STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 16-6033

LINCOLN MARTI COMMUNITY AGENCY, INC., d/b/a LINCOLN MARTI,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on February 13, 2017, at sites in Tallahassee and Miami, Florida, and by telephone conference call on February 14, 2017.

APPEARANCES

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For Respondent: Christopher G. Berga, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent's employee hit or forcefully grabbed children in care, as alleged in the Administrative Complaint;

and, if so, whether Petitioner should impose a fine of $400.00 against Respondent, a licensed child care facility, for the commission, by an employee, of an act that meets the statutory definition of child abuse.

PRELIMINARY STATEMENT

On September 8, 2016, Petitioner Department of Children and Families issued an Administrative Complaint against Respondent Lincoln Marti Community Agency, Inc., d/b/a Lincoln Marti, charging the licensed day-care provider with an offense relating to child abuse or neglect.

The licensee timely exercised its right to be heard in a formal administrative proceeding. On October 18, 2016, 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 February 13 and 14, 2017, with both parties present. The agency called the following witnesses: Laura Pantano, Denise Hannah, Andrea Noguera, Paola Hincapie, Patricia Parker, and Yanet Perez-Cruz. In addition, Petitioner's Exhibits 1, 2, 4, and 7 through 11 were received in evidence.

Respondent presented three witnesses: Gertrutis Lora, Stephanie Duarte, and Michael J. DiTomasso, Ph.D. Respondent's

Exhibits A through E, J, K, M, and N were admitted into evidence.

The final hearing transcript, comprising three volumes, was filed on March 6, 2017. Each party timely filed a Proposed Recommended Order on or before March 16, 2017, 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 2016, 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 relevant times, Respondent Lincoln Marti Community Agency, Inc., d/b/a Lincoln Marti ("LMCA"), held a Certificate of License, numbered C11MD1532, which authorized LMCA to operate a child care facility (the "School") in Miami Beach, Florida, for the period from June 7, 2016, through December 4, 2016. As a licensed child care facility, LMCA falls under the regulatory jurisdiction of Petitioner Department of Children and Families ("DCF").

2. On August 25, 2016, Laura Pantano arrived at the School in the afternoon to pick up her child. While waiting in the reception area, Ms. Pantano noticed the real-time video feeds

from the surveillance cameras in the classrooms. These live videos were displayed on multiple monitors in plain view. Ms. Pantano focused her attention on the classroom of Clara Gonzalez-Quintero. Although her child was not in Ms. Quintero's class, Ms. Pantano harbored suspicions that Ms. Quintero had been hitting children.

3. Sure enough, right on cue, Ms. Quintero appeared to forcefully grab and hit a child. It is not disputed in this proceeding that Ms. Quintero used corporal discipline on two children, D.D. and S.M, at the very moment Ms. Pantano happened to be watching the closed-circuit television for just such an occurrence.

4. That said, no one having personal knowledge of the incident in question testified at hearing. Ms. Pantano testified, but she was not actually an eyewitness, for she merely observed live surveillance video on a display device, not the incident itself. Naturally, the surveillance video is in evidence, allowing the undersigned (and anyone else) to see exactly what Ms. Pantano saw that day.[1/] Yet, while the video evidence is both captivating and seemingly unbiased, it is a mistake to assume that the assertive narrative of this (or any) video is objective and unambiguous, for rarely is that true, if ever. Viewers of filmic evidence, including the undersigned, do not somehow become eyewitnesses to a genuine occurrence; we

perceive only the video, and the video merely represents, imperfectly, the real events captured on camera. Of necessity, each viewer——such as Ms. Pantano, who as stated above was predisposed to believe the worst about Ms. Quintero——projects onto the images his or her own interpretation of the scenes depicted. As the fact-finder, the undersigned must determine the significance, meaning, and story of the images preserved in the video based upon a critical review of the film in conjunction with a careful consideration of all the available evidence.

5. Had the fact been disputed, the undersigned would have struggled with the question of whether Ms. Quintero "struck" D.D.[2/] or merely made incidental nonviolent contact of the sort parents and teachers routinely use when redirecting a disobedient child. One significant limitation of the video is that it lacks sound. During the crucial moments, Ms. Quintero appears to be reprimanding D.D., who was three years old at the time, but if so, the video provides no proof of the reasons, for we cannot hear what she is saying. At the same time, however, it is reasonable to assume that Ms. Quintero had some bona fide basis for approaching D.D., for no evidence to the contrary was offered.

6. On the video, Ms. Quintero appears to pat D.D. on the shoulder while addressing the child. Without audio, however,

this action is ambiguous. Is she punishing, exhorting, or encouraging the child? Hard to tell. D.D. seems to put his hands over his ears. Fear, protective response, or defiance? Take your pick. Then — did she just slap him? It happens so fast, the picture is not clear, and the angle of the shot less than ideal. Maybe.

7. *Something* happened, to be sure, but different viewers will form different conclusions about what the video depicts. Because LMCA concedes the point, and because the filmic evidence, though ambiguous, justifies such acquiescence, the undersigned finds that Ms. Quintero administered a form of physical punishment, which violated both the law[3/] and LMCA's written policy on discipline. But the undersigned does *not* find that the corporal discipline at issue evinced malice or cruelty. The record, in short, convinces the undersigned to find that physical contact occurred, but not violent contact.

8. Believing that she had seen a teacher repeatedly slap a child, Ms. Pantano rushed upstairs to confront Ms. Quintero in the classroom, while she simultaneously called the police on her cellphone. When she arrived in the classroom, excited and crying, Ms. Pantano screamed accusations at the teacher, who denied any wrongdoing. The commotion drew the School's director, Yanet Perez-Cruz, to the room, where she heard Ms. Pantano, in front of the children, uttering a conditional

threat to kill Ms. Quintero, the condition being Ms. Pantano's possession of a knife, which fortunately for everyone involved was not met.

9. Within a short time, the police arrived and immediately set to work investigating the incident. Neither D.D. nor any of the other children were found to have visible physical injuries attributable to Ms. Quintero. No evidence of such was presented at hearing, and the undersigned finds that Ms. Quintero did not cause any physical harm to D.D., S.M., or any child at the School on the day in question. LMCA fired Ms. Quintero the next day, not for hurting a child, but for violating its policy on corporal punishment.

10. As for possible mental injury, D.D. was anxious, did not sleep quite as well, and had some instances of bed-wetting after the occurrence with Ms. Quintero, according to his mother. These symptoms, however, reflected at most a marginal aggravation of preexisting conditions, and within a few weeks or so D.D. had returned to his baseline. In addition, D.D. had been receiving speech therapy, for about ten months before the incident, to treat a stutter. In the months following the occurrence at issue, after which he had been abruptly removed from the School and enrolled in another day care facility, D.D. made rapid improvement in his speech, to the point that by the time of the hearing, D.D.'s stutter was nearly gone.

11. The record lacks convincing evidence that D.D.'s intellectual or psychological capacity was injured by Ms. Quintero, as there is no persuasive proof of any discernible and substantial impairment of D.D.'s ability to function within normal limits. To the contrary, the evidence shows that, as of the hearing, D.D. is functioning within the normal ranges of intellectual and psychological performance and not displaying any signs of even mild, much less severe, mental or emotional impairment.

12. With regard to S.M., there is likewise no convincing evidence of any significant mental injury. Similar to D.D., S.M. was observed, by her parent, to be somewhat more anxious than usual following the incident with Ms. Quintero, but this general anxiety resolved before long and was not causing S.M. any problems at the time of the hearing. Other evidence suggests, credibly, that S.M. is (as of the hearing) a happy, intelligent, and normal child evincing no discernable impairments in intellectual or psychological functioning.

13. In sum, neither D.D. nor S.M. suffered any physical harm at the hands of Ms. Quintero, and although there is some (but not clear and convincing) evidence that one or both children might have experienced mild emotional or psychological distress——as manifested by, e.g., bed-wetting or anxiety——in the immediate aftermath of the events at the School on August 25,

2016, it is clear that such symptoms did not persist or substantially impair either child, even briefly, and that within a few months, if not sooner, both D.D. and S.M. were back to normal.

14. At hearing, LMAC presented Michael J. DiTomasso, Ph.D., as an expert witness. Dr. DiTomasso is a clinical psychologist who specializes in forensic psychology and, to the point, child abuse. Indeed, Dr. DiTomasso has testified frequently as an expert for DCF in dependency trials involving child abuse and child neglect. Dr. DiTomasso provided the following credible and convincing overview of the current dispute:

> Okay. So we have a video recording of some unpleasant behavior on the part of a teacher. And I reviewed this. I looked at it. I actually watched it a couple of times.
>
> I see that she hit the kid, she shook the child. She was unpleasant with the children. And I understand that this behavior is prohibited by the school. . . . But does the -- does what we see in this tape rise to something monstrous that we would think is going to cause significant impairment in a child's psychological life somewhere down the line? Maybe the first question is: Did it cause -- does it cause significant physical damage?
>
> But everyone says no. The police say no, the mothers say no, the children -- that went to a doctor there's no medical findings. So by every measure, DCF says no. By every measure everyone who considered

> actual physical damage said no. So, no, we're not at the psychological damage.
>
> What we see in these tapes, it's unpleasant, of course. But, I mean, is there anyone, really, who never saw behavior like this before in their lives? In their own family, in their own lives, in a Target.
>
> In a Target store, in the K-Mart, we see this kind of behavior. We don't like it, but we're not -- we're not looking at it as catastrophic. We're looking at it as maybe unpleasant to see.
>
> And the parents are maybe looking at it as appropriate because parents in America believe in physical discipline of their children, corporal punishment of the children -- of children is accepted by most -- most parents in America and even more here in Florida, in the south.
>
> * * *
>
> If the corporal punishment causes broken bones or fractures or bruises or welts, oh, we're talking a different name. But that's not what happened for these kids. This was ordinary run-of-the-mill corporal punishment in a place where it shouldn't have happened.
>
> But the fact that it happened in a place where it shouldn't have happened doesn't make it a traumatic event that leads to psychological harm down the line.

Tr. 351-54. The undersigned agrees with the foregoing description and explanation of the video evidence.

15. The bottom line, according to Dr. DiTomasso, is that no "meaningful disruption of a child's ability to function and enjoy his life" happened, "it's not going to happen, it

shouldn't be expected to ever happen based only on the event [at the School on August 25, 2016,] and the follow-up seems to show that it hasn't." Tr. 414. The undersigned accepts Dr. DiTommasso's opinion on cause-and-effect and determines as a matter of ultimate fact that neither of the subject children suffered a "mental injury" as defined in section 39.01(42), Florida Statutes, as a result of the incident in question.[4/]

Ultimate Factual Determinations

16. The undersigned determines that LMCA's employee, Ms. Quintero, while caring for children at the School on August 25, 2016, did *not* commit an act or omission that meets the definition of child abuse or neglect provided in chapter 39.[5/]

CONCLUSIONS OF LAW

17. 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.

18. 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 LMCA 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).

19. 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).

20. Section 402.310, Florida Statutes, authorizes DCF to impose discipline against licensed child care facilities. This statute provides, in pertinent part, that DCF "may administer . . . disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder." § 402.310(1)(a), Fla. Stat.

21. DCF charged LMCA with the offense of Child Abuse or Neglect.[6/] Florida Administrative Code Rule 65C-22.001(11)(a) specifies that "[a]cts or omissions that meet the definition of child abuse or neglect provided in Chapter 39, F.S., constitute a violation of the standards in Sections 402.301-.319, F.S., and shall support imposition of a sanction, as provided in Section 402.310, F.S."

22. Rule 65C-22.010(1)(d) defines the term "violation" as meaning a "finding of noncompliance by the department or local licensing authority of a licensing standard." In its Administrative Complaint against LMCA, DCF cited Standard #63-01 as the "licensing standard" supporting the alleged violation. Standard #63-01 is found in CF-FSP Form 5316, which is titled "Child Care Facility Standards Classification Summary." Rule 65C-22.010(1)(d)1 incorporates CF-FSP Form 5316 by reference.

23. Standard #63-01 makes it a Class I Violation for "[t]he owner, operator, employee or substitute, while caring for children, [to] commit[] an act or omission that meets the

definition of child abuse or neglect provided in Chapter 39, Florida Statutes."

24. Child "abuse" is defined as:

> [A]ny willful act or threatened act that results in any physical, mental, or sexual abuse, injury, or harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired. Abuse of a child includes acts or omissions. Corporal discipline of a child by a parent or legal custodian for disciplinary purposes does not in itself constitute abuse when it does not result in harm to the child.

§ 39.01(2), Fla Stat.

25. To constitute abuse under this definition, an act must result in "harm." "Harm" is a term of art defined in section 39.01(30). The definition, however, is quite long, and need not be quoted in full here. As relevant to this case, "harm" includes:

> Inappropriate or excessively harsh disciplinary action that is likely to result in physical injury, mental injury as defined in this section, or emotional injury. The significance of any injury must be evaluated in light of the following factors: the age of the child; any prior history of injuries to the child; the location of the injury on the body of the child; the multiplicity of the injury; and the type of trauma inflicted. Corporal discipline may be considered excessive or abusive when it results in any of the following or other similar injuries:
>
> a. Sprains, dislocations, or cartilage damage.

b. Bone or skull fractures.
c. Brain or spinal cord damage.
d. Intracranial hemorrhage or injury to other internal organs.
e. Asphyxiation, suffocation, or drowning.
f. Injury resulting from the use of a deadly weapon.
g. Burns or scalding.
h. Cuts, lacerations, punctures, or bites.
i. Permanent or temporary disfigurement.
j. Permanent or temporary loss or impairment of a body part or function.
k. Significant bruises or welts.

§ 39.01(30)(a)4., Fla. Stat.

26. As found above, D.D. and S.M. did not suffer any physical injuries at the School on August 25, 2016. The statutory list of bodily injuries indicative of abuse is instructive, nevertheless, for it draws a fairly clear line between (i) *ordinary* corporal punishment as that concept is commonly understood and (ii) *abusive* corporal punishment as conceived under chapter 39. However much one might disapprove of Ms. Quintero's conduct as captured on the surveillance video, her actions are easily distinguishable from the kind of abusive corporal discipline that the statute contemplates, regarding which "we're talking a different name," as Dr. DiTomasso put it.

27. The definition of "harm" also includes "mental injury," a term defined to mean "an injury to the intellectual or psychological capacity of a child as evidenced by a discernible and substantial impairment in the ability to function within the normal range of performance and behavior."

§ 39.01(42), Fla. Stat. As found above, neither D.D. nor S.M. suffered a mental injury meeting this definition.

28. The foregoing statutory provisions and rules "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).

29. Further, the grounds proven must be those specifically alleged in the administrative complaint. See, e.g., Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842, 844 (Fla. 2d DCA 1984). Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically

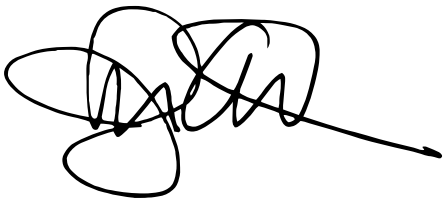
alleged in the charging instrument. See § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action . . . ."); see also Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

30. In determining as a matter of ultimate fact that LMCA did not commit the offense of Child Abuse or Neglect, 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 this offense.

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 exonerating Lincoln Marti Community Agency, Inc., d/b/a Lincoln Marti, from the accusation of Child Abuse or Neglect as charged in the Administrative Complaint.

DONE AND ENTERED this 4th day of April, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of April, 2017.

ENDNOTES

[1/] Viewing the tape of an historical event is a different experience from seeing the broadcast images of the same event unfolding in real time. But even though Ms. Pantano was there, in a sense, she was not actually present to witness the alleged abuse, which means that she does not have any more personal knowledge about the disputed incident than any competent present-day viewer of the tape can acquire.

[2/] If Ms. Quintero made contact with the other child, S.M., the undersigned was unable to observe the act on the video.

[3/] See Fla. Admin. Code R. 65C-22.001(8)(b)("Spanking or any other form of physical punishment is prohibited for all child care personnel.").

[4/] The undersigned has considered the testimony of Patricia Parker, who appeared as an expert witness for DCF. Her credibility was adversely affected by several factors, including an unprofessional demeanor, prior inconsistent statements, and the fact that she appears to have engaged in the unlicensed practice of marriage and family therapy under the title of "MFT" (an acronym which reasonably suggests that the person using it is a licensed marriage and family therapist), possibly in violation of Florida law. See § 491.012(1)(b), Fla. Stat. In any event, to the extent that any of the findings herein contradict, or are inconsistent with, Ms. Parker's testimony, the latter is rejected as unpersuasive in favor of evidence that the undersigned found to be more believable and convincing, including Dr. DiTommasso's testimony.

[5/] LMCA did not have the burden to prove its innocence by any standard of proof; the burden, rather, was on DCF to prove the allegations against LMCA by clear and convincing evidence, which DCF failed to do. It so happens, however, that LMCA is actually exonerated by the greater weight of the evidence (at least), which is more than sufficient proof to find LMCA not guilty of the instant charges.

[6/] As defined in section 39.01(44), "neglect" involves a deprivation of necessary food, clothing, shelter, or medical care. There were no factual allegations or proof of child "neglect" in this case.

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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.