STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR PERSONS WITH DISABILITIES,

Petitioner,

Case No. 15-2422FL

vs.

DANIEL MADISTIN LLC #1,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on July 29 and September 22, 2015, at sites in Tallahassee and West Palm Beach, Florida.

APPEARANCES

For Petitioner: Elaine M. Asad, Esquire
Agency for Persons with Disabilities
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Tallahassee, Florida 32399

For Respondent: John M. Howe, Esquire
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STATEMENT OF THE ISSUES

The primary issue in this case is whether Respondent, a licensed group home operator, violated several statutes and rules governing such homes and their staffs, with most of the alleged offenses occurring, Petitioner charges, in connection

with the accidental death of a resident. If Respondent is found guilty of any disciplinable offenses, then it will be necessary to determine the appropriate penalties for such violation(s).

PRELIMINARY STATEMENT

On April 9, 2015, Petitioner Agency for Persons with Disabilities issued an Administrative Complaint against Respondent Daniel Madistin LLC #1, charging the licensed group home operator with offenses relating to noncompliance with the statutes and rules governing group homes and their staffs, including direct service providers.

The licensee timely exercised its right to be heard in a formal administrative proceeding. On April 29, 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 commenced as scheduled on July 29, 2015, with both parties present, and resumed, after a continuance, on September 22, 2015, coming to a conclusion that day. The agency called the following witnesses: Daniel Madistin, Ashley Cole, Lori Kohler (whose testimony was stricken without objection), Paul Valerio, Lisa Davis, and Sabah Bissainthe. Petitioner's Exhibits 1 through 13 were received in evidence without objection. Mr. Madistin, a principal of Respondent, returned to the stand to testify on behalf of Respondent during its case in chief. No Respondent's exhibits were offered.

The final hearing transcript was filed on October 16, 2015. Each side submitted a proposed recommended order in accordance with the deadline established at the conclusion of the hearing.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2015, 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. At all times relevant to this action, Respondent Daniel Madistin LLC #1 ("DM1") held a Certificate of License, numbered 091867, which authorized DM1 to operate a group home for the developmentally disabled in West Palm Beach, Florida, for the one-year period from April 1, 2014, through March 31, 2015. DM1 had been licensed as a group home since 2009. DM1's facility (the "Home") could house up to six residents at a time.

2. As a group home licensee, DM1 falls under the regulatory jurisdiction of Petitioner Agency for Persons with Disabilities ("APD"), which issued DM1's initial and annual renewal licenses and periodically inspected the Home.

3. One of the Home's longtime residents was a young man named V.H.-D. This wheelchair-bound, nonverbal resident suffered from a number of medical conditions, including severe

cerebral palsy, as a result of which he was unable to care for himself. The Home's staff, therefore, were required, among other things, to feed V.H.-D., whose difficulty swallowing solid foods had caused him to be placed, on doctor's orders, on a diet of puree as a precaution against choking. (V.H.-D.'s family had refused to consent to the placement of a feeding tube.)

4. On the morning of Sunday, October 19, 2014, an employee of DM1, Pharah Murat, fed V.H.-D. his breakfast, as she had done many times since starting to work in the Home in June of 2014. Because V.H.-D. could not talk, he generally manifested satiety by regurgitating food and expelling it from his mouth, at which point the caregiver would clean him up. So, this day, when V.H.-D. began expelling food, Ms. Murat stopped feeding him and wiped his mouth, per the routine.

5. The situation was not routine, however, as Ms. Murat soon realized. V.H.-D. became pale and nonresponsive and looked unwell. Concerned, Ms. Murat immediately called her supervisor, Daniel Madistin, the eponymous principal of DM1. Upon hearing Ms. Murat's description of V.H.-D.'s condition, Mr. Madistin, who was at church with his wife, ended the call and promptly dialed 911. Having thus summoned emergency medical services and law enforcement, Mr. Madistin rushed to the Home.

6. Meantime, Ms. Murat and a fellow employee, Marie Cadet, attended to V.H.-D. as they awaited the arrival of the

paramedics. The evidence, which is in conflict, persuades the undersigned to find that, more likely than not, Ms. Murat placed V.H.-D. on the floor and performed cardiopulmonary resuscitation, or tried to, although to what avail cannot be determined. Afterwards, she and Ms. Cadet returned V.H.-D. to his wheelchair and moved him from the dining room to the front door, so that the paramedics would be able to work on him without delay once they appeared, which they did within a matter of minutes.

7. V.H.-D. was removed from the Home and taken by ambulance to the hospital, where he died from asphyxiation due to pulmonary aspiration of food secondary to cerebral palsy.

8. APD contends that V.H.-D. was the victim of "neglect" because (a) Ms. Murat called Mr. Madistin, instead of 911, and (b) the staff failed to (i) recognize that V.H.-D was choking and (ii) handle an emergency situation promptly and intelligently. While there is no dispute that Ms. Murat called Mr. Madistin, there is no debate that she did so immediately upon realizing that V.H.-D. might be in distress, which she observed very quickly. The evidence does not establish whether or not Ms. Murat realized that V.H.-D. was choking, but it does clearly prove that she not only realized something was wrong, but also acted upon that recognition without delay.

9. APD insinuates that by not calling 911 first, Ms. Murat increased the response time of the EMTs, to the detriment of V.H.-D. There is, however, no persuasive evidence that Ms. Murat's actions decreased the likelihood of V.H.-D.'s survival, nor is that a reasonable inference. To the contrary, it is more reasonable to infer, although not necessary to find, that Ms. Murat expedited the delivery of emergency medical services because she could converse in her primary language with Mr. Madistin, whose first language, too, is Creole, enabling the latter, who is fluent in English, to relay the relevant information efficiently to the 911 dispatcher.

10. In addition, it should be mentioned that DM1's policy directed employees to call 911 in an emergency. So, even if Ms. Murat's failure to call 911 first amounted to neglect in this instance, which it did not, there is no basis in the evidence for holding the licensee responsible, for there is no evidence suggesting that DM1 knew or should have known that Ms. Murat would act as she did in a crisis.

11. In any event, the evidence shows, and the undersigned finds, that Ms. Murat and Ms. Cadet acted with reasonable skill and efficiency in this emergency. In making this finding, the undersigned is mindful that direct care staff are not medical providers. Indeed, at the time DM1 hired Ms. Murat, a caregiver needed only an eighth-grade education to meet the minimum

academic requirements,[1/] and even under the current rule a high school diploma or its equivalent suffices.[2/] The point is that it is unreasonable to expect a direct service provider in a group home, when responding to a medical emergency, to meet the standard of care applicable to a doctor, nurse, or EMT. No persuasive evidence in the instant record establishes the appropriate standard of care for direct service providers, but the undersigned is nevertheless able to determine, based on the totality of the circumstances, that the performance of DM1's staff, while probably falling short of heroic, was at least reasonable, and certainly not neglectful.

12. After the EMTs had left for the hospital, Palm Beach County Sheriff's Office ("PBSO") deputies stayed behind at the Home to investigate. One of the officers tried to interview Ms. Murat, but she was reluctant to speak. Ms. Murat and Ms. Cadet are Haitian immigrants whose native tongue is Creole, and once the officers realized this, they called for the assistance of Deputy Vessage, a bilingual PBSO deputy who often serves as a translator in such instances. Deputy Vassage responded to this request and questioned the women in Creole, without incident.

13. APD has alleged that Ms. Murat and Ms. Cadet were not fluent speakers of English and thus were incapable of communicating effectively in the official language of the state

of Florida.[3/] This allegation was not proved. That Ms. Murat insisted upon using her primary language when speaking with law enforcement officers, who were investigating a fatal event that had just recently occurred in her presence, shows good judgment, not a lack of communication skills. At any rate, the evidence persuades the undersigned to find that both women likely were able to speak English with sufficient proficiency to make themselves understood in ordinary circumstances. More important, however, as will be discussed below, the law does not require that direct service providers such as Ms. Murat and Ms. Cadet be capable of communicating effectively *in English*, but rather that they be capable of communicating effectively. Needless to say, speaking in English is not the only way to communicate effectively; nor, for that matter, is *talking* necessary for effective communication.

14. APD investigated the circumstances surrounding the death of V.H.-D., and in so doing reviewed DM1's business records, including the personnel file for Ms. Murat. APD claims that DM1 failed to maintain written evidence of Ms. Murat's qualifications as required by Florida Administrative Code Rule 65G-2.012(5)(b)(1978). This rule was substantially amended in 2014, however, and the recordkeeping requirement was repealed, effective July 1, 2014. See Fla. Admin. Code R. 65G-2.012 (2014). There is no persuasive evidence in this record to

support a finding that DM1 failed to comply with the former version of rule 65G-2.012 while it was in effect.[4/]

15. It is undisputed that DM1 did not terminate Ms. Murat's employment, or otherwise discipline her, as a result of V.H.-D.'s death.

16. On January 16, 2015, an APD employee named Sabah Bissainthe made an unscheduled visit to the Home to conduct an inspection. Upon her arrival, she encountered Sinclair Concin, who worked for DM1. Mr. Concin, who was not expecting visitors, called Mrs. Naomi Madistin for guidance when he realized that Ms. Bissainthe was a state employee performing official business. Mr. Concin put Ms. Bissainthe on the phone with Mrs. Madistin, and the two made arrangements for Mrs. Madistin to meet Ms. Bissainthe at the Home as soon as Mrs. Madistin could get there, which she did within an hour. Mrs. Madistin cooperated fully with Ms. Bissainthe. Ms. Bissainthe was not refused entry to the Home or forbidden from inspecting any part of the facility, contrary to APD's allegations.

17. Mr. Concin's primary language is Creole, which Ms. Bissainthe does not speak. APD alleged that Mr. Concin does not speak English, but the evidence fails to prove that charge, which would not, at any rate, be a disciplinable offense, without more. APD further asserted that Mr. Concin is unable to communicate effectively because he did not converse in English

with Ms. Bissainthe. The evidence shows, however, that Mr. Concin and Ms. Bissainthe did communicate effectively, notwithstanding that each spoke a different primary language, because Mr. Concin proved capable, in fact, of accomplishing the task when the circumstances required that he accommodate an APD investigator who had appeared unannounced at the doorstep of the Home.

18. On February 18, 2015, an investigator from the Attorney General's office, Paul Valerio, paid an unannounced visit to the Home in connection with a matter unrelated to V.H.-D.'s death. Neither Mr. nor Mrs. Madistin was on-site at the time, so Mr. Valerio called Mr. Madistin to let him know that an official investigation was under way. The two men agreed that Mr. Valerio would meet with Mrs. Madistin at the Home the next day, and that meeting took place as planned. Mrs. Madistin fully cooperated with Mr. Valerio, who completed his investigation without difficulty. The evidence does not establish that Mr. or Mrs. Madistin was unavailable or uncooperative, as APD charged.

Ultimate Factual Determinations

19. Neither Ms. Murat nor Ms. Cadet abused, neglected, exploited, or harmed V.H.-D., who received prompt and appropriate medical treatment on the day he died. Moreover, Ms. Murat and Ms. Cadet were mentally competent to perform their

duties as direct service providers. The evidence, therefore, does not establish the violations of sections 393.13(3)(a), 393.13(3)(g), and 393.13(4)(c), Florida Statutes; and Florida Administrative Code Rules 65G-2.008(1)(h) and 65G-2.009(1)(d) set forth in Count I of the Administrative Complaint.

20. The evidence failed to establish that Ms. Murat and Ms. Cadet, or either of them, were (i) incapable of demonstrating effective communication or (ii) not mentally competent to perform their jobs as direct service providers. Thus, the violations of rules 65G-2.008(1)(g) and 65G-2.008(1)(h) alleged in Count II were not proved.

21. The charges brought in Count III of the Administrative Complaint are duplicative of the charges set forth in Count I and fail for the same reasons of fact.

22. The charges in Count IV are based on allegations that DM1 failed to maintain adequate personnel records for Ms. Murat, in violation of outdated provisions Florida Administrative Code Rule 65G-2.012(5)(1978), which expired on July 1, 2014, when a new version of the rule took effect. The evidence failed to show that DM1 violated the former rule at any time during its existence.

23. The charges brought in Count V of the Administrative Complaint are duplicative of the charges set forth in Count II and fail for the same reasons of fact.

24. The allegations of Count VI largely overlap those of Counts I and III, with the additional allegation that DM1 failed to fire Ms. Murat or suspend her employment. While it is true that Ms. Murat was not punished as a result of V.H.-D.'s death, DM1's decision not to take such action does not constitute a disciplinable offense, and the remaining allegations of Count VI fail for the same reasons of fact that doom the charges set forth in Count I.

25. The charges in Count VII are based on allegations that Sinclair Concin (i) was unable to communicate effectively with Sabah Bissainthe and (ii) refused to allow Ms. Bissainthe to enter the Home to conduct an investigation, thereby putting DM1 in violation of rules 65G-2.008(1)(g), 65G-2.008(1)(h), and 65G-2.0032(3). The evidence showed, however, that Mr. Concin did communicate effectively with Ms. Bissainthe, and that he let her into the Home. Therefore, the charges were not proved.

26. In Count VIII, APD charged DM1 with failure to have a facility operator (manager) on-site or on call at all times, in violation of rule 65G-2.012(1)(a). This charge was based on the allegation that when investigator Paul Valerio arrived at the Home for an unscheduled visit, neither Mr. Madistin nor his wife was in the residence. Mr. Valerio was able immediately to reach Mr. Madistin by phone, however, and make plans to meet with

Mrs. Madistin the following day. Thus, the charge set forth in Count VIII was not proved.

CONCLUSIONS OF LAW

27. 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.

28. A proceeding, such as this one, which arises from an agency's preliminary decision not to renew a license based upon the licensee's alleged commission of a disciplinable offense, is penal in nature because nonrenewal of licensure is tantamount to imposing a penalty upon the licensee. See Wilson v. Pest Control Comm'n, 199 So. 2d 777, 781 (Fla. 4th DCA 1967). Accordingly, just as it would if the agency were seeking to revoke the license at issue, APD must prove the charges against DM1 by clear and convincing evidence.[5/] See Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726, 726 (Fla. 5th DCA 1998)(to deny application for renewal of day care license based on alleged misconduct, agency agreed it needed to prove, by clear and convincing evidence, that child was injured while in licensee's care and under her supervision); Dubin v. Dep't of Bus. Reg., 262 So. 2d 273, 274 (Fla. 1st DCA 1972)(refusal to renew the license of one who previously has shown that he meets the statutory requirements for licensure cannot be used as a substitute for revocation); 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).[6/]

29. 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).

30. Section 393.0673(2)(a)3., Florida Statutes, authorizes APD to deny an application for licensure if the applicant has "[f]ailed to comply with the applicable requirements of this chapter or rules applicable to the applicant."

31. Florida Administrative Code Rule 65G-2.009 provides in relevant part as follows:

> (1) MINIMUM STANDARDS. Residential facility services shall ensure the health and safety of the residents and shall also address the provision of appropriate physical care and supervision.
>
> * * *
>
> (d) The facility shall adhere to and protect resident rights and freedoms in accordance with the Bill of Rights of Persons with Developmental Disabilities, as provided in Section 393.13, F.S. Violations of Section 393.13(3)(a), F.S. relating to humane care, abuse, sexual abuse, neglect, or exploitation and all violations of Section 393.13(3)(g), F.S., shall constitute a Class I violation. All other violations of Section 393.13(3), F.S., shall constitute Class III violations. All violations of Sections 393.13(4)(c)1. and 2., (f), and (g), F.S., shall constitute Class I violations. All violations of Section 393.13(4)(h), F.S. shall constitute Class II violations. All other violations of Section 393.13(4), F.S., shall constitute Class III violations.

32. APD accused DM1 of violating the following provisions of the Bill of Rights of Persons with Developmental

Disabilities, to which adherence is required under rule 65G-2.009(1)(d):

> (3) RIGHTS OF ALL PERSONS WITH DEVELOPMENTAL DISABILITIES.—The rights described in this subsection shall apply to all persons with developmental disabilities, whether or not such persons are clients of the agency.
>
> (a) Persons with developmental disabilities shall have a right to dignity, privacy, and humane care, including the right to be free from abuse, including sexual abuse, neglect, and exploitation.
>
> * * *
>
> (g) Persons with developmental disabilities shall have a right to be free from harm, including unnecessary physical, chemical, or mechanical restraint, isolation, excessive medication, abuse, or neglect.
>
> * * *
>
> (4) CLIENT RIGHTS.—For purposes of this subsection, the term "client," as defined in s.393.063, shall also include any person served in a facility licensed under s. 393.067.
>
> * * *
>
> (c) Each client shall receive prompt and appropriate medical treatment and care for physical and mental ailments and for the prevention of any illness or disability. Medical treatment shall be consistent with the accepted standards of medical practice in the community.

§ 393.13, Fla. Stat.

33. APD alleged that DM1 had violated the following provisions of rule 65G-2.008(1):

> (g) Direct service providers must be capable of demonstrating effective communication with the residents of the homes as well as other individuals such as waiver support coordinators, Agency staff, family members of residents, and others who routinely interact with residential staff. A violation of this paragraph shall constitute a Class III violation.
>
> (h) Direct service providers must be mentally competent to comprehend, comply with, and implement all requirements provided by law and Agency rule for the provision of services rendered to residents of their facilities. In addition, they must be physically capable of performing duties for which they are responsible. A violation of this paragraph shall constitute a Class II violation.

(Emphasis added.)[7/]

34. APD charged DM1 with having violated the following provisions of rule 65G-2.102(5)(1978):

> (b) Staff identified in the application for licensure and providing direct care services must be at least eighteen years of age. Written evidence of the qualifications of the direct care staff shall be maintained. Minimum criteria shall be demonstrated ability to meet the written established job description, appropriate life experience, and eighth grade education.
>
> (c) Staff shall be of suitable physical and mental ability to care for the clients they propose to serve; have knowledge of the needs of the clients; be capable of handling an emergency situation promptly and

> intelligently; and be willing to cooperate with the supervisory staff.
>
> (d) At least three written character references (excluding relatives) and an employment work history shall be required for direct care staff.

35. Rule 65G-2.012(1)(a), which DM1 allegedly violated, provides as follows:

> Each group home facility shall have a designated facility operator on-site or on call at all times. The facility operator is responsible for the on-going operation of the group home facility and for ensuring compliance with Chapter 65G-2, F.A.C., and Section 393.067, F.S. whenever the facility operator is on-site or on call and one or more residents are present in the facility.

36. APD charged DM1 with a violation of rule 65G-2.0032(3), which states:

> Licensees and facility employees must permit any Agency staff or designated agent of the State of Florida, who presents proper State of Florida-issued identification, to enter and inspect any part of any facility building or to inspect records relating to the operation of the facility or the provision of client care at any time that facility staff, management, owners, directors, or residents are present in the facility. A violation of this subsection shall constitute a Class II violation.

37. The foregoing statutory and rule provisions "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).

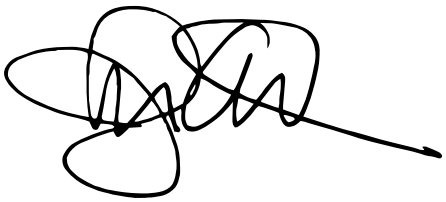
38. As discussed above, the undersigned has determined that DM1 is not guilty, as a matter of ultimate fact, of having committed the several violations charged in the Administrative Complaint.

39. In making these ultimate determinations, the undersigned concluded that the plain language of the applicable statutes and rules, 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 these violations.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities enter a final order finding that Daniel Madistin LLC #1 is not guilty of the offenses charged in the Amended Administrative Complaint.

DONE AND ENTERED this 25th day of November, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2015.

ENDNOTES

[1/] Fla. Admin. Code R. 65G-2.012(5)(b)(1978).

[2/] Fla. Admin. Code R. 65G-2.008(1)(e)(2014).

[3/] See Art. II, § 9, Fla. Const.

[4/] In its "Proposed Final Order," APD argues that DM1 failed likewise to keep sufficient personnel records on Ms. Cadet.

This charge was not pleaded in the Administrative Complaint, however, and for that reason will not be considered.

[5/] This question regarding the standard of proof in proceedings involving renewal of licensure arises with surprising frequency, for a matter that one would think should have been authoritatively settled by now. To be clear, the question is whether an agency can refuse to renew a license based upon its determination that the licensee, as a licensee, committed a disciplinable offense, where the misconduct was proved merely by a preponderance of the evidence. To further frame the issue, it is well settled that, while an agency may decline to issue an initial license based upon proof of the applicant's misconduct by the greater weight of the evidence, it may revoke a license, once issued, only upon clear and convincing proof of a disciplinable offense. One's position on the standard of proof applicable in renewal proceedings, therefore, generally turns on whether one views nonrenewal for cause as tantamount to revocation or, rather, the equivalent of the denial of an initial application for licensure.

Those who think an application for renewal is the same as an initial application for licensure naturally tend to conclude that the standard of proof for nonrenewal based upon a disciplinable offense should be preponderance of the evidence. While conceding that revocation for the *same offense* would require clear and convincing proof, they maintain that when a license reaches its renewal date, it simply vanishes in the eyes of the law, returning the licensee to the status quo ante licensure, as if he had never been licensed, which obviates the need to revoke. In this view, every renewal is a new beginning, and the licensee must start from scratch every year or two when the time to renew comes around. From this premise it follows that an applicant for renewal is no different from those who, by filing applications for initial licensure, seek to enter the field for the first time.

The undersigned rejects this view, which does not adequately account for the true nature of licensure. For most licensees, the license represents a long-term commitment to a business, occupation, or profession, one that often entails a substantial investment of resources. Once obtained, a license is the sort of thing around which careers and lives are planned. Doubtless few licensees think of their licensure status as comprising a series of separate licenses. Rather, they look at licensure, not a sequence of discrete, time-limited segments,

but as a seamless state continuing without interruption over time. As a practical matter, not many ordinary licensees plan their lives according to the renewal schedule, for renewal is a form of maintenance, not acquisition. To the licensee, nonrenewal for cause is indistinguishable from revocation; either event frustrates reasonable expectations of ongoing licensure arising from possession of the license in a way that denial of initial licensure, before one has come to rely upon the license, does not. The undersigned, consequently, perceives no meaningful distinction between nonrenewal for cause and revocation.

Once it is concluded that nonrenewal for cause equals revocation, it follows that the standard of proof must be the same for both, i.e., that clear and convincing evidence of alleged wrongdoing is required for termination of a license, whether the disciplinable offense is charged in an administrative complaint or a notice of nonrenewal. There is another pragmatic reason, as well, why this should be so. If the courts were to decide that nonrenewal for cause is supportable on proof of misconduct by a preponderance of the evidence, then agencies would be encouraged simply to wait until the time for renewal to take action against licensees suspected of wrongdoing, especially in cases where clear and convincing proof might be difficult to obtain or the alleged misconduct occurred in close proximity to the renewal date. The agency would be in control of the standard of proof by the expedient of timing its action to coincide with renewal.

This case is a good example of how agencies could dictate the standard of proof. Here, APD issued its Administrative Complaint nine days after DM1's most recent license expired, and in that complaint announced its intent to impose the penalty of nonrenewal. The events giving rise to the complaint, of course, all occurred while DM1 was licensed and acting in its capacity as a licensee. Had APD issued its Administrative Complaint a few months or weeks earlier, it necessarily would have sought revocation, and its burden clearly would have been to prove the charges by clear and convincing evidence. If a court decides that the standard of proof in this case (or one like it) is preponderance of the evidence, such will be so only because APD (or some other agency) waited to take action until DM1 (or a similarly situated licensee) applied for renewal of its license.

If it were to become the law that agencies may control the standard of proof by the timing of their actions, then rational

agencies would opt for the least demanding standard as often as possible, with the result many licensees accused of wrongdoing would lose the protection they are supposed to enjoy as a result of the stricter standard of proof otherwise applicable in penal proceedings, and similarly situated licensees would receive equal treatment under the standard of proof——or not——as a matter of agency discretion. These undesirable consequences may be avoided by requiring clear and convincing proof of any alleged wrongdoing which is relied upon as grounds for refusing to issue a renewal license.

[6/] The decision in M.H. v. Department of Children and Family Services, 977 So. 2d 755 (Fla. 2d DCA 2008), might appear to hold that an agency may deny the renewal of a license based on a disciplinable offense proved by a preponderance of the evidence, but on examination the language in the opinion arguably supporting such a proposition is properly regarded as dicta. There, the agency sought to deny the renewal of a foster care license, claiming that the foster parents had intentionally harmed a child in their care. After conducting a formal hearing, the administrative law judge found that the agency had failed to prove the allegations of misconduct by a preponderance of the evidence and accordingly recommended that the renewal license be issued. Id. at 758. The agency rejected the ALJ's conclusion regarding the applicable standard of proof and entered a final order refusing to issue a renewal license, reasoning that it had offered competent substantial evidence in support of its allegations, and that was enough. Id. The issue on appeal, therefore, was whether the correct standard of proof in a renewal-license denial case is *less demanding* than preponderance of the evidence, which latter mark the agency had failed to meet.

The court rejected the agency's position. In so doing, the court drew no distinction (or even acknowledged that there might be a difference) between the denial of an *initial* license and the denial of a *renewal* license, but instead it discussed the issues presented as if the two were identical. This is not surprising because the law clearly required (and requires) proof of misconduct by a preponderance of the evidence when an agency proposes to deny an *initial* license on such a charge——the very standard which the ALJ had applied in finding for the licensees. Having prevailed under this standard, the appellants had no incentive to argue, nor the court reason to find, that a *stricter* standard of proof should apply. To reverse the agency's conclusion about the standard of proof, as it did, id.

at 762, the court needed only to determine that the correct standard is *no less than* preponderance of the evidence. The court did not need to hold that the correct standard is *no more than* preponderance of the evidence. Put another way, the facts of M.H. required the court only to rule that proof of misconduct by the greater weight of the evidence is *necessary* to justify the refusal to renew a license, because in M.H. there was no such proof; the case provided no occasion to rule that a preponderance of evidence is *sufficient*, without more, to support the denial of a renewal license for misconduct, where such evidence is presented. Consequently, to the extent the opinion implies a rejection of the clear and convincing standard, it is nonbinding dicta.

[7/] "Effective communication" is not further defined in the rule to require that direct service providers be capable of speaking English according to some standard of fluency. Clearly, one need not speak English, or any language for that matter, to communicate effectively. People who do not speak the same language can generally convey meaning effectively using body language and hand gestures. To be sure, conversing in the same language is usually more efficient than resorting to hand gestures, but efficiency is different from effectiveness. To the extent that APD construes rule 65G-2.008(1)(g) as requiring direct service providers to speak English fluently, this interpretation is rejected as contrary to the rule's clear and unambiguous language. Such a rule, further, would come dangerously close to providing a warrant for employment discrimination based on national origin or even disability.

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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.