May 18, 2015, Petitioner filed written exceptions.

As a threshold matter the Petitioner disagrees with the phrasing of the issue by the ALJ in the Recommended Order indicating that it is not identical to how the ALJ framed the issue during the hearing. It is clear, however, from the substance of the Recommended Order that the ALJ analyzed the issue in accordance with the provisions of s. 393.0673(2), F.S., which sets forth the grounds upon which the Agency may deny an application for licensure. See e.g., R.O. paragraphs 13 and 14.

Filed July 21, 2015 10:53 AM Division of Administrative Hearings

Exception to Finding of Fact in Paragraph 6: Petitioner takes exception to paragraph 6 of the Recommended Order where it stated: "What [the Department of Children and Families] DCF had concluded in its investigation (and ultimately reported to APD) was that on or about March 5, 2014, Ms. Milsap was serving as the owner and operator of Milsap Family Day Care Home." Petitioner argues that "[t]here is no competent substantial evidence that DCF reported anything regarding the investigation to APD." Petitioner argues essentially that because APD utilized a "DCF [s]ummary of a computer generated form designed to auto populate into its several fields information from the mainframe database in the Florida Safe Family System," that there is no evidence that DCF "reported" anything to APD. Petitioner's argument is without merit. Under s. 393.0673(2), one of the grounds for which the Agency may deny an application for licensure is upon the existence of verified findings of abuse, neglect or abandonment of a child. There is no requirement that the Department of Children and Families "report" this information to APD by any specific method. During the hearing, testimony was presented that explained in detail the application review process and how the Agency validates information concerning the existence of verified findings of abuse by DCF. (T-84-86) The Petitioner claims the report relied upon by APD entitled "Confidential Investigative Summary" (investigative summary) is only a report of the initial findings. That description, however, mischaracterizes what the document represents. Testimony from the hearing, as well as the document itself, refutes the notion that the investigative report documents only preliminary findings. Testimony from the hearing showed that the investigation was closed and verified findings were in fact made by DCF's investigator. (T – 59) Testimony from the hearing also indicated that

the computer database utilized by DCF from which the investigative summary was produced was updated until the investigation was completed, the verified findings made, and that further entries were locked once the investigation was closed. (T- 42, 59) The testimony also indicated that the child protection investigator entered her verified findings into the investigative summary herself. (T- 62 63) The Agency finds that the Petitioner's claim of "no competent substantial evidence" is clearly refuted by the record.

In addition, Petitioner's reliance upon s. 120.60(7), F.S., is misplaced. This provision requires an agency to identify specific legal authority for conditional approval of licenses based upon agency statements, policies or guidelines. Here the Petitioner's license was not denied due to failure to satisfy the condition of an agency policy, statement or guideline, but was denied based on the statutory authority provided to the Agency under s. 393.0673(2), F.S., to approve or deny licensure to an applicant.

The exception to Finding of Fact in Paragraph 6 is rejected.

Exception to Finding of Fact in Paragraph 7: Petitioner's takes exception to Finding of Fact 7, because in it the ALJ states in the Recommended Order that the Petitioner does not dispute that a child in her care was bitten several times, and claims that the Agency has the burden of proving the stated reasons for the denial. Petitioner implies that inclusion of this finding amounts to shifting the burden onto the Petitioner to disprove the allegations of wrongdoing. The Agency finds the Petitioner's claim unpersuasive. In a proceeding conducted under the Administrative Procedure Act, it is the hearing officer's duty to consider all the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. Heifetz v.

Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985); Wills v. Florida Elections Com'n, 955 So. 2d 61 (Fla. 1st DCA 2007). To make a Finding of Fact is to set out the facts which the hearing officer found from the evidence and testimony to be true. Laney v. Holbrook, 8 So. 2d 465 (Fla. 1945); United Health Care v. Department of Health and Rehabilitative Services, 511 So. 2d 684 (Fla. 1st DCA 1987); Baptist Hospital, Inc. v. Department of Health and Rehabilitative Services, 500 So. 2d 620 (Fla. 1st DCA 1986). Here, the ALJ simply made a factual finding based on numerous statements by the Petitioner during the hearing that support the finding that the Petitioner, did not deny or dispute the fact that a child in her care was bitten repeatedly. (T-21, 25, 26, 27, 28) A Finding of Fact is presumed correct. An agency may only reject a Finding of Fact if, after a complete review of the record and transcript, it determines that there is no competent substantial evidence for support. Gruman v. Department of Revenue, 379 So.2d 1313 (Fla. 1st DCA 1980). There is no indication from review of the Recommended Order that, by including this Finding of Fact in his Recommended Order, that the ALJ improperly shifted the burden to the Petitioner to disprove allegations of wrongdoing.

Petitioner for this exception again misconstrues the applicability of s. 120.60(7), F.S., apparently arguing that this section requires the Agency to join DCF as a party in order to prove the validity of the reasons for the denial. Neither this section nor 393.0673(2), F.S., imposes such a requirement. Petitioner also objects to the finding because of its prejudicial nature against the Petitioner. While it is true that the factual finding is prejudicial against the Petitioner, it is supported by competent substantial and properly included as a factual finding. Petitioner in this exception also asserts in a

conclusory manner that the finding should be deleted as being contrary to the essential requirements of law. The Agency finds no legal basis to remove or disregard the Finding of Fact contained in paragraph 7 from the Recommended Order.

The exception to Finding of Fact in Paragraph 7 is rejected.

Exception to Finding of Fact in Paragraph 8: Petitioner takes exception to this factual finding on similar rational raised in her exception to paragraph 6 claiming "[t]here is no competent, substantial evidence that DCF made any recommendations or a verified finding of any violation. The record is clear that the investigator stated in her initial report her findings; however, there is no evidence, competent or of any kind, that supports that DCF came to any conclusions as a result of the investigation." Those assertions, however, are not supported by the record, particularly those portions of the record previously noted in response to the exception to paragraph 6. Furthermore, at the hearing the following testimony was presented:

[BY MR. ARHENDT:]

Q. And did you close the investigation of the Milsap Family Daycare with a verified finding of neglect?

A. Of inadequate supervision, which is one of our subsects of neglect, yes.

THE COURT: Let me understand. You said there was a verified finding of inadequacy of supervision?

THE WITNESS: Inadequate supervision, yes. This one is the maltreatment in the child maltreatment index.

BY MR. AHRENDT:

Q. And in your finding, did you verify that Jane Milsap was the caregiver responsible --

A. Yes.

Q. -- in this situation? (T- 59,60)

The Agency finds no basis to reject the factual findings of paragraph 8 of the Recommended Order.

The exception to Finding of Fact in Paragraph 8 is rejected.

Exception to Finding of Fact in Paragraph 9: This exception is also based upon the mischaracterization of the investigative summary as an "initial" or incomplete report of DCF concerning its verified findings. This assertion is not supported by the record, in particular, section VII of the investigative summary admitted into evidence at the hearing (T- 49) states ". . . the allegations are closed verified as the child sustained at least 13 bites over his face, arms, and back while at the childcare facility." In addition, Petitioner again takes issue with the fact that APD validated the application information, and thereby discovered the existence of DCF verified findings, through the Florida Safe Family System. Petitioner for this exception also misapplies s. 120.60(7), F.S., in a similar argument previously addressed in this order's explanation in response to exception 6. As to these points, the Agency finds them unpersuasive for the same reasons.

Also in connection with this exception, Petitioner asserts essentially that the determination of whether the incident was "seriousness enough" is not within the jurisdiction of the Agency, but is instead the prerogative of DCF, and that since DCF did not administer a sanction as a result of the incident, APD cannot rely "on its own finding

as to the seriousness of the incident. . ." Petitioner's position is contrary to the plain language of s. 393.0673(2), F.S., which authorizes the Agency to deny an application for licensure if: "(b) The Department of Children and Families has verified that the applicant is responsible for the abuse, neglect, or abandonment of a child . . ." The statute provides APD discretion to deny an application for licensure based upon the existence of a verified finding. Neither concurrence with DCF as to the seriousness of the neglect, nor a sanction imposed by DCF, is required in order for the Agency to deny a license application. The Agency finds no basis in law or fact to reject this finding of the ALJ.

The exception to Finding of Fact in Paragraph 9 is rejected.

Exception to Conclusion of Law in Paragraph 12: This exception asserts that the "entire text of the Conclusion of Law is a Finding of Fact and asks that it be stricken because it is not supported by competent and substantial evidence. An agency is not bound by the labels affixed to findings of fact and Conclusions of Law. If a Conclusion of Law is improperly labeled as a Finding of Fact, the label should be disregarded and the item treated as though it were properly labeled. Battaglia Properties, LTD., v. Florida Land and Water Adjudicatory Commission, 626 So.2d 161 (Fla. 5th DCA 1993), *citing* Kinney v. Department of State, 501 So.2d 129 (Fla. 5th DCA 1987). The Agency agrees with Petitioner that this paragraph is more accurately described as a Finding of Fact, however, it disagrees with the claim that it is not supported by competent and substantial evidence. In support of her position Petitioner argues that "[t]here was no verified finding of inadequate supervision because there was no hearing nor an opportunity for a hearing on the matter; hence the alleged finding is but a summary of

an investigator's initial report." Further the Petitioner takes exception to the end note used by the ALJ to note the existence of other competent substantial evidence. There is no requirement in law requiring the provision of a hearing before the Agency may rely upon a verified finding by DCF to deny licensure to an applicant. Contrary to the assertion of Petitioner, the investigator did not testify at the hearing that the investigative summary was only a report of preliminary or initial findings. See the excerpted testimony in response to exception 8. (T 59, 60) see also, Section VII of the investigative summary. The Agency treats this "Conclusion of Law" as a Finding of Fact but finds no basis in law or fact to reject this finding of the ALJ.

The exception to the Conclusion of Law in Paragraph 12 is rejected except that it shall be considered a Finding of Fact.

Exception to Conclusion of Law in Paragraph 14: Petitioner takes exception to the "Conclusion of Law" stated in paragraph 14 where it states that "[a]bsent evidence that APD ignored any mitigating or aggravating factors, there is no basis to overturn the decision as it falls within APD's authority." The Petitioner argues in support of this exception that the "clear and competent evidence is that APD ignored the mitigating or aggravating factors in this instance . . ." and that therefore provides a basis for overturning the Agency's decision to deny licensure. As noted elsewhere in Petitioner's exceptions, "[w]hen reviewing exceptions, the Agency may not reweigh the evidence to substitute its judgment for that of the hearing officer." Respondent's Exceptions at 2. Also, as noted previously, a factual finding of an ALJ is presumed correct and an agency may only reject a Finding of Fact if, after a complete review of the record and transcript, it determines that there is no competent substantial evidence

for support. Here the ALJ found that "[t]here is insufficient evidence to make a determination of what factors - other than verified findings of inadequate supervision – APD relied upon in making its decision." Included, however, in the testimony proving the existence of the verified finding of inadequate supervision were the facts establishing the circumstances of the inadequate supervision and the extent of injuries sustained by the child as a result. Section 393.0673(2), F.S., authorizes the Agency to deny an application for licensure if any of the conditions set forth in s. 393.0673(2)(a) or (b), F.S., are present, without regard to other evidence the applicant may consider to be mitigating evidence. Here the Agency denied licensure under 393.0673(2)(b), F.S., i.e., "[t]he Department of Children and Families has verified that the applicant is responsible for the abuse, neglect, or abandonment of a child . . ." The Agency finds no basis in law to strike, modify or disregard the Conclusion of Law of the ALJ.

The exception to the Conclusion of Law in Paragraph 14 is rejected.

Conclusion

The Findings of Fact and Conclusions of Law in the Recommended Order are approved and adopted except that paragraph 12 of the Recommended Order will be considered a Finding of Fact (Battaglia Properties, LTD., v. Florida Land and Water Adjudicatory Commission, 626 So.2d 161 (Fla. 5th DCA 1993), *citing* Kinney v. Department of State, 501 So.2d 129 (Fla. 5th DCA 1987).

Accordingly, upon review of the complete record in this case, including the Recommended Order, submissions and arguments of the parties, and being otherwise fully advised in the premises, the Agency adopts to recommendation of the ALJ that a final order be issued upholding the denial of the licensure application filed by the

Petitioner. The application of Petitioner for licensure to operate a group home facility is DENIED.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 20th day of July, 2015.

Tom Rankin 7/20/15

Tom Rankin, Deputy Director of Operations
Agency for Persons with Disabilities

RIGHT TO APPEAL

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. Review proceedings shall be conducted in accordance with Florida Rules of Appellate Procedure. The Notices must be filed within thirty (30) days of the rendition of this final order.[1]

[1] The date of the "rendition" of this Final Order is the date that is stamped on its first page. The Notices of Appeal must be received on or before the thirtieth day after that date.

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Filed via e-ALJ

APD Central Region Office

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Final Order was provided to the above-named individuals at the listed addresses, U.S. Mail or electronic mail, this 21st day of July, 2015.

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