

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

Case No. 15-0896

vs.

WORTHLEY FAMILY DAY CARE HOME,

Respondent.
_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on April 13, 2015, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Karen Milia Annunziato, Esquire
Department of Children and Families
401 Northwest Second Avenue, Suite N-1014
Miami, Florida 33128

For Respondent: Wayne R. Worthley, pro se
Worthley Family Day Care Home
16320 Southwest 278th Street
Miami, Florida 33031

STATEMENT OF THE ISSUES

The primary issue in this case is whether Respondent, a licensed family day care home, failed to have an operable pool alarm for its backyard swimming pool, as Petitioner alleges. If Respondent is found guilty of this disciplinable offense, then

it will be necessary to determine the appropriate penalties for such violation.

PRELIMINARY STATEMENT

On January 29, 2015, Petitioner Department of Children and Families issued an Amended Administrative Complaint against Respondent Worthley Family Day Care Home, charging the licensed day-care provider with an offense relating to noncompliance with the rule governing swimming pool safety.

The licensee timely exercised its right to be heard in a formal administrative proceeding. On February 17, 2015, the agency referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge.

The final hearing took place as scheduled on April 13, 2015, with both parties present. The agency called one witness, a family services counselor named Yessenia Plata. Petitioner's Exhibits 1 through 6 were received in evidence without objection. Wayne Worthley, who, together with his wife Cristina, operates the couple's licensed family day care home and represented Respondent at hearing, elected not to testify, but he cross-examined Petitioner's witness and argued Respondent's case. Respondent's Exhibits 2, 3, and 4 were admitted into evidence.

The final hearing was transcribed, but neither party ordered a transcript of the proceeding. Each side submitted a proposed recommended order on or before April 23, 2015, in accordance with the deadline established at the conclusion of the hearing.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2014 Florida Statutes, except that all references to statutes or rules defining disciplinable offenses or prescribing penalties for committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

FINDINGS OF FACT

1. Wayne and Cristina Worthley hold a Certificate of License, numbered F11MD0165, which authorizes them to operate a family day care home^{1/} in Homestead, Florida, for one year, from January 6, 2015, through January 6, 2016. They do business under the name Cristina Worthley Family Day Care Home. As a licensed day-care provider, the Worthleys' business falls under the regulatory jurisdiction of Respondent Department of Children and Families ("DCF").

2. On December 17, 2014, a DCF employee named Yessenia Plata inspected the Worthley home. Ms. Plata observed (and it is undisputed) that the Worthleys' backyard swimming pool was

not surrounded on all four sides by a fence.^{2/} She noticed, as well, that there was no pool alarm in the pool.

3. In a telephone conversation later that day, Ms. Plata informed Mrs. Worthley that the licensee would be cited for the violation of a Class I standard, namely the failure to have a fence enclosure around the pool or, alternatively, a pool alarm. Mrs. Worthley told Ms. Plata that she would talk to her husband about purchasing a pool alarm.^{3/} Ms. Plata asked Mrs. Worthley to let her know when the pool alarm was in place so that a reinspection could be conducted.

4. By email dated December 21, 2014, Mr. Worthley notified Ms. Plata that his wife and he had "the pool alarm installed and [we]re ready . . . for the re-inspection."^{4/}

5. Ms. Plata performed another inspection of the Worthley home on December 23, 2014. She confirmed that a pool alarm in good working order was floating in the pool.

Ultimate Factual Determinations

6. The undersigned determines, based on clear and convincing evidence, that the Worthleys did not have a pool alarm in their backyard swimming pool on December 17, 2014.

7. The failure to have an operable pool alarm, coupled with the undisputed fact that the Worthleys' pool fence did not completely surround the pool, constituted a Class I Violation of Florida Administrative Code Rule 65C-20.010(1)(i), which

mandates that a family day-care licensee having a pool shall install an operable pool alarm if it lacks a fence enclosure around the pool.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

9. A proceeding, such as this one, to impose discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973).

Accordingly, DCF must prove the charges against the Worthleys by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

10. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

clear 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) (citation omitted).

11. Section 402.310 authorizes DCF to impose discipline against licensed child care facilities, licensed large family child care homes, and licensed or registered family day care homes, such as the Worthleys'. This statute provides, in pertinent part, as follows:

[DCF] or [a] 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.

* * *

3. Deny, suspend, or revoke a license or registration.

§ 402.310(1)(a), Fla. Stat.

12. DCF charged the Worthleys with a violation of rule 65C-20.010(1)(i), which provides in relevant part as follows:

All in-ground swimming pools and above-ground swimming pools more than one foot deep shall have either a fence or barrier on all four sides, at a minimum of four feet in height, separating the home from the swimming pool, or a pool alarm that is operable at all times when children are in care. . . . The exterior wall of the home with an ingress and egress does not constitute a fence or barrier.

(Emphasis added.)^{5/}

13. The foregoing statutory provisions and rule "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So.

2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011) (statutes imposing a penalty must never be extended by construction).

14. As discussed above, the undersigned has determined, based upon the clear and convincing evidence adduced by DCF, that the Worthleys are guilty, as a matter of ultimate fact, of having violated rule 65C-20.010(1)(i).

15. In determining that the Worthleys committed this violation, the undersigned concluded that the plain language of the applicable statutes and rule, being clear and unambiguous, could be applied in a straightforward manner to the historical events at hand without resorting to principles of interpretation or examining extrinsic evidence of legislative intent. It is therefore unnecessary to make additional legal conclusions concerning this violation.

16. DCF imposes penalties upon licensees in accordance with the enforcement guidelines prescribed in rule 65C-20.012. The following general principles apply:

(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 home 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 and CF-FSP Form 5317.

Fla. Admin. Code R. 65C-20.012(3).

17. DCF asserts that the Worthleys committed a Class I Violation. Such a violation is defined in rule 65C-20.012(1)(d) as follows:

1. "Class I Violation" is an incident of noncompliance with a Class I standard as described on CF-FSP Form 5318 March 2009 Family Day Care Home Standards Classifications Summary and CF-FSP Form 5317, March 2009 Large Family Child Care Home Standards Classification Summary, which is incorporated. A copy of CF-FSP Form 5318 and 5317 may be obtained from the department's website www.myflorida.com/childcare. 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.

18. The Worthleys' violation is an offense falling under Standard No. 12 as described in CF-FSP Form 5318, which provides in pertinent part as follows: "Children in care had access to a

water hazard or swimming pool" In this instance, the element of access was established by clear and convincing proof of the absence, on December 17, 2014, of both a compliant fence and an operable pool alarm at the Worthley home. This particular offense is classified as a Class I Violation in CF-FSP Form 5318.

19. The penalties for a first violation of a Class I standard offense are a fine of between \$100 and \$500 per day and such "other disciplinary sanctions" as DCF may in its discretion impose. Fla. Admin. Code R. 65C-20.012(3)(e)1.a.

20. Section 402.281(4)(a), Florida Statutes, provides that "[c]ommission of a class I violation shall be grounds for termination of the designation as a Gold Seal Quality Care provider until the provider has no class I violations for a period of 2 years."

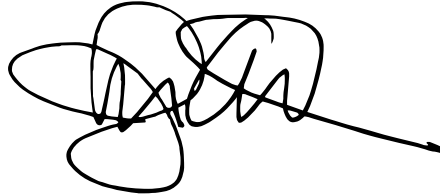
21. DCF has urged the undersigned to recommend that the Worthleys be fined \$100 and that the licensee's designation as a Gold Seal Quality Care provider be terminated. These sanctions are warranted for a Class I Violation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families enter a final order finding the Worthley Family Day Care Home guilty of the offense charged in the Amended

Administrative Complaint. It is further RECOMMENDED that DCF impose a fine against the Worthleys in the amount of \$100 and terminate the licensee's Gold Seal designation.

DONE AND ENTERED this 29th day of April, 2015, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of April, 2015.

ENDNOTES

^{1/} Section 402.302(8), Florida Statutes, defines the term "family day care home" to mean:

an occupied residence in which child care is regularly provided for children from at least two unrelated families and which receives a payment, fee, or grant for any of the children receiving care, whether or not operated for profit. Household children under 13 years of age, when on the premises of the family day care home or on a field trip with children enrolled in child care, shall be included in the overall capacity of the licensed home. A family day care home

shall be allowed to provide care for one of the following groups of children, which shall include household children under 13 years of age:

(a) A maximum of four children from birth to 12 months of age.

(b) A maximum of three children from birth to 12 months of age, and other children, for a maximum total of six children.

(c) A maximum of six preschool children if all are older than 12 months of age.

(d) A maximum of 10 children if no more than 5 are preschool age and, of those 5, no more than 2 are under 12 months of age.

^{2/} The Worthleys' home is separated from the pool by a three-sided fence that encloses a play area on their patio. This fence, which abuts the exterior wall of the house on either side of the back door, prevents access to the pool from the patio.

^{3/} Ms. Plata, who has firsthand knowledge of Mrs. Worthley's statement, credibly testified about the substance of the statement. Mrs. Worthley's out-of-court statement is admissible under a recognized exception to the hearsay rule. See § 90.803(18), Fla. Stat.

^{4/} This email corroborates Ms. Plata's testimony regarding Mrs. Worthley's statement, on December 17, that she would speak with her husband about buying an alarm.

^{5/} The Worthleys' fenced-in patio fails to satisfy this rule because the exterior wall of the home completes the enclosure.

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.