STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR PERSONS WITH DISABILITIES,

Petitioner,

vs. Case No. 18-4973FL

DALE'S FOSTER HOME, FOSTER HOME OWNED AND OPERATED BY KRM QUALITY CARE, LLC,

Respondent.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings ("DOAH"), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019),[1/] on November 27, 2018, and March 20, 2019, by video teleconference between sites in Tallahassee and Sarasota, Florida.

APPEARANCES

For Petitioner: Trevor S. Suter, Esquire
Agency for Persons with Disabilities
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Tallahassee, Florida 32399-0950

For Respondent: Marcia A. Taylor, Qualified Representative
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Cape Coral, Florida 33914

STATEMENT OF THE ISSUE

Whether Respondent's license as a group home should be revoked for failing to comply with the requirements of chapter 393, Florida Statutes, and Florida Administrative Code Chapter 65G-2, as alleged in the Administrative Complaint ("Complaint").

PRELIMINARY STATEMENT

On July 25, 2018, the Agency for Persons with Disabilities ("APD") filed a Complaint against Dale's Foster Home, which is owned and operated by KRM Quality Care, LLC (referred to individually as "Dale's" or "KRM," or collectively as "Dale's"), and managed by its president, Dale Bogan. The Complaint alleged violations of sections 393.0665 and 393.067, Florida Statutes, and Florida Administrative Code Rules 65G-2.007, 65G-2.008, and 65G-2.011, and sought to revoke Dale's license.

On August 21, 2018, Dale's timely filed a response to the Complaint, admitting to some of the factual allegations, disputing the rest, and requesting a hearing.

On September 17, 2018, APD referred the Complaint to DOAH to conduct a formal administrative hearing under section 120.57. The final hearing occurred over two days, beginning on November 27, 2018, and concluding on March 20, 2019.

In its case-in-chief and rebuttal case, APD presented the testimony of Nina Giordano, an APD human resources program

specialist, and Myra Leitold, APD's Suncoast Regional Office residential program supervisor. Petitioner's Exhibits 1 through 20 were admitted into evidence. Petitioner's Exhibits 21 and 22 were not admitted into evidence, but were used to question witnesses for impeachment purposes.

In its case-in-chief, Dale's presented the testimony of Ms. Bogan and Jeffrey Smith, APD's Suncoast Regional Office operations manager. Respondent's Exhibits 1 through 3 were admitted into evidence.[2/]

A four-volume Transcript of the final hearing was initially filed on July 10, 2019, but failed to comply with Florida Rule of Appellate Procedure 9.200(b)(4) because it lacked pagination and master indices listing the witnesses and exhibits. APD filed the corrected Transcript on August 7, 2019. The parties timely filed their Proposed Recommended Orders ("PROs"), which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

The Parties and Principal Allegations of the Complaint

1. APD is the state agency charged with licensing of foster care facilities, pursuant to authority provided in chapter 393 and chapter 65G-2 and ensuring facility compliance therewith.

2. KRM, operated as Dale's, is a licensed foster home (#5442-3-FA) in Wesley Chapel, Florida, with a capacity of three

residents. Dale's obtained its license in 2012 and APD annually renewed its license until 2018. Ms. Bogan, KRM's president, manages the home and lives there with her husband, Celestine Oliver, and their minor daughter. Their 21-year-old daughter, Justine Oliver, comes home from college over the summer. All family members are background screened because they interact with the foster children and, except for the minor daughter, all have the required medical screenings because they also provide care to the foster children. Ms. Bogan and Mr. Oliver own the property where the home is located.

3. At all times relevant hereto, three minor children resided in Dale's——D.M., Z.M., and N.B.[3/] D.M. was a client of APD, which contracted with Dale's to pay for his room and board and other services provided by the home.[4/] N.B. was a client of YMCA Sarasota. Z.M. was a client of Eckerd Connects Community Alternatives ("Eckerd"), though Ms. Bogan and her husband adopted her in November 2018.

4. APD conducts monthly and annual license visits of foster homes to ensure compliance with the law. During a monthly visit, an inspector tours the home, observes staff with the clients, audits one client's file, and audits medications to ensure they are current and clients are receiving them. During an annual visit, an inspector does a more thorough physical

walk-through and an in-depth audit of the files of all of the staff and at least half of the clients.

5. On July 25, 2018, APD issued a six-count Complaint seeking to revoke Dale's license under section 393.0673 for the following violations of statutes and rules:

> I. Failing to timely notify APD about a foreclosure action filed against Ms. Bogan, as required by rule 65G-2.007(18)(a) and (c);
>
> II. Failing to have level two background screening performed for two family members from another country who stayed at the home in and around January 2017, in violation of section 393.0655(1)(d);
>
> III. Willfully or intentionally misstating its financial ability to operate the home in the 2017 application despite the pending foreclosure action, in violation of rule 65G-2.007(20)(a);
>
> IV. Failing to have level two background screening for a substitute caretaker who stayed in the home with one foster child while Ms. Bogan was out of town in July 2017, as required by rules 65G-2.008(2) and 65G-2.011(3), and making willful misstatements about that issue to APD staff, in violation of rule 65G-2.007(20)(a);
>
> V. Failing to furnish sufficient proof of its financial ability to operate the facility for at least 60 days in the 2018 application, as required by section 393.067(6), and willfully or intentionally misstating its financial ability in that application despite the bankruptcy petition, in violation of rule 65G-2.007(20)(a); and
>
> VI. Willfully or intentionally misstating in the 2018 application that Ms. Bogan was

not a "party responsible for a licensed facility receiving an administrative fine," when she owned a facility that received two prior fines in 2008 and 2011, in violation of rule 65G-2.007(20)(a).

Foreclosure, Bankruptcy, & Financial Ability - Counts I, III, V

6. In 2010, Ms. Bogan hired an attorney to help her modify the mortgage on the property. They were initially unsuccessful.

7. On June 25, 2013, the lender electronically filed a notice of lis pendens to foreclose the mortgage on the property.

8. On January 3, 2018, a final judgment of foreclosure was filed. The judgment scheduled a public sale for March 5, 2018.

9. On January 29, 2018, Ms. Bogan notified Ms. Giordano, an APD inspector, about the foreclosure during a monthly visit. This was the first time that Ms. Bogan had notified APD about the pending foreclosure action.

10. On March 1, 2018, Ms. Bogan filed a petition for personal bankruptcy in the U.S. Bankruptcy Court for the Middle District of Florida based on the advice of foreclosure counsel. She also filed a suggestion of bankruptcy in the pending foreclosure action. As permitted, she applied to pay the $310 filing fee in the bankruptcy case in monthly installments.

11. Ms. Bogan filed for bankruptcy to stop the foreclosure sale, which was accomplished by filing the suggestion of bankruptcy. In November 2018, the lender modified the mortgage,

Ms. Bogan dismissed the bankruptcy petition, and they have remained in the home ever since.

12. In Count I, APD alleged that Dale's violated rule 65G-2.007(18)(a) by failing to "provide notification to the Regional office within two business days of receipt of a foreclosure notice." Id.

13. Ms. Bogan admitted that the notice of lis pendens was "electronically" filed on June 23, 2013, but testified that the notice was not served on her at the time, that she was unaware of it because her attorneys were handling the case, and that, in any event, she did not know of the requirement to notify APD. Ms. Bogan did not immediately notify APD of the foreclosure judgment because she remained unaware of that requirement.

14. According to Ms. Leitold, APD's residential program supervisor in the Suncoast Regional Office, Ms. Bogan violated the rule by failing to notify APD within two days of either: the date the notice of lis pendens was filed, June 25, 2013, or the date the foreclosure judgment was entered, January 2, 2018.

15. Although there is no dispute about the dates on which the notice of lis pendens and foreclosure judgment were filed, the record is devoid of evidence as to when Ms. Bogan received those foreclosure pleadings, which is the triggering date under rule 65G-2.007(18)(a).[5/]

16. In Counts III and V, APD alleged that Ms. Bogan willfully or intentionally misrepresented her financial ability, in violation of rule 65G-2.007(20)(a), by attesting as follows:

> I hereby state that I have sufficient capital, income or credit to staff, equip, and operate this facility in accordance with Rule 65G-2 for sixty days without dependence on client fees or payments from the State of Florida.

17. In Count III, APD alleged that the foreclosure action proved Ms. Bogan lied in the 2017 application. In Count V, APD alleged that the bankruptcy action proved Ms. Bogan lied in the 2018 application.

18. Ms. Bogan testified definitively that she never willfully or intentionally lied about her financial ability in either application. She maintained that Dale's has always had sufficient capital to operate the home. Indeed, it continued to operate throughout 2017 and 2018 while the foreclosure and bankruptcy cases were pending, apparently without receiving several monthly room and board payments or Medicaid payments for services it provided, as confirmed by Mr. Smith.

19. APD acknowledged its burden to prove that Ms. Bogan willfully or intentionally lied in the applications. But it elicited no testimony from Ms. Bogan as to Dale's or her financial situation in 2017 and 2018, or whether they had access to the financial sources listed in the application, i.e.,

capital, other income, or credit. It never asked Ms. Bogan about the underlying circumstances of the foreclosure, why she filed for bankruptcy, what she understood about the cases, or what she intended by signing the attestation. Such evidence is key to proving willful or intentional misstatements, especially given Ms. Bogan's credible testimony to the contrary.

20. APD chose instead to rely on the mere existence of the foreclosure and bankruptcy actions (and that Ms. Bogan asked to pay the filing fee in installments) to prove that she lied.

21. However, the foreclosure and bankruptcy filings offer no insight into Dale's financial ability, which is the applicant and licensed entity. Although Ms. Leitold said APD considers the financial ability of both the entity and individual owners, the application explicitly refers to proof of financial ability "of the licensee." The attestation is also signed by the owner on behalf of the facility and notes APD's right to request more financial documentation from the "applicant." The statute is in accord. See § 393.067(6), Fla. Stat. ("The applicant shall furnish satisfactory proof of financial ability . . . .").

22. Even as to Ms. Bogan's financial ability, the foreclosure and bankruptcy pleadings offer little detail, much less credibly undermine her testimony that she did not lie. This is particularly so given that the bankruptcy apparently was just a strategy to modify her loan.

23. Ms. Leitold's testimony suffers a similar fate. She conceded this was the first foreclosure action against a foster home she had experienced and that she lacked knowledge of the foreclosure process and the rules of bankruptcy. She only reviewed the pleadings filed by APD in this case and had not researched other documents. She did not know if Ms. Bogan had in fact paid the filing fee in installments, though she based her belief that Ms. Bogan lied on that request.

24. In Count V, APD also alleged that Dale's failed to furnish satisfactory proof of financial ability in its 2018 application, in violation of section 393.067(6).

25. With a renewal application, APD typically does not ask for proof beyond an annual budget. Indeed, APD renewed Dale's license in 2017 based on the budget alone. Ms. Leitold testified that APD knew about the foreclosure and bankruptcy cases in 2018, which is why she requested more documentation.

26. But the record is unclear as to what Ms. Leitold requested from Ms. Bogan, how she requested it, or what proof would have been deemed sufficient; there also was substantial confusion that APD's counsel and witness had about whether this issue was even part of the Complaint.[6/] The confusion about this allegation and how it was handled bear directly on the weight of the evidence and APD's burden in this proceeding.

27. What appears to be clear is that Ms. Bogan initially submitted a budget and attested to Dale's financial ability on March 20, 2018. Presumably based on a request by Ms. Leitold, Ms. Bogan submitted a revised budget, a new attestation signed on June 2, 2018, and a bank statement in her daughter's name, payable on death to Ms. Bogan, with a balance of $10,050.

28. Ms. Bogan believed she had provided all of the information requested by APD to establish sufficient financial ability and never heard otherwise. Indeed, APD had granted the initial license in 2012 with proof of capital of only $7,000.

29. Ms. Leitold received the statement, but she deemed it insufficient because the account was Ms. Oliver's, who was not an officer of KRM, and it was only payable on death to Ms. Bogan. Ms. Leitold made this decision without knowing whether and to what extent Ms. Oliver may be involved in the business. She believed proof of financial ability of corporate officers was required, though she conceded the law did not so specify. Ms. Leitold never explained what document or amount would have been satisfactory or cite a statute or rule articulating those standards.

30. Nevertheless, Ms. Leitold did not contact Ms. Bogan to inquire, obtain clarification, or request more documentation. She did not believe she was obligated to do so for a second time, even though the attestation Ms. Bogan signed on June 2,

2018——the form sent to APD with the bank statement——expressed APD's right to request and obtain additional documentation to substantiate financial ability.

Background Screenings – Counts II and IV

31. In Count II, APD alleged that Dale's failed to conduct level two background screenings for two of Ms. Bogan's family members who were from another country and resided in the home, in violation of section 393.0655(1)(d).

32. During a monthly visit on or around February 20, 2017, Ms. Bogan informed Ms. Giordano that her sister and niece were visiting from out of the country. Ms. Bogan credibly explained that they were visiting the U.S. for about three months, but would not be staying with her the entire time. She explained that they ultimately stayed with her for about a week, went to Atlanta for a few weeks, came back for two days, and then went to New York for the rest of their trip.

33. APD presented no evidence as to when the visitors arrived or left, how old they were, or whether they were alone with the children or had access to their living areas. Ms. Giordano testified that Ms. Bogan said the visitors would be staying for four months, but confirmed that she did not know when they arrived or how long they stayed. She also was unsure as to when she saw the visitors at the home or how many times, though she did not believe it was more than once or twice.

34. Upon learning of the visitors, Ms. Giordano was unsure if they needed to be screened, so she asked Ms. Leitold. Because Ms. Leitold had never dealt with a foreign visitor before, she e-mailed an APD lawyer to inquire. In that e-mail, Ms. Leitold confirmed that the home would accommodate the guests and noted that the foster children lived on the first floor and the guest rooms were on the second floor.

35. On February 21, 2017, the APD lawyer advised that the visitors would need to have level two background screening performed under section 393.0655(1)(d), as they were visiting for four months and living at the home during their stay. Ms. Leitold forwarded the response to Ms. Bogan and informed her that she needed to conduct the level two screenings immediately.

36. Ms. Bogan attempted to obtain screenings for the relatives, but could not because they were not U.S. citizens. She had name searches conducted by the Hillsborough County Sheriff's Office, which revealed no arrests for either visitor.

37. On March 23, 2017, Ms. Giordano conducted an annual license inspection of Dale's and Ms. Bogan informed her that the screens could not be obtained. There is no credible evidence that the visitors were still there at that time, as Ms. Giordano could not recall and, though Ms. Leitold believed they were, her belief was not based on fact because she never visited the home and had no independent knowledge.[7/]

38. Because screens of the visitors could not be obtained, APD required Dale's to sign a child safety plan to ensure that the foster children were never left alone with them. The evidence was undisputed that the visitors never stayed in the home after the child safety plan was issued on March 28, 2017.

39. Despite APD's belief that Dale's had violated the law by failing to obtain the screenings, it did not cite Dale's for the violation at the time. Instead, it executed the safety plan, allowed the children to stay in the home, and renewed Dale's license in 2017 notwithstanding the purported violation.

40. In Count IV, APD alleged that Dale's violated rule 65G-2.008(2) by leaving a child with an unscreened person while Ms. Bogan was out of town in July 2017.

41. In July 2017, Ms. Bogan traveled to Grenada. She planned to take the YMCA child with her and arranged for the APD child to stay with his parents. Ms. Bogan did not want to take the 11-year-old Eckerd child, who she and her husband have since adopted, because she is severely mentally disabled.

42. Ms. Bogan did not, however, want to put the Eckerd child in a respite home. Although Ms. Bogan's 21-year-old daughter had the medical screenings to serve as a caregiver, Ms. Bogan did not want to place that responsibility solely on her. Instead, Ms. Bogan asked her sister, Becky John, who was a foster mom in Atlanta, to stay in the home with her daughters.

43. Before she arrived, Ms. John obtained her medication administration assistance certification from APD, effective March 2, 2017, and had sufficient background screening under Georgia law. But, she could not obtain a level two background screening for APD until she was present in Florida, so she planned to obtain that screening upon arrival.

44. Ms. Bogan left first and took the YMCA child with her. Her husband and two daughters remained in the home, all of whom were background screened.

45. Ms. John arrived at the home late at night on July 17, 2017. The next morning, Mr. Oliver departed for Grenada, leaving the Eckerd child with his two daughters and Ms. John. That same morning, however, an emergency required Ms. John to travel back to Atlanta immediately. Ms. John had only been in the house for about ten hours at that point.

46. Ms. Bogan credibly testified that she called an APD respite home and asked it to keep the child for one day until Ms. John returned from Atlanta, as she wanted the child to be able to be in their home. Eckerd approved this plan. Ms. Bogan informed Ms. Giordano and Ms. Leitold that Ms. John had been screened in Georgia and had that documentation sent to APD.

47. Ms. John dropped the child off at the respite home on her way back to Atlanta. She returned to Florida the next day and got fingerprinted, but the home would not allow her to pick

up the child on instructions from APD. Several days later, on July 21, 2017, the background screening was approved and APD deemed Ms. John eligible.

48. Ms. Bogan decided to return home from Grenada early. Upon her return, the respite home brought the Eckerd child back to Dale's. The child had spent between 11 and 14 days there.

49. Ms. Giordano and Ms. Leitold offered conflicting testimony, but neither of them visited or called the home. Neither had personal knowledge of the details of Ms. John's involvement or what transpired while Ms. Bogan was away. They lacked consistent and definitive details about how they obtained the out-of-state screening documents and who arranged for the child to be moved to the respite home. They based much of their testimony on what Ms. Bogan purportedly told them, which was in stark contrast to her credible testimony to the contrary.

50. The witnesses also waivered at times while testifying. For example, Ms. Giordano testified that Ms. Bogan called on July 12, 2017, to say that her husband and family were with her in Grenada, yet later testified that Ms. Bogan never mentioned her daughters on that call. When asked whether she recommended Dale's license be renewed with knowledge of this issue, Ms. Giordano said she does not write a recommendation because she has no say in that process. However, Ms. Giordano signed the 2017 application checklist and attested, "I have reviewed

this application licensure package and, based upon the information contained therein, recommend the issuance of a one year license." Ms. Giordano also testified that having an unscreened adult in the home is a violation even if Mr. Oliver or his daughters were there, yet testified many times that unscreened persons can be in the house for less than ten hours per month as long as a screened caregiver is also there.

51. Based on the weight of the credible evidence, the undersigned finds that Ms. John was in the house for less than ten hours and was never alone in the house with the child, as either Mr. Oliver or Ms. Oliver was there at all times.

Prior Administrative Fines - Count VI

52. In Count VI, APD alleged that Ms. Bogan willfully or intentionally misstated in the 2018 application that neither Dale's nor one of its controlling entities had ever been "the party responsible for a licensed facility receiving an administrative fine," even though Ms. Bogan served as the director of another facility that had received administrative fines. APD alleged a violation of rule 65G-2.007(20)(a).

53. In 2005, Ms. Bogan and Mr. Oliver incorporated Welcome Home Elite Kids, Inc. ("Kidz, Inc."), serving as its officers. That same year, Kidz, Inc., registered the fictitious name, Creative World School – New River ("Creative World"), which was a franchise business owned by Ms. Bogan.

54. Creative World, initially licensed in 2005, was a daycare with 29 employees and 172 children. Ms. Bogan was neither trained nor licensed as a director. Instead, she hired a director, Patricia Tiller, and an assistant director, who were trained, licensed, and responsible for operations. Ms. Tiller completed the school's license applications with the Department of Children and Families ("DCF").

55. In July 2017, Ms. Giordano reached out to DCF as to whether Creative World had previously been disciplined. She did this because Ms. Bogan mentioned owning a school in the past and having an unfavorable view of inspectors, so Ms. Giordano searched sunbiz.org for other entities owned by Ms. Bogan and found Kidz, Inc. DCF ultimately forwarded a set of documents, which included two administrative complaints against Creative World that resulted in the imposition of fines totaling $225.

56. The first complaint, issued in 2008, named Ms. Tiller, Director, Creative World, as respondent. The complaint sought to impose $50 in fines for two staff training violations. Ms. Bogan was neither named in nor served with the complaint. Creative World paid the fine on a check drafted on its petty cash account, but the signature is not legible.

57. The second complaint, issued in 2010, named Kidz, Inc., d/b/a Creative World, as respondent. The complaint alleged that Ms. Tiller was the director and sought to impose

$175 in fines for three violations. DCF served the complaint on Ms. Tiller. Ms. Bogan was neither named in nor served with the complaint. Creative World paid the fine on a check drafted on its petty cash account, but the signature again is not legible.

58. Ms. Bogan credibly explained that, if there was a prior fine, Ms. Tiller may have mentioned it to her but she did not recall anything specific. Ms. Tiller was the director, had access to the checks, and ran the business. It, thus, makes sense why DCF's documents referred to Ms. Tiller and not Ms. Bogan. And, given that the fines were over eight years old and totaled only $225, it is not surprising that Ms. Bogan did not recall them in 2018, even if she knew of them years before.

59. Ms. Bogan's testimony was largely unrebutted. None of APD's witnesses could credibly testify that Ms. Bogan knew about the fines, much less willfully or intentionally lied about them. They had no knowledge of her involvement in the business. APD never asked Ms. Bogan if she knew about the complaints or had her review them to jog her memory. It never asked any witness, including Ms. Giordano (who had testified to being familiar with Ms. Bogan's signature as it related to the 2017 and 2018 applications), if Ms. Bogan signed the checks. These answers could have shed light on Ms. Bogan's memory and veracity.

FINDINGS OF ULTIMATE FACT

60. It is well settled under Florida law that determining whether alleged misconduct violates a statute or rule is a question of ultimate fact to be decided by the trier-of-fact based on the weight of the evidence. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). Determining whether the alleged misconduct violates the law is a factual, not legal, inquiry.

61. APD has the burden to prove its allegations against Dale's by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Avalon's Assisted Living, LLC v. Ag. for Health Care Admin., 80 So. 3d 347, 348-49 (Fla. 1st DCA 2011) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)). As the Florida Supreme Court has stated:

> 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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

62. Count I - Based on the findings of fact above, APD failed to prove by clear and convincing evidence that Dale's violated rule 65G-2.007(18), by not "provid[ing] notification to the Regional office within two business days of receipt of a foreclosure notice involving the property." Though the notice of lis pendens was electronically filed on June 25, 2013, and the final foreclosure judgment was filed on January 3, 2018, APD presented no credible evidence as to when Ms. Bogan received the "foreclosure notice," which is the critical date triggering the obligation to notify APD under rule 65G-2.007(18).

63. Count II - Based on the findings of fact above, APD failed to prove by clear and convincing evidence that Dale's violated section 393.0655(1)(d), by not obtaining level two background screenings for two family members. The weight of the credible evidence established that the family members visited the home for no more than two weeks and, thus, were not "residing with a direct services provider," as required to prove a violation of section 393.0655(1)(d).

64. Count III - Based on the findings of fact above, APD failed to prove by clear and convincing evidence that Dale's violated rule 65G-2.007(20)(a). The weight of the credible evidence did not prove that Ms. Bogan lied about Dale's or her financial ability in the 2017 application or did so willfully or intentionally, much less that such a lie concerned "the health,

safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident" as required by rule 65G-2.007(20)(a).

65. Count IV - Based on the findings of fact above, APD failed to prove by clear and convincing evidence that Dale's violated rule 65G-2.008(2). Apart from the fact that APD failed to cite what provision of section 393.0655 or chapter 435 was violated, the weight of the credible evidence established that Ms. John visited the home for less than ten hours and was never alone in the house with the child without a screened caregiver.

66. Count V - Based on the findings of fact above, APD failed to prove by clear and convincing evidence that Dale's violated rule 65G-2.007(20)(a). The weight of the credible evidence does not prove that Ms. Bogan lied about Dale's or her financial ability in the 2018 application or did so willfully or intentionally, much less that such a lie concerned "the health, safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident," as required by rule 65G-2.007(20)(a).

67. Count V - Based on the findings of fact above, APD also failed to prove by clear and convincing evidence that Dale's violated section 393.067(6), by not furnishing satisfactory proof of financial ability in its 2018 application. APD's confusion as to this issue and the conflicting testimony as to whether and to what extent more documents were requested from Ms. Bogan make it impossible to find the evidence clear and

convincing. APD also failed to present credible evidence as to the level of proof that it would have deemed satisfactory or cite a statute or rule where such standards are articulated.

68. Count VI - Based on the findings of fact above, APD failed to prove by clear and convincing evidence that Dale's violated rule 65G-2.007(20)(a), by swearing that she had not been "the party responsible for a licensed facility receiving an administrative fine" in the 2018 application. The weight of the credible evidence did not prove that Ms. Bogan even knew about the prior fines or lied about them in the 2018 application, much less that such a lie concerned "the health, safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident," as required by rule 65G-2.007(20)(a).

CONCLUSIONS OF LAW

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

70. "Where a statute imposes sanctions and penalties in the nature of denial or revocation of a license to practice for violating its proscriptions, such a statute 'must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it.'" McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441, 444 (Fla. 5th DCA 2013) (citing Lester v. Dep't of Prof'l & Occ. Regs., 348 So. 2d 923, 925 (Fla. 1st DCA 1977)); accord Elmariah v. Dep't of Prof'l Reg.,

574 So. 2d 164, 165 (Fla. 1st DCA 1990) (holding that a statute imposing "sanctions or penalties" is "penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee"); see also Djokic v. Dep't of Bus. & Prof'l Reg., 875 So. 2d 693, 695 (Fla. 4th DCA 2004) (same).

Count I

71. APD alleged that Dale's committed a Class II violation by failing to notify it within two business days of receipt of the foreclosure notice, as required by rule 65G-2.007(18)(a).[8/]

72. Under rule 65G-2.007(18)(a), "[l]icensees must provide notification to the Regional office within two business days of receipt of a foreclosure notice involving the property at which the license is maintained." The failure to do so "shall constitute a Class II violation." Id. at 65G-2.007(18)(c).

73. Based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Dale's did not timely notify it within two business days of receipt of the notice of lis pendens or the foreclosure judgment. Although there is no dispute as to the dates on which the notice of lis pendens and foreclosure judgment were filed, the record contains no admissible evidence as to the date Ms. Bogan received the "foreclosure notice," which is the critical date triggering the obligation to notify APD as clearly expressed in the rule. Id. Harsh as that result may seem, APD's burden in this licensure

case is to prove a violation based on a strict construction of the language of the rule. Elmariah, 574 So. 2d at 165.

74. The undersigned rejects APD's argument that Dale's admitted to this violation. In her response to the Complaint, Ms. Bogan admitted to the alleged dates on which the pleadings were filed and the date on which she notified APD, and argued that any violation of rule 65G-2.007(18) was an unintentional oversight on her part. APD's counsel questioned her about this response, but she was confused and "guess[ed]" about whether she was admitting to the violations in this count——as opposed to the factual allegations. Based on a review of the record and the weight of the credible evidence, the undersigned finds that Ms. Bogan did not admit to the ultimate violation.

75. Even had APD sufficiently proved a Class II violation, revocation of Dale's license——the only relief sought by APD in its Complaint——would be improper. Section 393.0673 authorizes APD to revoke a license for failing to comply with chapter 393 or its own rules, but APD adopted a rule limiting such authority for Class II violations. Fla. Admin. Code R. 65G-2.0041(4). Although APD may revoke a license for a Class I violation or where four or more Class II violations occur in one year, it is constrained to impose only a fine of $500 per day for a single Class II violation. Id. Because APD failed to prove any other violation as detailed below, revocation for a single Class II

violation is precluded by its rules. See Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st DCA 1989) ("Under section 120.68(12)(b), if an agency's action is inconsistent with its rules, an appellate court must remand the case to the agency.").

76. Revocation is also not supported by the factors APD is required to consider when imposing a sanction. Fla. Admin. Code R. 65G-2.0041(2). The failure to timely notify APD about the foreclosure action did not result in any harm to the children or otherwise involve abuse, neglect, exploitation, or abandonment. Ms. Bogan credibly explained that she had lawyers handling the matter, which was an attempt to modify a bad mortgage. Despite not knowing about the notification requirement, Ms. Bogan nevertheless volunteered the information to Ms. Giordano during a monthly visit and ultimately succeeded in modifying the loan and avoiding foreclosure. The undersigned finds that these factors do not support revocation, even if that were a permissible sanction based on a single Class II violation.

Count II

77. APD alleged that Dale's failed to obtain level two background screening for two family members who resided in the home in July 2017, in violation of section 393.0611(1)(d).

78. Pursuant to section 393.0655(1)(d):

> (1) Minimum standards. — The agency shall require level 2 employment screening pursuant to chapter 435 for direct service

> providers who are unrelated to their clients, including support coordinators, and managers and supervisors of residential facilities or comprehensive transitional education programs licensed under this chapter and any other person, including volunteers, who provide care or services, who have access to a client's living areas, or who have access to a client's funds or personal property. Background screening shall include employment history checks as provided in s. 435.03(1) and local criminal records checks through local law enforcement agencies.
>
> * * *
>
> (d) Persons 12 years of age or older, including family members, residing with a direct services provider who provides services to clients in his or her own place of residence are subject to background screening; however, such persons who are 12 to 18 years of age shall be screened for delinquency records only.

Thus, although homes must conduct level two screenings for persons residing with a direct services provider, there is no such requirement for those merely visiting. Id.

79. Section 393.0655(1)(d) does not define "residing," but it has been defined as "to dwell permanently or continuously [or] occupy a place as one's legal domicile." Merriam-Webster Dictionary, available at https://www.merriam-webster.com/dictionary/reside (last visited Aug. 27, 2019). Residence is defined as "[t]he act or fact of living in a given place for some time." Black's Law Dictionary at 1310 (7th ed. 1999).

80. Based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Dale's violated this provision. The weight of the credible evidence established that the two relatives visited the home for one to two weeks and, thus, were never "residing" there. APD also failed to present evidence of the visitors' ages, even though the statute requires no screening for persons under 12 and only a search of delinquency records for those between 12 and 18. Id. Without such evidence, APD cannot prove Dale's violated the strict language of the statute. Elmariah, 574 So. 2d at 165.

81. It also cannot be ignored that APD's inspectors were unsure at the time if the visitors needed to be screened and had to confer with an agency lawyer. That the statutory requirement was unclear to APD's employees at the time buttresses the need to strictly construe this provision against APD. McCloskey, 115 So. 3d at 444; Elmariah, 574 So. 2d at 164. And, by the time APD finally determined what the statute required, the issue had been corrected as the visitors were gone.

82. The undersigned rejects APD's argument that Dale's admitted to this violation. APD's counsel questioned Ms. Bogan about whether her request for a one-time pardon in the response to the Complaint was "an admission to Count II," to which she said, "yes." However, the undersigned finds that the weight of the credible evidence established that Ms. Bogan did not intend

to admit to this violation, particularly where she maintained throughout that she did not violate the statute because her relatives were only visitors who were not residing in the home.

Count III

83. APD alleged that Ms. Bogan made willful or intentional misstatements about her financial ability in violation of rule 65G-2.007(20)(a), by signing the following attestation in the 2017 application despite the existence of a foreclosure action pending against her property:

> I hereby state that I have sufficient capital, income or credit to staff, equip, and operate this facility in accordance with Rule 65G-2 for sixty days without dependence on client fees or payments from the State of Florida.

84. Pursuant to rule 65G-2.007(20)(a):

> A licensee or applicant shall not make willful or intentional misstatements, orally or in writing, to intentionally mislead Agency staff, the Department of Children and Families, or law enforcement in the performance of their duties.
>
> (a) Willful or intentional misstatements, regarding the health, safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident shall be considered a Class I violation.

85. The terms "willfully" and "intentionally" are not defined in chapter 65G-2. However, willful is defined as "[v]oluntary and intentional, but not necessarily malicious."

Black's Law Dictionary at 1593. Intentional is defined as "[d]one with the aim of carrying out the act." Id. at 814.

86. Based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Ms. Bogan willfully or intentionally misstated that Dale's had sufficient capital, income, or credit to operate the home for 60 days without outside payments. APD presented no credible evidence as to Dale's financial circumstances in 2017, how the fact that a foreclosure action against Ms. Bogan's property (not owned by Dale's) meant the entity did not have sufficient resources to operate the home, or that she intended to lie (and did, in fact, lie) about Dale's ability to do so.

87. Although APD focused on Ms. Bogan's financial ability in the Complaint and at the hearing, the financial ability to which Ms. Bogan attested was that of Dale's, the applicant and licensee. Although the attestation in the application is drafted in the first person, Ms. Bogan signed on behalf of Dale's. The application elsewhere requires proof of financial ability "of the licensee" and notes APD's right to request more financial documentation from the "applicant." Requiring proof of financial ability of the "applicant" is also consistent with the statute. § 393.067(6), Fla. Stat.

88. Even if Ms. Bogan had been attesting to her own financial ability, the findings of fact and ultimate fact above

confirm that APD failed to meet its burden. As articulated in paragraph 86 above, APD failed to present credible evidence proving that Ms. Bogan lacked the requisite financial ability or intentionally or willfully lied about it in the application.

89. Nevertheless, even had APD sufficiently proved a willful or intentional lie, it failed to present any evidence that such a lie concerned "the health, safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident," as required by rule 65G-2.007(20)(a). APD cited that subdivision in the Complaint and must prove this violation based on the strict language thereof. McCloskey, 115 So. 3d at 444; Elmariah, 574 So. 2d at 165; Delk, 595 So. 2d at 967.

Count IV

90. APD alleged that Dale's committed a Class I violation when it failed to ensure that a substitute caregiver was background screened, as required by rule 65G-2.008(2).[9/]

91. Rule 65G-2.008(2) states that "[t]he licensee must comply with the screening requirements established in Section 393.0655, F.S. and Chapter 435, F.S. A violation of this subsection shall constitute a Class I violation."

92. Section 393.0655(1) requires level two background screening for persons who provide services, have access to a client's living areas, or have access to a client's funds or personal property. "A volunteer who assists on an intermittent

basis for less than 10 hours per month does not have to be screened if a person who meets the screening requirement of this section is always present and has the volunteer within his or her line of sight." Id. at § 393.0655(1)(a).

93. However, APD did not allege in the Complaint what minimum standard of section 393.0655 or chapter 435 was not followed, even though that is required before a violation of rule 65G-2.008(2) can be found. This failure is fatal to the alleged violation of rule 65G-2.008(2).

94. Regardless, based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Dale's violated rule 65G-2.008(2) or section 393.0655. The weight of the credible evidence showed that Ms. John visited the home for less than ten hours and was never alone in the house with the child without at least one properly screened caregiver present——Mr. Oliver, the first few hours, and Ms. Oliver, the remaining few hours. Even APD's inspector agreed that a visitor (which is how APD's witnesses characterized Ms. John) need not be screened if they stay in the house for less than ten hours per month and are never left alone with the children in the house without a properly screened worker.

Count V

95. APD alleged that Ms. Bogan made willful or intentional misstatements in violation of rule 65G-2.007(20)(a), by

attesting to her financial ability in the 2018 application despite the existence of a pending bankruptcy action and requesting to pay the filing fee in installments.

96. Based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Ms. Bogan willfully or intentionally misstated Dale's financial ability. APD presented no evidence as to Dale's finances in 2018, how the fact that Ms. Bogan filed for personal bankruptcy had any bearing on whether Dale's had sufficient resources to operate the home, or that she intended to lie (and did, in fact, lie) about Dale's ability to do so. As noted above, the financial ability to which Ms. Bogan attested was that of Dale's, not herself. § 393.067(6), Fla. Stat.

97. Even had Ms. Bogan been attesting to her own financial ability, APD failed to meet its burden based on the findings of fact and ultimate fact above. As articulated in paragraph 96 above, APD failed to present credible evidence establishing that Ms. Bogan lacked the requisite financial ability or willfully or intentionally lied about it in the application. This is especially so where Ms. Bogan employed the bankruptcy proceeding as a tool to stop the foreclosure sale, successfully negotiated a modified mortgage, and operated Dale's throughout 2018 without full payment for room and board and other services provided.

98. Moreover, even had APD proved that Ms. Bogan willfully or intentionally lied about her financial ability in the 2018 application, it failed to present any evidence that such a misstatement concerned "the health, safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident." Fla. Admin. Code R. 65G-2.007(20)(a). Again, APD cited that subdivision in its Complaint and is obligated to prove that violation based on the strict language thereof. Elmariah, 574 So. 2d at 164; Delk, 595 So. 2d at 967.

99. APD also alleged that Dale's failed to furnish sufficient proof of its financial ability with its 2018 application, in violation of section 393.067(6).

100. Pursuant to section 393.067(6), an "applicant shall furnish satisfactory proof of financial ability to operate and conduct the facility or program in accordance with the requirements of this chapter and adopted rules."

101. Based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Dale's violated section 393.067(6). APD's confusion as to this issue, along with the conflicting testimony as to whether and to what extent more documentation was requested from Ms. Bogan, make it impossible to find the evidence clear or convincing.

102. The statute also does not define "satisfactory proof of financial ability" or express what form or level of proof

would be deemed "satisfactory." Although the application requires sufficient capital to operate without outside payment for 60 days, APD failed to identify and the undersigned could not find any statutory provisions or rules setting forth a standard for how APD evaluates this requirement——not only as to the type and amount of resources, but also the level of proof. That alone undermines APD's ability to prove the violation given the undersigned's duty to strictly construe the provision in favor of Dale's. McCloskey, 115 So. 3d at 444; Elmariah, 574 So. 2d at 164. And, given the lack of a definitive standard that puts regulated entities on notice, it was unfair and arbitrary for APD not to ask for clarification or more documentation once it deemed the bank statement insufficient. See Breesmen v. Dep't of Prof'l Reg., 567 So. 2d 469, 471 (Fla. 1st DCA 1990) ("Basic due process requires that a professional or business license not be suspended or revoked without adequate notice to the licensee of the standard of conduct to which he or she must adhere.").

103. Moreover, APD failed to prove that Ms. Bogan's proof was unsatisfactory. The budget alone should have been enough (as in years past), given that the foreclosure and bankruptcy were not indicative of a lack of financial ability as the findings above reflect. The bank statement with $10,000 also should have been enough, given that Ms. Bogan's initial

application in 2012 was approved with just $7,500 of capital. And, regardless, the evidence showed that Ms. Bogan operated Dale's throughout 2018——even without full payment for room and board and Medicaid reimbursement——which proves she had the ability to do so despite the foreclosure and bankruptcy cases.

Count VI

104. APD alleged that Ms. Bogan willfully or intentionally misstated in the 2018 application that neither Dale's nor one of its controlling entities had ever been "the party responsible for a licensed facility receiving an administrative fine," even though another facility of which Ms. Bogan served as the director had received a $50 administrative fine in 2008 and a $175 administrative fine in 2011. APD alleged a violation of rule 65G-2.007(20)(a).

105. Based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Ms. Bogan willfully or intentionally lied about the prior fines at Creative World. The weight of the credible evidence showed that Ms. Bogan, though the franchise owner and a controlling entity, did not recall the two fines and, thus, did not lie about them on the application. Ms. Bogan's failure to recall the fines is not surprising either, as Ms. Tiller was the school's director and operator who was served with and named in

the complaints, and the two fines, totaling only $225, were paid over eight years before.

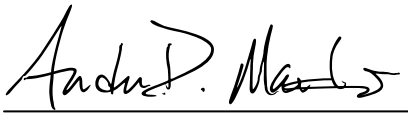
106. Moreover, the statement in the application referred to "the party responsible for a licensed facility receiving an administrative fine." Contrary to APD's contention, this suggests to the undersigned that the question related to the actual person in charge of facility operations, whose conduct caused the facility to receive the fine. Yet, here, the evidence is undisputed that Ms. Bogan was not the director, she was not involved in the operations, and it was not her conduct that caused Creative World to be fined. APD also never questioned Ms. Bogan about her understanding of the question, which is critical to proving that she willfully or intentionally lied in answering it.

107. Even had APD proved that Ms. Bogan willfully or intentionally lied, it failed to present any evidence that such a misstatement concerned "the health, safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident." Fla. Admin. Code R. 65G-2.007(20)(a). Again, APD cited that subdivision in the Complaint and is obligated to prove that violation based on the strict language thereof. Elmariah, 574 So. 2d at 164; Delk, 595 So. 2d at 967.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities issue a final order dismissing the Administrative Complaint against Dale's Foster Home.

DONE AND ENTERED this 30th day of August, 2019, in Tallahassee, Leon County, Florida.



ANDREW D. MANKO
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2019.

ENDNOTES

[1/] All statutory references are to Florida Statutes (2019) because there have been no material changes to the substantive laws and rules charged from the versions in effect when the acts occurred. The current versions are cited for ease of reference.

[2/] Respondent's Exhibit 2 contains pleadings filed in Case No. 8:18-bk-01586-MGW, a chapter 13 bankruptcy case filed by Ms. Bogan as debtor in the U.S. Bankruptcy Court for the Middle District of Florida. APD moved for official recognition of the record in that case and the undersigned granted that request at the final hearing.

[3/] To maintain the confidentiality of these minor children, the undersigned refers to them by initials only.

[4/] Prior to the first hearing date, Dale's filed a motion to reinstate payment under its Medicaid waiver agreement with APD. The motion noted that APD cancelled Dale's contract, that Dale's had been providing services to the APD client without reimbursement, and that payment should be reinstated during the pendency of the proceedings because APD had allowed its client to remain in the facility. In attached correspondence, APD's counsel informed Dale's that the contractual issue was separate from the licensing issue pending at DOAH.

At the beginning of the hearing, this motion was addressed. Counsel for APD acknowledged that the agency contracted with facilities to pay them under Medicaid for services provided and that the contracts allowed either party to terminate with notice. Counsel maintained that the undersigned lacked jurisdiction to rule on or hear evidence about contract issues like this based on Diaz v. Agency for Health Care Administration, 65 So. 3d 78 (Fla. 3d DCA 2011). The undersigned asked whether this license revocation proceeding is what caused the contract to be cancelled and counsel for APD said, "I don't know that for a fact." But the undersigned acknowledged that the case pending before him related solely to the Complaint and the allegations therein. Dale's qualified representative argued that, even if jurisdiction was lacking, the issue was critical because APD has continued to license Dale's during the pendency of the case, left its client in the home where Dale's is providing the services, and cut off payment for those services as a punishment. The undersigned informed the parties that he would take the issue under advisement and would address it in his recommended order, but that Dale's would be permitted to present evidence on that issue.

Dale's questioned Ms. Leitold, APD's witness, about the Medicaid waiver issue. Counsel for APD repeatedly objected to this line of questioning as irrelevant and beyond the jurisdictional scope of the proceedings. Dale's contended that such evidence was relevant to refute Counts I, III, and V, because it showed Dale's financial ability to operate the facility even without Medicaid reimbursement. The undersigned overruled the objections based on his prior pronouncement.

On December 7, 2018, the undersigned held a teleconference to discuss the continuation of the final hearing, at which Dale's again raised the Medicaid waiver issue because it was still not receiving reimbursement for services provided. Counsel for APD maintained that APD did not have authority over the Medicaid payments and had little to nothing to do with it,

as it was a contractual issue between Dale's and the Agency for Health Care Administration ("AHCA"). He agreed, however, that AHCA's contract with Dale's was likely cancelled as a result of this license revocation proceeding.

The undersigned agreed with APD's argument that he lacked jurisdiction to order reinstatement of the payment, as it was beyond the scope of the Complaint and apparently related to an agency that was not a party to the case. But, the undersigned stressed his concern over the issue and encouraged the parties to resolve it to protect the welfare of the child, as that was APD's primary reason for seeking to revoke Dale's license.

After the teleconference, both parties moved to disqualify the other's counsel/representative. APD moved to disqualify Dale's qualified representative on grounds that she violated Florida Administrative Code Rule 28-106.107(3)(f) by communicating with Mr. Smith about the Medicaid waiver issue. The undersigned denied that motion in a detailed order on December 19, 2018, on grounds that: (1) the communication was permissible under rule 28-106.107(3)(f), which only precluded communications about matters within the scope of the proceeding, particularly where APD had consistently maintained that this issue was irrelevant and that the undersigned lacked jurisdiction to resolve it——a point the undersigned definitively agreed with at the teleconference held on December 7, 2018; and, regardless, (2) Rule Regulating the Florida Bar 4-4.2 and the comments thereto made clear that communications between lawyers and government officials are permissible even about a matter at issue in a controversy.

Notwithstanding that ruling, APD's counsel apparently continued to refuse to allow Mr. Smith to speak with Dale's qualified representative or Ms. Bogan about the Medicaid issue. As such, Dale's moved to disqualify APD's counsel for violating rule 28-106.107 and breaching his duty of candor to the tribunal. Dale's also filed a motion seeking clarification as to how it can reinstate the payments when APD is refusing to discuss the issue with them. Because the Medicaid waiver issue is beyond the scope of the proceedings, the undersigned now denies Dale's pending motions to reinstate the Medicaid waiver payments and the motion for clarification relating thereto.

On December 21, 2018, a teleconference was held on the motion to disqualify APD's counsel. APD's counsel maintained that the agency's position was that its employees are not permitted to communicate directly with lawyers or qualified

representatives about any issues when there is pending litigation, notwithstanding the Bar rules. When the undersigned asked why he would preclude such communications even after the undersigned had just issued an order expressly concluding that such discussions should be permitted, APD's counsel maintained that the order solely denied a motion to disqualify and that the reasoning did not preclude him from continuing to forbid the communications. The undersigned expressed his concern about whether APD's counsel breached his duty of candor to the tribunal and whether he had violated at the least the spirit of the prior order, but reserved ruling on the issue until he had a chance to review the transcript. The undersigned also permitted Dale's to present the testimony of Mr. Smith at the continuation of the final hearing on any issues relevant to the Complaint or the pending motion to disqualify.

The continuation of the hearing occurred on March 20, 2019. Mr. Smith testified that he ultimately spoke to Ms. Bogan and exchanged e-mails with her about room and board payments and briefly about how she could re-apply for the Medicaid waiver contract. Mr. Smith confirmed he would be permitted to speak to Ms. Bogan or her representative about that issue.

After review of the entire record in the case, including the transcript and the relevant pleadings, the undersigned concludes that disqualification of APD's counsel is not justified under these facts. Importantly, however, APD's counsel is cautioned that his conduct——particularly after the undersigned ruled that such communications were permissible——treaded close to the ethical line and that similar conduct in the future could result in disqualification, referral to the Bar, or other sanctions deemed appropriate based on the circumstances.

[5/] APD failed to ask Ms. Bogan questions about when she was served with the lis pendens or when she actually received it. It also failed to introduce evidence of proof of service or receipt. Indeed, the lis pendens notes the electronic filing and recording dates, but does not include a certificate of service. APD also withdrew its motion for official recognition of the foreclosure case as moot, as the purpose of the motion was to obtain admission of three foreclosure pleadings——the notice of lis pendens, the foreclosure judgment, and the suggestion of bankruptcy——and those pleadings had already been admitted in evidence. As noted in endnote 2, the undersigned granted APD's renewed motion for official recognition, but only as to the bankruptcy case. Thus, the entire record in the

foreclosure case was not in evidence. As such, the undersigned did not consider Ms. Bogan's purported response to the lis pendens, attached as Exhibit A to APD's PRO, which was neither introduced by APD nor admitted in evidence at the hearing.

[6/] The following summarizes the confusion that APD's counsel and its witness had about this issue. APD filed two exhibits in the record relating to the 2018 application. Petitioner's Exhibit 2 contains portions of the 2018 application, including a budget projecting $50,000 in revenue and an attestation as to financial ability signed by Ms. Bogan on March 20, 2018. Petitioner's Exhibit 17 contains three pages, including a budget projecting $120,000 in revenue, an attestation signed by Ms. Bogan on June 2, 2018, and a copy of a bank statement for Justine Oliver, payable on death to Ms. Bogan, with a balance of $10,050.

Ms. Leitold testified initially that the 2018 application lacked sufficient proof of financial ability and that Ms. Bogan never produced bank statements. She "believe[d]" she asked Dale's to provide those documents. However, when Dale's asked her about a bank statement that Ms. Bogan had submitted, which Ms. Leitold agreed she had received, APD objected and argued that this testimony was irrelevant because the count was solely based on the alleged misstatements about financial ability in the 2018 application. Unbeknownst to the undersigned at that time, this was incorrect as APD had also alleged that Dale's failed to furnish satisfactory proof.

Ms. Bogan thereafter testified that she submitted a bank statement with the 2018 application, showing a balance of about $10,000, and that APD never informed her that it was insufficient. At that point, the undersigned identified the additional allegation in the Complaint and a discussion ensued. Ms. Leitold testified——contrary to what she said earlier that day——that Ms. Bogan had in fact submitted a bank statement. Then, moments later, Ms. Leitold said she had been confused. She now believed that the statement Ms. Bogan submitted was to support an application for a new facility and that she e-mailed Ms. Bogan to inform her that the statement was insufficient, though no such e-mail was offered or admitted in evidence. Ms. Leitold based this belief on the fact that Petitioner's Exhibit 2 comprised Dale's complete 2018 application and, given that the statement was omitted from that exhibit, it must not have been submitted to support the 2018 application.

On the second day of the hearing, Ms. Leitold now believed she had requested financial documentation from Ms. Bogan to

support the 2018 application, though she could not recall how she requested it or what exactly she requested. But, she believed Ms. Bogan submitted the statement in response to that request. Ms. Leitold also testified that Petitioner's Exhibit 2 was not the complete application, contrary to what she said earlier.

The undersigned does not intend to besmirch APD's counsel or its witness with these details. However, the fact that there was substantial confusion must be considered in evaluating the weight of the evidence and whether APD met its burden.

[7/] APD's testimony on this issue was not as credible as that of Ms. Bogan. For one, neither witness had actual knowledge about the visitors, when they came, or how long they stayed. Further, both witnesses offered conflicting testimony as to the background screening requirements. Ms. Giordano testified that anyone staying at a home for more than ten hours per month was required to be background screened. However, the only provision in section 393.0655 that discusses a minimum hour requirement is subsection (1)(a) and that provision only applies to volunteers, which undisputedly does not apply here. Ms. Giordano also testified that she told Ms. Bogan every time she saw a visitor in the home about the ten-hour rule, including when she encountered the two relatives. Yet, at the same time, she admitted being unsure about the requirements for the relatives on the day she encountered them, so she asked Ms. Leitold.

Ms. Leitold testified that visitors from outside the country should not be staying in the licensed home if a level two background screening cannot be done, relying on sections 435.03 and 435.04, Florida Statutes. Yet, she admitted that those provisions do not explicitly refer to visitors. In truth, both sections require background screenings for employees, not visitors like the relatives at issue here.

[8/] The undersigned rejects APD's belated attempt to argue in its PRO that Dale's committed a Class II violation under rule 65G-2.007(18)(b), as it failed to allege a violation of that subdivision in its Complaint. See Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992) (holding that due process means that "the proof at trial or hearing be that conduct charged in the accusatorial document"). Regardless, subdivision (b) concerns receipt of a "Notice of Eviction" and the record is devoid of evidence that such a notice was served on Ms. Bogan, which is not surprising since the property was never sold at auction.

[9/] In its Complaint, APD also alleged that Dale's violated: (1) rule 65G-2.011(3), by failing to have at least one back-up direct care staff with level two background screening staying with the child; and (2) rule 65G-2.007(20)(a), by making willful or intentional misstatements to APD staff about the screening performed on the substitute caregiver. APD abandoned those alleged violations by omitting any reference or proposed findings about them in its PRO.

Even if they had been preserved, APD failed to meet its burden as to each violation. As to rule 65G-2.011(3), that provision requires facilities with live-in caregivers to have at "at least one back-up direct care staff, who has undergone a successful background screening in accordance with Section 393.0655, F.S. and Chapter 435, F.S., that would be willing and able to render services to residents in the event that neither of the live-in caregivers are able to do so." However, based on the findings of fact and ultimate fact above, APD failed to prove by clear and convincing evidence that Dale's violated this rule. The weight of the credible evidence established that Ms. Bogan's 21-year-old daughter, who was in the home the entire time that Ms. John was there, had all of the requisite background and medical screenings to act as the substitute caregiver. Indeed, Ms. Giordano conceded that Ms. Oliver may have had sufficient screening, though she did not recall.

As to rule 65G-2.007(20)(a), APD failed to prove by clear and convincing evidence that Ms. Bogan made willful or intentional misstatements to APD staff about the screening performed on the substitute caregiver. The weight of the credible evidence does not establish that Ms. Bogan lied to APD staff about the background issue, much less that she did so intentionally or willfully, as required by the rule. Id.

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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.