STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHAGUANDRA RUFFIN BULLOCK,

Petitioner,

vs. Case No. 18-0228

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.
_______________________________/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2017),[1/] before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on March 5, 2018, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Shaguandra Ruffin Bullock, pro se
3817 Northwest 202nd Street
Miami Gardens, Florida 33056

For Respondent: Patricia E. Salman, Esquire
Department of Children and Families
401 Northwest 2nd Avenue, Suite N-1014
Miami, Florida 33128

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner is entitled to issuance of a license to operate a family day care home,

pursuant to chapter 402, Florida Statutes, and Florida Administrative Code Rule 65C-20.008.

PRELIMINARY STATEMENT

By correspondence dated December 8, 2017, Respondent notified Petitioner that it proposed to deny her application for a license to operate a family day care home. Petitioner timely requested an administrative hearing under sections 120.569 and 120.57(1) to challenge Respondent's proposed denial of the license, and the matter was referred to DOAH to conduct the hearing.

The final hearing was scheduled for, and held on, March 5, 2018. Petitioner testified on her own behalf and did not tender any exhibits for admission into evidence. Respondent presented the testimony of Deanna McDonald, Ann Gleeson, and Suzette Frazier. Respondent's Exhibits 1, 2, 4, and 5 were admitted into evidence without objection, and Respondent's Exhibit 3 was admitted into evidence over a hearsay objection.

A transcript of the final hearing was not filed. The parties timely filed their proposed recommended orders, which have been duly considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties

1. Petitioner, Shaguandra Ruffin Bullock, is an applicant for a family day care home license for the Ruffin Bullock Family Day Care Home.

2. Respondent is the state agency responsible for licensing family day care homes in Florida. § 402.312(1), Fla. Stat.

Events Giving Rise to this Proceeding

3. A "family day care home" is 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. § 402.302(8), Fla. Stat.

4. On or about July 6, 2017, Petitioner filed an application to operate a family day care home.

5. Respondent reviewed the application and determined that it was incomplete, pending completion of the background screening required by sections 402.313(3), 402.305, and 402.3055.[2/]

6. On or about December 8, 2017, Respondent sent Petitioner a Notice of Intent to Deny Family Day Care Home Licensure ("NOI"), informing her of Respondent's intent to deny her application for a family day care home.

7. The NOI stated, in pertinent part:

> 4. On October 10, 2017, the Department received background clearance letters from child care personnel at Respondent's Family Day Care Home.
>
> 5. Pursuant to Section 402.313(3), Florida Stat., childcare personnel in family day care homes are subject to applicable screening provisions.
>
> 6. Pursuant to Section 402.302(15), Florida Stat. and Section 39.201(6), Florida Stat., The Department assessed the background of child care personnel at Respondent's family day care home including, but not limited to information from the central abuse hotline.
>
> 7. The Department's assessment revealed the Respondent did not meet minimum standards for child care personnel upon screening which requires personnel to have good moral character pursuant to Section 402.305(2)(a), Florida Stat.
>
> 8. The foregoing violates Rule 65C-22.008(3), Fla. Admin. Code,[3/] Section 402.305(2)(a), Fla. Stat. and Section 402.313(3), Florida Stat.
>
> 9. Based on the foregoing, Ruffin Bullock Family Day Care Home's, [sic] pending licensure application will be denied.

Evidence Adduced at the Hearing

8. At the final hearing, Respondent acknowledged that the background screening for Petitioner and her husband, Marlon Bullock, did not reveal that either had ever engaged in any of the offenses identified in section 435.04, Florida Statutes, which establishes the level 2 screening standards applicable to

determining good moral character in this proceeding, pursuant to section 402.305(2)(a).[4/]

9. Rather, Respondent proposes to deny Petitioner's license application solely based on two confidential investigative summaries ("CIS reports") addressing incidents—— one involving Petitioner that occurred over 11 years ago, and one ostensibly involving Marlon Bullock that allegedly occurred almost 11 years ago.

10. The CIS report for Intake No. 2007-310775-01 addresses an incident that occurred on or about January 16, 2007.

11. Petitioner acknowledges that the incident addressed in the CIS report for Intake No. 2007-310775-01 occurred. Petitioner testified, credibly and persuasively, that at the time of the incident, Petitioner and her then-husband, Bernard L. Johnson, were going through a very difficult, emotionally-charged divorce. Petitioner went to Johnson's home to retrieve their minor children. An argument between her and Johnson ensued, and she threw a car jack through the back window of Johnson's vehicle. As a result of this incident, Petitioner was arrested. However, she was not prosecuted, and the charges against her were dropped.

12. Respondent's witnesses, Ann Gleeson and Suzette Frazier, both acknowledged that they did not have any independent personal knowledge regarding the occurrence, or any

aspects, of the incident reported in the CIS report for Intake No. 2007-310775-01.

13. The other CIS report, for Intake No. 2007-455485-01, addresses an incident that ostensibly took place on September 7, 2007, involving Marlon Bullock, who is now Petitioner's husband.

14. Petitioner was not married to Bullock at the time of the incident reported in the CIS report for Intake No. 2007-455485-01. She credibly testified that she was completely unaware of the incident, and had no knowledge of any aspect of it, until she saw the CIS report in connection with this proceeding.

15. Gleeson and Frazier both acknowledged that they did not have any independent knowledge regarding the occurrence, or any aspects, of the incident addressed in the CIS report for Intake No. 2007-455485-01.[5/]

16. The CIS reports and their contents are hearsay that does not fall within any exception to the hearsay rule.[6/] The CIS reports and the information contained therein consist of summaries of statements made by third parties to the investigators who prepared the reports. The investigators did not have any personal knowledge about the matters addressed in the reports. It is well-established that hearsay evidence, while admissible in administrative proceedings, cannot form the sole basis of a finding of fact in such proceedings.

§ 120.57(1)(c), Fla. Stat. Accordingly, the CIS reports do not constitute competent, substantial, or persuasive evidence in this proceeding regarding the matters addressed in those reports.

17. Thus, Petitioner's testimony constitutes the only competent substantial evidence in the record regarding the matters addressed in the CIS report for Intake No. 2007-310775-01, and there is no competent substantial evidence in the record regarding the matters addressed in the CIS report for Intake No. 2007-455485-01.

18. Respondent has not adopted a rule defining the term "good moral character." Therefore, it is required to determine an applicant's "good moral character" based on the definition of that term in statute. As noted above, section 402.305(2)(a) provides that "good moral character" is determined "using the level 2 standards for screening set forth in" chapter 435.

19. Ann Gleeson reviewed Petitioner's application for a family day care home license. She testified that based on her review of the CIS reports for Intake No. 2007-310775-01 and Intake No. 2007-455485-01, she "didn't feel comfortable" recommending approval of Petitioner's application for a family day care home license, and she recommended that the license be denied. As noted above, Gleeson did not have any personal knowledge of any of the matters in the CIS reports. She relied

on the reports and their contents in making her recommendation to deny Petitioner's application.

20. Suzette Frazier, Gleeson's supervisor, made the ultimate decision to deny Petitioner's application for the license.

21. At the final hearing, Frazier testified that she determined that Petitioner's license should be denied based on the matters addressed in the CIS reports.

22. Frazier testified that Petitioner's application raised particular concerns because of the two CIS reports, even though the CIS report for Marlon Bullock contained a "Findings - No Indicator" notation.[7/]

23. Frazier testified that it is Respondent's "policy" to deny an application for a family day care home license in every case in which the background screening for the applicant reveals an incident addressed in a CIS report. According to Frazier, this policy applies even if the background screening shows that the applicant does not have a history involving any of the offenses listed in section 435.04.

24. Further to this point, when Petitioner asked Frazier at the final hearing what she (Petitioner) could do to demonstrate that she has good moral character for purposes of obtaining her license, Frazier told her that although she could

reapply, she would never qualify to get the license because of the CIS reports.

25. Frazier testified that, in her view, the CIS reports contain information indicating that both Petitioner and Marlon Bullock have a "propensity" toward violent behavior.

26. Webster's Collegiate Dictionary, 11th edition,[8/] defines "propensity" as "a natural inclination or tendency." A "tendency" is "an inclination, bent, or predisposition to something." Id. An "inclination" is a "tendency toward a certain condition." Id. A "predisposition" is a "tendency to a condition or quality." Id.

27. Frazier's view that Petitioner and Marlon Bullock have a "propensity" toward violent behavior is not supported by the competent, substantial, or persuasive evidence in the record.

28. To the extent Frazier relies on the information contained in the CIS reports to conclude that Petitioner and Marlon Bullock have a "propensity" toward violent behavior, neither of these reports constitutes competent substantial evidence regarding the matters addressed therein.

29. Furthermore, to the extent Petitioner acknowledges that she engaged in the conduct addressed in CIS report Intake No. 2007-310775-01, the competent, substantial, and persuasive evidence shows that this incident——which was an isolated event that occurred in the context of an extremely emotional and

difficult personal event in Petitioner's life——simply does not establish that she has a "tendency" or "inclination" or "predisposition" toward violent behavior. To the contrary, the competent, persuasive evidence shows that this was a one-time event that happened over 11 years ago, that Petitioner did not have any instances of violent behavior before then, and that she has not had any instances of violent behavior since then. Far from showing a "propensity" toward violent behavior, the competent, persuasive evidence shows that Petitioner has exhibited an otherwise completely non-violent course of conduct throughout her life.

30. Additionally, as previously noted, the evidence shows that neither Petitioner nor Marlon Bullock have any history involving any of the offenses listed in section 435.04.

31. There is no competent substantial evidence in the record showing that Petitioner has engaged, during the past 11-plus years, in any criminal or other conduct that would present a danger to children, and there is no competent substantial evidence in the record establishing that Marlon Bullock has ever engaged in any criminal or other conduct that would present a danger to children. To the contrary, the competent substantial evidence establishes that Petitioner and Marlon Bullock are law-abiding citizens.

32. Petitioner is employed as the manager of a department for a Wal-Mart store. Marlon Bullock is, and has worked for 23 years as, a chef. Petitioner credibly and persuasively testified that she is a Christian who attends, and actively participates in, activities with her church.

33. Petitioner also credibly and persuasively testified that she has raised her four sons from her previous marriage to be law-abiding, upstanding citizens. None of them has ever been arrested or involved in any criminal behavior, and her three adult children are all gainfully employed. Petitioner posits, persuasively, that her children are testaments to the stability of her character and her ability to provide a safe, nurturing environment for the care of children.

34. Frazier testified that Respondent's review of Petitioner's application showed that apart from the good moral character requirement, Petitioner's application met all other requirements to qualify for a family day care home license.[9/]

Findings of Ultimate Fact

35. Although Respondent has adopted a rule, detailed in its Handbook, which establishes the background screening process for purposes of determining good moral character, Respondent has not adopted a rule defining "good moral character" or establishing, apart from the standards set forth in section 402.305(2)(a), any other substantive standards for

determining "good moral character." Accordingly, pursuant to the plain language of section 402.305(2)(a), the level 2 screening standards set forth in section 435.04 are the standards that pertain in this proceeding to determine good moral character.

36. Pursuant to the foregoing findings of fact, and based on the competent, substantial, and persuasive evidence in the record, it is found, as a matter of ultimate fact, that Petitioner and Marlon Bullock are of good moral character.

37. Conversely, the competent, substantial, and persuasive evidence in the record does not support a determination that Petitioner and Marlon Bullock do not have good moral character.

38. As noted above, Respondent determined, in its review of Petitioner's application, that other than the good moral character requirement, Petitioner met all other statutory and rule requirements for a family day care home license. Because it is determined, in this de novo proceeding under section 120.57(1), that Petitioner and Marlon Bullock meet the good moral character requirement, Petitioner is entitled to issuance of a family day care home license pursuant to sections 402.305(2)(a), 402.312, and 402.313 and rule 65C-20.008.

39. Finally, it is noted that Respondent has not adopted as a rule pursuant to section 120.54(1)(a), its "policy" of denying applications for family day care home licenses in every

case in which the background screening for the applicant reveals an incident addressed in a CIS report. Accordingly, pursuant to section 120.57(1)(e)1., Respondent cannot rely on or apply this "policy" to deny Petitioner's application for a family day care home license.

CONCLUSIONS OF LAW

40. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

41. Petitioner bears the ultimate burden in this proceeding, by a preponderance of the evidence, to prove her entitlement to a family day care license pursuant to the applicable statutes and rules. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996); Nikki Henderson, d/b/a Henderson Fam. Day Care Home v. Dep't of Child. & Fams., Case No. 15-5820 (Fla. DOAH May 2, 2016; Fla. DCF June 16, 2016).

42. Section 402.312(1) prohibits, among other things, the operation of a family day care home without a license.

43. Section 402.313 specifically addresses family day care homes. Section 402.313(3) provides that child care personnel in family day care homes are subject to the applicable screening provisions contained in sections 402.305(2) and 402.3055.[10/] For purposes of screening in family day care homes, the term "child

care personnel" includes screening of any member over the age of 12 years of a family day care home operator's family.

44. Section 402.305, titled "Licensing standards; child care facilities," subsection (1), directs Respondent to establish licensing standards that each licensed child care facility must meet.

45. Section 402.305(2), titled "Personnel," specifically requires these licensing standards to include minimum standards for child care personnel. In pertinent part, this statute states: "[m]inimum standards for child care personnel <u>shall</u> include minimum requirements as to: (a) Good moral character <u>based upon screening</u>. This screening shall be conducted as provided in chapter 435, <u>using the level 2 standards for screening set forth in that chapter</u>." § 402.302(2)(a), Fla. Stat. (emphasis added).

46. Section 435.04 establishes the level 2 screening standards that, per the plain language of section 402.305(2)(a), are used to determine "good moral character." The security background investigations under section 435.04 are to:

> ensure that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the

> following provisions of state law or similar
> law of another jurisdiction[.]

The statute goes on to list 53 criminal offenses, in subsections 435.04(2)(a) through (zz) and 435.04(3), to which level 2 background screening applies. Thus, section 435.04 establishes the level 2 screening standard to identify, and screen from employment, persons that have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any of the 53 offenses listed in section 435.04(2)(a) through (zz) and (3).

47. Respondent has adopted rule 65C-20.008, titled "Application." Among other things, this rule establishes and prescribes the application form for a license to operate a family day care home; prescribes the timeframe and process for review of applications for license; and incorporates by reference the Family Day Care Home/Large Family Day Care Home Handbook, dated October 2017 ("Handbook").[11/]

48. The Handbook, subsection 4.1, titled "Initial Screening," states, in pertinent part:

> 4 Background Screening
>
> 4.1 Initial Screening
>
> Operators, household members, substitutes,
> volunteers and Large Family Child Care Home

employees must have a level 2 background screening clearance from the department prior to obtaining a license, residing in the home, employment, or volunteering unsupervised with children. The employer/owner/operator must review each employment application to assess the relevancy of any issue uncovered by the complete background screening, including any arrest, pending criminal charge, or conviction, and should use this information in employment decisions in accordance with state laws.

A. Level 2 screening as outlined in s[.] 435.04, F.S., is required for all child care personnel and includes a criminal records check (both national and statewide), a sexual predator and sexual offender registry search, and child abuse and neglect history of any state in which an individual resided during the preceding 5 years. All fingerprints must be submitted and processed through the Background Screening Clearinghouse and therefore a LiveScan vendor that is Clearinghouse compatible must be used for submission of fingerprints.

B. The fingerprint results from the Federal Bureau of Investigation will be returned to DCF via the Florida Department of Law Enforcement. DCF will review both the federal and state criminal history results, along with state criminal records, national sex offender registry, Florida sex offender registry, and the Florida child abuse and neglect registry.

C. DCF will issue an eligible or non-eligible result for employment through the Clearinghouse upon completion of searches and results from other states, if applicable.

D. The operator must submit to licensing a five year employment history. Licensing staff will conduct employment history

checks, including documented attempts to contact each employer that employed the individual within the preceding five years and documentation of the findings. Documentation must include the applicant's job title and description of his/her regular duties, confirmation of employment dates, and level of job performance.

E. The employer/owner/operator must conduct employment history checks for substitutes, including documented attempts to contact each employer that employed the individual within the preceding five years and documentation of the findings. Documentation must include the applicant's job title and description of his/her regular duties, confirmation of employment dates, and level of job performance. The employer/owner/operator must make at least three attempts to obtain employment history information. Failed attempts to obtain employment history must be documented in the personnel file and include date, time, and the reason the information was not obtained.

F. The employer/owner/operator must send a request for criminal history records for each state the individual lived if the individual has lived outside the state of Florida in the preceding five years. Visit www.myflfamilies.com/backgroundscreening, click on the National Records Request link to obtain the instructions and forms to complete to submit a request for a search. Once the results are received, the information must be sent to the DCF Background Screening unit.

G. The employer/owner/operator must send a request for a search of each state's child abuse and neglect registry if the individual has lived outside the state of Florida in the preceding five years. Visit www.myflfamilies.com/backgroundscreening, click on the Out of State Abuse Registry Check link to obtain the instructions and

forms to complete to submit a request for a search. Documentation of the date the search was requested, and the date the results were received, must be maintained in the employee's file for review by the licensing authority.

H. The employer/owner/operator must conduct a search of the sexual offender/predator registry of any state the individual has lived in outside the state of Florida in the preceding five years. Visit www.myflfamilies.com/backgroundscreening, click on the Out of State Sexual Predator/Offender Registry Check link to obtain the instructions and forms to complete to submit the request for a search. Documentation of the search date, and findings from each state, must be documented in the employee's file for review by the licensing authority.

I. The employer/owner/operator must maintain on-site at the program copies/documentation of completion of all applicable elements in the screening process for an individual in the personnel file for review by the licensing authority.

J. An individual may be hired under one of these circumstances: 1. If all components are complete with an eligible screening and documented in the employee's file.
2. 'Provisional hire' status upon notification email from the department allowing the individual to be hired for a 45 day period while out of state records are being requested and awaiting clearance. During those 45 days the individual must be under the supervision of a screened and trained staff member when in contact with the children. 3. Screening requests have been initiated, but before results have been received, the individual may be hired for training and orientation purposes only in accordance with s. 435.06(2)(d), Florida Statutes. Until screening is complete

> showing good moral character, the employee may not be in contact with the children as specified in this statute.
>
> K. The employer/owner/operator must initiate the screening through the Clearinghouse prior to fingerprinting. Failure to initiate the screening may result in an invalid screening and the individual will have [to] be re-fingerprinted and pay the fees again.
>
> L. The employer/owner/operator must add substitutes, employees and household members to their Employee/Contractor Roster when the individual has received a child care eligible result. Employer/owner/operator must immediately add an end date for individuals on the Employee/Contractor Roster in the Clearinghouse when employment terminates or a household member is no longer residing in the home.
>
> M. The employer/owner/operator will receive an email notification if any individual on the Employee/Contractor Roster is arrested for a disqualifying offense. The employer/owner/operator is required to take appropriate action if an individual becomes disqualified pursuant to s. 435.06, Florida Statutes.

49. These Handbook provisions establish the <u>process</u> for initial background screening. However, importantly, they do not establish any definition or substantive <u>standards</u> prescribing what constitutes "good moral character." Nor has Respondent adopted any other rules defining or establishing substantive standards for determining what constitutes "good moral character."

50. Thus, the standard for determining whether or not an applicant possesses "good moral character" is specifically——and exclusively——established in sections 402.305(2)(a) and 435.04——which, as discussed above, is whether or not the family day care home license applicant has been arrested for and is awaiting final disposition of, has been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or has been adjudicated delinquent and the record has not been sealed or expunged for, any of the 53 offenses listed in section 435.04.[12/]

51. As discussed above, the evidence establishes that neither Petitioner nor Marlon Bullock were determined, through background screening, to fall within the groups of persons and offenses described in section 435.04(2) and (3). Accordingly, pursuant to sections 402.305(2)(a) and 435.04, it is concluded that the evidence shows that Petitioner and Marlon Bullock possess good moral character, as required by those statutes.

52. The circumstances in this case are remarkably similar to those in Henderson Family Day Care Home, cited above. In that case, based on five CIS reports, some of which had verified findings and others of which had no indicators, Respondent denied a license for a family day care home on the basis that the applicant lacked good moral character. At the final hearing, Respondent tendered and relied on the CIS reports as

its evidence that the applicant should not be licensed. In his recommended order, the ALJ did not ascribe weight to the reports, reasoning that:

> The information contained in the reports that the Department relies upon is largely hearsay or hearsay reports of hearsay. The reports consist mostly of summaries of records reviewed by the reporter or summaries of statements by other individuals. They are not reports of information about which the reporter has direct knowledge. The reports do not identify who the investigator obtained the information from. In short[,] all of the statements in Respondent's Exhibits C through G about anything Ms. Henderson did or did not do are hearsay recitations of statements made to and summarized by the reporters or summaries of documents reviewed. §§ 90.801 & 90.802, Fla. Stat. Hearsay alone cannot support a finding of fact. § 120.57(1)(c), Fla. Stat.

53. Notably, the ALJ found that an isolated incident that occurred 11 years before the application was submitted did not make the applicant a person who lacks good moral character. The ALJ determined in his Recommended Order that the applicant had shown, by competent substantial evidence, that she was entitled to issuance of the license. Respondent adopted the ALJ's recommended order, without modification, as its Final Order.

54. Likewise, here, based on the competent substantial evidence in the record, it is concluded that Petitioner has established that she and Marlon Bullock possess good moral character. Accordingly, Petitioner is entitled, pursuant the

pertinent statutes and rules, to issuance by Respondent of a family day care home license.

55. Furthermore, under any circumstances, Respondent is not authorized to rely on its "policy"——which has not been adopted as a rule pursuant to section 120.54(1)——to deny Petitioner's family day care home license on the basis that the CIS reports per se establish lack of "good moral character."

56. Section 120.57(1)(e)1. states, in pertinent part: "[a]n agency or administrative law judge may not base agency action that determines the substantial interests of a party on an unadopted rule."

57. Section 120.52(16) defines a "rule," in pertinent part, as "each agency statement of general applicability that implements, interprets, or prescribes law or policy."

58. A "statement of general applicability" is a statement that purports to affect a category or class of similarly-situated persons or activities. McCarthy v. Dep't of Ins., 479 So. 2d 135 (Fla. 2d DCA 1985). Here, Frazier testified that Respondent has a "policy" to deny family day care home license applications in every case in which there is a CIS report. Thus, Respondent's "policy" is a "statement of general applicability" that applies, as a rule of decision, to every application for a family day care home license.

59. If the statement of general applicability gives a statute a meaning not apparent from its literal reading and creates or adversely affect rights, requires compliance, or otherwise has the direct and consistent effect of law, it is a rule. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enterprises-Fla., Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st DCA 1990).

60. Here, Respondent's "policy" gives the pertinent statutes——here, sections 402.305(2)(a) and 435.04——a meaning that is not apparent from a literal reading of the statutes. As previously discussed, the plain language of section 402.305(2)(a) provides that good moral character is determined based on screening, "which shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter." § 403.305(2)(a), Fla. Stat. (emphasis added). Neither section 402.305(2)(a) nor section 435.04 anywhere state that CIS reports are determinative of whether an applicant has good moral character. To the contrary, these statutes expressly limit the good moral character determination to the "level 2 standards for screening set forth in chapter 435." Thus, Respondent's "policy" indisputably gives these statutes a meaning not apparent from their literal reading, so constitutes an interpretation of the statutes.[13/] Additionally, the policy adversely affects applicants' rights by effectively imposing a

requirement——the absence of any CIS reports in an applicant's background, even when the level 2 screening standards imposed by sections 402.305(2)(a) and 435.04 are met——for issuance of a license.

61. Pursuant to section 120.52(16) and the interpretive case law, it is clear that Respondent's policy constitutes a rule. It has not been adopted, as required by section 120.54(1)(a), pursuant to the rulemaking process established in section 120.54. Accordingly, pursuant to section 120.57(1)(e) 1., Respondent is not authorized to base its agency action regarding Petitioner's license on this policy.

62. Additionally, Respondent cannot successfully assert that it is simply applying sections 402.305 and 435.04 to deny Petitioner's license. Here, Respondent's stated basis for its decision to deny Petitioner's license——that the background screening includes CIS reports——is contrary to the plain language of sections 402.305(2)(a) and 435.04, which expressly limits the standards considered in determining good moral character to the level 2 screening standards set forth in chapter 435. As such, any application of the statute that makes CIS reports determinative of family day care home licensure is clearly erroneous, and, thus, cannot support the denial of Petitioner's license. See Summer Jai Alai Partners v. Dep't of Bus. & Prof'l Reg., 125 So. 3d 304, 307 (Fla. 3d DCA 2013); Fla.

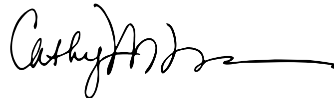
Hosp. v. Ag. for Health Care Admin., 823 So. 2d 844, 848 (Fla. 1st DCA 2002)(an agency's interpretation and application of a statute it is charged with administering is not entitled to deference where it conflicts with the plain language of the statute).

63. Based on the foregoing, it is concluded that Petitioner meets the good moral character requirement, as well as all other pertinent requirements in chapters 402 and 435, and rule 65C-20.008, and therefore is entitled to issuance of a family day care home license.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent enter a final order granting Petitioner's license for a family day care home.

DONE AND ENTERED this 12th day of April, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of April, 2018.

ENDNOTES

[1/] All references are to the 2017 codification of Florida Statutes.

[2/] Section 403.3055 imposes the requirement that a license application contain a question that asks whether the applicant, owner, or operator of a child care facility license has previously had a child care license denied, revoked, or suspended in any state or jurisdiction, or whether that person has been subject to disciplinary action or been fined while employed in a child care facility. The statute authorizes Respondent to deny a child care facility license on this basis or to impose other sanctions on child care facilities for failure to request this information from employees. There is no allegation that Petitioner failed to comply with this provision, nor is there any evidence in the record that Petitioner previously had a child care license denied, revoked, or suspended in any state or jurisdiction, or that she was subject to disciplinary action or fined while employed in a child care facility. To the contrary, the evidence establishes that Petitioner has not previously owned, operated, or been employed by a child care facility.

[3/] The NOI cites rule 65C-22.008(3) as a basis for the proposed denial. This citation appears to be incorrect. Rule 65C-22.008 is titled "School Age Child Care" and deals with licensure of a type of facility that is not the subject of Petitioner's application.

[4/] Section 402.305 is titled "Licensing standards; child care facilities." As discussed more extensively below, section 402.305 requires Respondent to establish minimum licensing standards that each licensed child care facility must meet. Among these are "minimum requirements as to: (a) Good moral character based upon screening. This screening shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter." § 402.305(2)(a), Fla. Stat.

[5/] As more fully discussed below, this CIS report is hearsay that does not fall within any exception to the hearsay rule, and

there is no other competent substantial evidence in the record of this proceeding regarding the matters addressed in this CIS report. As such, the report does not constitute competent substantial evidence on which any findings of fact may be based in this proceeding. Accordingly, the undersigned has not made any findings of fact regarding this report, other than that the report exists.

[6/] Although Respondent presented the testimony of its records custodian to authenticate the CIS reports, that does not render the reports non-hearsay or establish that they fall within any exception to the hearsay rule. See Dollar v. State, 685 So. 2d 901, 903 (Fla. 5th DCA 1996)(even if a document is authenticated, it still must satisfy the requirements for a hearsay exception). Respondent, as the proponent of the hearsay evidence, bears the burden of establishing, by evidence in the record, the proper predicate for applicability of an exception to the hearsay rule. Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008).

It is noted that to the extent documents tendered for admission in administrative hearings may fall within an exception to the hearsay rule, the two exceptions most often propounded are the exception for records of regularly conducted business activity——the so-called "business records exception"—— in section 90.803(6), Florida Statutes, and the exception for public records and reports——the so-called "public records exception"——in section 90.803(8). Although here, Respondent failed to establish that the CIS reports fell within any exception to the hearsay rule, these two exceptions and their elements merit discussion.

To fall under the business records exception in section 90.803(6), the proponent of the document must show that the record was made at or near the time of the event recorded; that it was the regular practice of the business to make such a record; and that the record was made by or from information transmitted by persons with knowledge who are acting in the course of the regularly conducted business. Quinn v. State, 662 So. 2d 947, 953 (Fla. 5th DCA 1995). It is well-established in Florida law that investigative reports generally do not fall within the business records hearsay exception because the persons providing the information to the person preparing the report do not, themselves, have a business duty to provide that information. See Visconti v. Hollywood Rental Serv., 580 So. 2d 197 (Fla. 4th DCA 1991)(patient statement regarding slip and fall incident did not fall within the business records exception

because the patient did not have a business duty to make the statement); Brooks v. State, 918 So. 2d 181 (Fla. 2005)(where the initial supplier of information in a record is not acting in the course of the business, the information does not fall within the business records exception); Harris v. Fla. Game and Fresh Water Fish Comm'n, 495 So. 2d 806 (Fla. 1st DCA 1986)(statements made in investigative reports do not fall within the business records exception where the statement is not made by a person who was acting within the regular course of the business's activity). Here, the evidence does not definitively show that the information contained in the CIS reports was recorded at or near the time of the event recorded. Further, and most important, the persons who transmitted the information to the investigators who prepared the report did not have a business duty to provide that information to the investigator, so were not acting in the course of regularly conducted business when they provided that information to the investigators. Accordingly, the CIS reports do not fall under the business records exception to the hearsay rule.

Nor do the CIS reports fall under the public records exception to the hearsay rule in section 90.803(8). This exception applies to records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The exception encompasses two types of public records and reports: (1) records setting forth the activities of the office or agency; and (2) records of a public office or agency which set forth matters observed pursuant to duty imposed by law as to which matters there was a duty to report. Philip Morris USA, Inc. v. Pollari, 228 So. 115, 120 (Fla. 4th DCA 2017). The CIS reports do not fall within the first category of the exception because they were not records or reports of the activities of Respondent. To fall within this category, the documents can do no more than "simply set forth the activities of the government agency." Id. at 121 (emphasis added); Benjamin v. Tandem Healthcare, Inc., 93 So. 3d 1076, 1082 (Fla. 4th DCA 2012). Here, the CIS reports consist of a narrative prepared by CIS investigators, who are employees of Respondent, regarding statements made to them by third parties, ostensibly describing their actions or actions of other persons. They do not constitute factual reports "focused on the essential functions

of the office or agency," which is a necessary element for a document to fall within this category of the exception. Nationwide Mut. Fire Ins. Co. v. Darragh, 95 So. 3d 897, 900 (Fla. 5th DCA 2012). Nor do the reports fall in the second category of the public records exception. Reports that fall within this category must be based on a public official's first-hand observation of an event. Yisrael, 993 So. 2d at 959. As discussed, the CIS reports consist of a narrative regarding statements made to investigators regarding matters reported to them by third parties, ostensibly describing the actions of those third parties or of other persons. The reports clearly and indisputably do not constitute reports of first-hand observations of events by the investigators. Simply stated, none of the investigators had any personal knowledge of the matters addressed in the reports, which is required for this hearsay exception to apply. Accordingly, the CIS reports do not fall within the public records exception to the hearsay rule.

Finally, it is noted that in Henderson Family Day Care Home, Respondent argued that because section 39.202 makes abuse and neglect reports available to it, that statute creates an exception to the hearsay rule for their use. In his Recommended Order, the ALJ flatly (and correctly) rejected that position, and Respondent accepted, in toto, the ALJ's conclusions of law in its Final Order. Although Respondent has not taken that position in its Proposed Recommended Order in this case, it warrants mention.

7/ Frazier testified that just because there is a finding of "no indicator" does not mean that a child is not injured. The undersigned notes that not only does Frazier have absolutely no personal knowledge of any aspect of the incident addressed in CIS report for Intake No. 2007-455485-01, but she engaged in completely unsupported speculation in surmising that a child was or may have been injured in the incident addressed in that CIS.

8/ Judicial tribunals are authorized to look to the dictionary for the plain and ordinary meaning of terms. Gyongyosi v. Miller, 80 So. 3d 1070, 1075 (Fla. 4th DCA 2012).

9/ Consistent with that testimony, it is noted that the NOI informing Petitioner that Respondent proposed to deny the application for license only mentioned that Petitioner did not satisfy the good moral character requirement. See § 120.60(3), Fla. Stat. (requiring the agency to provide written notice that the agency intends to grant or deny the application for license, and requiring the notice to state with particularity the grounds

or basis for the issuance or denial of the license, except when issuance is a ministerial act).

[10/] As discussed in note 2 above, section 402.3055 is not pertinent in this particular proceeding because neither Petitioner nor Marlon Bullock have previously been employed as child care personnel.

[11/] Respondent, in its Proposed Recommended Order, paragraph 10 of the Conclusions of Law, states: "Rule 65C-20.008(3)(a)(1)-(4), F.A.C., lays out the initial screening requirements." Respondent cites to a previous version of rule 65C-20.008 that is no longer in effect as of October 25, 2017. The version of rule 65C-20.008 that went into effect on October 25, 2017, applies to this proceeding. See Lavernia v. Dep't of Prof. Reg., 616 So. 2d 53, 54 (Fla. 1st DCA 1993)(law in effect at time licensure decision is made, rather than at time application is filed, applies).

[12/] Section 402.305(15) defines "screening" to include employment history checks, including documented attempts to contact each employer that employed the applicant within the preceding 5 years and documentation of the findings, and a search of the criminal history records, sexual predator and sexual offender registry, and child abuse and neglect registry of any state in which they applicant presided in the preceding five years. However, this definition, which is a more general statute describing screening, does not supersede the more specific provision in section 402.305(2)(a) establishing the substantive standards applicable to determining "good moral character." See Sch. Bd. of Palm Beach Co. v. Survivors Charter Sch., 3 So. 2d 1220, 1233 (Fla. 2009); Maggio v. Fla. Dep't of Labor & Emp't Sec., 899 So. 2d 1074, 1079 (Fla. 2005)(a specific statute covering a particular subject area controls over a statute covering that subject in general terms).

[13/] Additionally, that interpretation is contrary to the plain language of sections 402.305(2)(a) and 435.04.

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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.