STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 19-1113

J AND A JOYFUL HEARTS ACADEMY, INC.,

Respondent.
_____/

RECOMMENDED ORDER

On May 2, 2019, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings conducted a hearing pursuant to section 120.57(1), Florida Statutes, in Titusville, Florida.

APPEARANCES

For Petitioner: Brian Christopher Meola, Esquire
Department of Children and Families
Suite S-1129
400 West Robinson Street
Orlando, Florida 32801

For Respondent: Jenail Martin, pro se
J & A Joyful Hearts Academy
410 South Park Avenue
Titusville, Florida 32780

STATEMENT OF THE ISSUE

Whether Respondent, J & A Joyful Hearts Academy (Joyful Hearts), violated Florida Administrative Code Rule 65C-

22.010(e)1., resulting in the Class I and Class II violations alleged in the Administrative Complaint.

PRELIMINARY STATEMENT

On January 22, 2019, Petitioner, Department of Children and Families (the Department or DCF), filed an Administrative Complaint Revoking Facility's License & Imposing Fine against Joyful Hearts, seeking to revoke Joyful Hearts' license and to impose a $5,100 fine. On February 15, 2019, Joyful Hearts filed a response that disputed the allegations in the Administrative Complaint and requested an administrative hearing under section 120.57(1). DCF referred the case to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was noticed for a hearing to commence on May 2, 2019. Given that Respondent was proceeding without the benefit of counsel, a telephone prehearing conference was conducted on April 18, 2019, in order to explain the process that would take place at hearing.

The hearing commenced as noticed on May 2, 2019, and concluded the same day. The proceedings were recorded but not transcribed. At hearing, the Department presented the testimony of Detective Lauren Watson of the Titusville Police Department; Shoshana Amores, a senior case coordinator for the child protection team (CPT) in Brevard County; Barbara Smith, a child

protection investigator for the Department; Laura Hair, a former employee at Joyful Hearts; and Tiffani Brown, a Department family services coordinator. The Department offered Petitioner's Exhibits numbered 1 through 17 for admission into evidence: Exhibits 1 through 14 were admitted, and Exhibit 17 was rejected. Respondent testified on her own behalf and presented the testimony of Laura Hair, Willie Mae Hair, Dawn Lazzaroni, Tanisha Whitehead, Angela McCray, and Wanda Taylor. Respondent's Exhibits 5, 7, 8, and 10 were also admitted into evidence.

Petitioner's Exhibits 15 and 16 are the Forensic Interview Report of J.M. and the CPT interview, respectively. Pursuant to the provisions of section 39.202(6), Florida Statutes, counsel for the Department had provided notice that he would be seeking to use the report and the interview, but had not provided a copy of the report to Respondent prior to hearing, because he needed to obtain an order allowing the release of the exhibits. The Department was ordered at hearing to provide a copy to Ms. Martin, with the caveat that she could not share it with anyone. Petitioner's Exhibit 15 was also not in the exhibits provided to the administrative law judge the day of hearing. Given that Respondent needed the opportunity to carefully review Petitioner's Exhibit 15 before determining whether she had an objection to it, the Department was directed to file the exhibit

with the Division within five days, after which Respondent was afforded five days in which to file an objection.

Department's Exhibit 15 was filed with the Division on May 10, 2019.[1/] On May 14, 2019, Respondent filed a letter with the Division. While the letter included information that was not presented at hearing, and will not be considered in this Recommended Order, it did not state an objection to the admission of Petitioner's Exhibits 15 and 16. Accordingly, on May 20, 2019, a Scheduling Order was issued advising the parties that Petitioner's Exhibits 15 and 16 were admitted into evidence, and that the deadline for filing proposed recommended orders was May 30, 2019. The Department timely filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order. All statutes are the current codification.

FINDINGS OF FACT

1. Joyful Hearts is a licensed daycare facility in Titusville, Florida. Jenail Martin is the director of the daycare, which has been open for approximately four years. Prior to the incidents giving rise to this case, Joyful Hearts had no disciplinary history with respect to its licensure.

2. The Department is the state agency charged with the licensing and regulation of child care centers in the State of Florida.

December 3, 2018

3. At approximately 6:00 a.m., on December 3, 2018, the Department received a report from the Florida Abuse Hotline, indicating that Jenail Martin struck M.H.[2/] in the mouth with a spatula while M.H. was at Joyful Hearts. The reporting parent also indicated that a second child, J.M., was also hit by Ms. Martin with a spatula.

4. M.H. was not at the daycare when the investigators went to Joyful Hearts, so they located him at his home. M.H. had a tiny cut on the side of his lip, as well as a pea-sized bruise. Barbara Smith interviewed M.H. as well as his mother, and based on statements he made about abuse toward other children, she interviewed a sampling of other children at Joyful Hearts.

5. After interviewing M.H. and his mother, Tiffani Brown and Barbara Smith went to Joyful Hearts. For at least part of the day, they were accompanied by Lauren Watson, a detective with the Titusville Police Department. Detective Watson was present because the Titusville Police Department also received a complaint with respect to M.H.

6. Upon arrival at Joyful Hearts, Ms. Brown and Ms. Smith spoke with Ms. Martin, who denied the charges against her. She claimed that M.H.'s mother was out to get her, and that M.H. and his friend were too busy bullying other children to fight each other.

7. Ms. Smith and Ms. Brown interviewed some of the children present at the daycare, in order to see if M.H.'s injury was isolated or part of a pattern. Detective Watson was present during these interviews. Several of the children indicated that they were hit with a black shoe, a flip flop, or a belt, and that two of the children had been hit with a spatula.[3/] All of the children indicated that J.M. got the brunt of the physical punishment.

8. Ms. Martin was interviewed by Ms. Brown, Ms. Smith, and Detective Watson, and was wearing flip flops. She admitted having a belt and shoe that she kept in the kitchen, but denied hitting the children with them at Joyful Hearts. She stated that she would threaten the children with the belt and shoe, to keep them in line. She also stated that she sometimes kept J.M. in her home and claimed that she had permission from his grandmother to "pop" him when necessary, and did spank J.M., but that she only did so when keeping him at her home.

9. Ms. Brown, however, testified that when she interviewed J.M.'s grandmother, the grandmother denied ever giving Ms. Martin permission to use corporal punishment with J.M. J.M.'s grandmother did not testify, and the conflicting statements by Ms. Martin and Ms. Brown regarding J.M.'s grandmother's position are hearsay. There is no competent evidence to demonstrate whether Ms. Martin did or did not have

permission to use corporal punishment on J.M., and no finding is made either way. Even assuming that Ms. Martin in fact had permission, use of corporal punishment at the daycare would still be a violation of section 402.305(12)(a)3., Florida Statutes, and Department rules.

10. Shoshana Amores, a senior case coordinator for the CPT team in Brevard County, also interviewed M.H. and J.M. Ms. Amores has been trained to conduct interviews with children in order to ellicit details about what children have seen and experienced. The interviews are designed to establish a rapport with small children, and Ms. Amores generally spends some time determining whether the children are able to tell the truth, and to explain the rules. The questions Ms. Amores asked M.H. and J.M. were not leading or suggestive, and did not present as judgmental. The interviews were recorded in both audio and video form. Only the interview with J.M. is included in the record in this case.

11. While the Department offered the video of J.M.'s interview as an exhibit in this case, it offered no evidence regarding J.M.'s availability to testify at hearing, and no evidence that requiring him to do so would result in a substantial likelihood of severe emotional or mental harm.

12. Ms. Amores observed that M.H. had a small injury by his mouth. She reported that he was also examined medically,

but it could not be determined whether the injury occurred as a result of being hit by a spatula or whether it was a result of M.H.'s fight with J.M.

13. Based upon her interviews of the children, and the other evidence reviewed, Ms. Amores recommended that the staff at Joyful Hearts be retrained, and made a verified finding of abuse by history, in the absence of any observed injury to J.M. With respect to M.H., she also made a verified finding of abuse by history.

14. Ms. Brown advised Ms. Martin to stay away from the daycare until the investigation was completed. This directive was not in written form; she was simply advised that Department staff would call her when the investigation was complete.

15. As a result of the December 3, 2018, visit to the daycare, Joyful Hearts was issued an Inspection Checklist that indicated noncompliance with section 2.8B of the CCF Handbook related to child discipline (section 9, number 4), a Class II violation; and use of corporal punishment at the daycare, in violation of section 2.8A (section 9, number 2) of the CCF Handbook, a Class I violation. The same conduct was also the basis for a finding of a Class I violation by Department staff by the commission of an act that meets the definition of child abuse or neglect provided in chapter 39 or 827, Florida Statutes.

16. Detective Watson also presented a capias to the State Attorney's Office for child abuse. However, the State Attorney's Office elected not to file charges.

17. Ms. Martin acknowledged that she was advised to stay away, but that she did not. She testified that when she did not hear from Ms. Brown, she assumed it was all right for her to return to the daycare, and did so. Ms. Martin's belief, while perhaps sincere, makes no sense in light of the directive to stay away until she was called and told it was okay to return.

January 4, 2019

18. Ms. Brown and Ms. Smith returned to Joyful Hearts on January 4, 2019, and found Ms. Martin working. At that time, they issued her a "restriction letter," advising her that she could not be on the premises of the daycare until the investigation was complete.[4/] According to Ms. Brown, the letter restricted Ms. Martin from being at the facility during working hours. While by her own admission, Ms. Martin spent time at Joyful Hearts before and after business hours after issuance of the restriction letter, there is no persuasive evidence that she was thereafter present at Joyful Hearts during working hours.

19. When Ms. Brown visited the facility that day, Belle Lewis was working there and appeared to be in charge. Ms. Brown had received telephone calls stating that a man named Timothy Watkins was working at the daycare, so she asked Ms. Lewis

whether he had been working there. Mr. Watkins has an extensive criminal history that would prevent him from working with children. While Ms. Brown testified that Ms. Lewis told her that Mr. Watkins had been at the facility picking up trash, Ms. Lewis did not testify, and her statement to Ms. Brown is hearsay. No testimony was offered that Ms. Brown or any of the other Department staff saw Mr. Watkins there, much less saw him working with any children at Joyful Hearts.

20. Moreover, no evidence was presented that Mr. Watkins was actually an employee of Joyful Hearts. Ms. Martin testified credibly that he was an employee of a vendor that she used for maintenance. Her testimony was corroborated by other witnesses at hearing.

21. When Ms. Brown arrived at Joyful Hearts on January 4, 2019, there were three children on the playground on Joyful Hearts' property. These three children were unattended. The evidence was not clear and convincing, however, that these three children were children for whom Joyful Hearts had any responsibility. While Ms. Brown testified that Ms. McCray claimed they were her grandchildren, Ms. Brown's notes in Petitioner's Exhibit 5 indicate that Ms. Lewis, as opposed to Ms. McCray, stated that the three children were her grandchildren, dropped off by her niece. Moreover, Ms. McCray denied having any grandchildren. In any event, the evidence as

a whole suggested that these children were school-aged children as opposed to children attending the daycare, and would not be part of the ratios the daycare was required to maintain.

22. There were, however, other problems at Joyful Hearts. The people present and working with the children on January 4, 2019, were Ms. Lewis and Ms. Angela McCray, as well as Ms. Martin before she was asked to leave. Ms. Brown asked Ms. McCray if she had been screened and she indicated that she had. Ms. Brown could not find any evidence that Ms. McCray had been screened at the facility, and asked her what she did to get screened. Ms. McCray responded that she "took a pee test (as opposed to being fingerprinted)." After checking Department records, Ms. Brown asked Ms. McCray to leave the daycare because she had not been screened. Laura Hair, a former employee who would substitute when needed, came in to replace Ms. McCray.

23. At hearing, Ms. McCray claimed that she did not believe she needed to be screened, because she was a "board member" for Joyful Hearts. She also testified that she was quite experienced in the daycare area, having owned a daycare in the past. At the time of hearing, she stated that she had since been screened. When asked if she was eligible to work, she stated that she had "something" from 22 years ago, but her "clearance was in the works."

24. Ms. McCray's claim that she did not know she needed to pass a background screening in order to work with children is not credible. Moreover, Ms. Martin acknowledged that Ms. McCray had not been screened when Ms. Martin asked her to come and help out at the daycare, but claimed that there were extenuating circumstances. It is found that Ms. McCray had not undergone background screening and that Ms. Martin asked her to work with children knowing that she had not undergone screening.

25. Even assuming that both teachers present were properly screened, Joyful Hearts did not have the proper ratio when Ms. Brown visited on January 4, 2019. At the time she was there, there were 11 children in one room, and one of those children was an infant. The age of the other children is unknown. When there is an infant present, the appropriate ratio is one adult for four children, even if there is only one infant, requiring at least two properly screened employees to be present to meet ratio. As is discussed below, Ms. Lewis was not eligible to work with children.

January 11, 2019

26. DCF's concerns that Ms. Martin was not complying with the restriction letter continued. Her car was seen at Joyful Hearts during the day, so on January 11, 2019, Ms. Brown returned early in the morning before Joyful Hearts opened and parked across the street from the daycare to see if Ms. Martin

was there. Ms. Brown saw Ms. Martin's car and there were lights on at the facility, but she did not see Ms. Martin. Within the hour, Belle Lewis came and knocked on the door, and someone let her inside. Ms. Brown did not see who.

27. At approximately 7:00 a.m., children started coming to the daycare. Among the children present was a child brought by someone who at that point was identified as "Annie Pittman." She went inside with the child, and after a while came outside with Belle Lewis to Ms. Lewis's car. Both women coming out of the building meant that, to the best of Ms. Brown's knowledge, there were no adults left in the daycare to supervise the children inside.

28. Ms. Brown confronted Ms. Lewis and the woman she believed to be Annie Pittman. "Ms. Pittman," who Ms. Brown believed to be a parent, just smiled and walked across the street.

29. At around 9:10 a.m., Ms. Brown went into Joyful Hearts and checked worker/child ratios. At that time, "Ms. Pittman" was in the infant room with one infant. Ms. Brown asked "Ms. Pittman" if she had gone through background screening and was told that "Ms. Pittman" had been screened in Rockledge. The office door for the facility was locked, and records to substantiate background screening could not be located.

30. When Ms. Brown checked ratios, there were eight children of mixed ages with two teachers, including Ms. Lewis. When Ms. Brown asked Ms. Lewis who was with the children when she went outside with "Ms. Pittman," Ms. Lewis said she left the children inside so that she could give "Ms. Pittman" some money to buy hotdogs to feed the children. When asked if there were any other adults, Ms. Lewis acknowledged that she was alone.

31. Leaving the children unsupervised meant that there were ratio violations, with no adults for three children.

32. After the visit on January 11, 2019, Ms. Brown checked on the background screening for Belle Lewis. She discovered that Ms. Lewis had gone through background screening on May 31, 2018, but was declared ineligible on June 5, 2018, because she had multiple drug offenses from 1993 through 1995 that disqualified her from working in positions of trust. Ms. Lewis was notified that she was ineligible on June 5, 2018, and advised of the process to seek an exemption from disqualification. She applied for an exemption, but was advised by letter dated November 2, 2018, that she was ineligible because court records indicated that she still had outstanding fees due.

January 14, 2019

33. In light of the discovery that Ms. Lewis was ineligible to work with children, Ms. Brown and Ms. Smith,

accompanied by a police officer from the Titusville Police Department, returned to Joyful Hearts on Monday, January 14, 2019, for what had to be one of the most memorable and bizarre days in their careers.

34. The trio arrived at Joyful Hearts at approximately 8:15 a.m., and they were met by "Annie Pittman," who was reluctant to let them in the building.

35. "Ms. Pittman" was asked if she was teaching, and she responded that she was. She was also identified as an employee of Joyful Hearts by another employee, Willa Mae Hair. "Ms. Pittman" was also asked if she was background-screened as of January 11, 2019, and she stated that she was, but would not give her date of birth.

36. The woman identified as Annie Pittman was a young woman in her twenties. The only person in DCF's system with that name that had been screened was born in 1970.

37. After being confronted with this information and having some discussion with the police officer, "Annie Pittman" admitted that her name was actually Mercedes Daughtry. On February 20, 2017, Ms. Daughtry pled nolo contendere to the third-degree felony of organized fraud to obtain property less than $20,000, in violation of section 817.034(4)(a)3., Florida Statutes, in the Eighteenth Judicial Circuit, in and for Brevard County. Ms. Daughtry was sentenced to 60 months of probation.

This offense disqualifies her from working at a daycare. Upon discovery of her criminal history, Ms. Daughtry was asked to leave the facility.

38. DCF staff also confronted Ms. Lewis, who acknowledged that she knew she was disqualified from working with children. DCF staff advised her that she could not stay at Joyful Hearts. Ms. Lewis called Ms. Martin to notify her that she had to leave.

39. With both Ms. Lewis and Ms. Daughtry gone, no staff employed by Joyful Hearts was present to take care of the children at the facility. Ms. Brown advised Ms. Martin by telephone that she needed to call the parents and ask them to pick up the children, as there was no one to care for them. Ms. Martin said that she had someone coming in at 9:00 a.m. Ms. Brown reminded her that she would still be out of ratio, given the number of children present. Ms. Martin said she had someone coming in the afternoon as well, but even if true, that would not address the immediate problem of insufficient staff.

40. At 9:00 a.m., Willa Mae Hair came to Joyful Hearts to work in the baby room.[5/] She sat down until several of the parents had picked up their children. When there were only three children left, Ms. Hair stated that she was leaving, and she would take one of the children with her, leaving the DCF staff with the other two. Ms. Brown would not allow her to take the child, because Joyful Hearts is not a transporting facility,

and she did not believe that Ms. Hair was on the list of approved individuals allowed to pick up the child.

41. Tanisha Whitehead, the child's mother, came to pick up the child, but was frustrated that Ms. Hair was not allowed to bring her home. Ms. Whitehead testified that the list of people approved to pick up her child could not be found, but that Ms. Hair was on it. She felt that DCF staff was disrespectful and would not provide any real explanation of what was going on.

42. The pick-up list was not offered into evidence by either party, so whether Ms. Hair was on the list is unknown at this point. It is understandable that parents would be upset at having to come get their children because the daycare was not properly staffed. The issue here, however, is not whether Ms. Hair was on Ms. Whitehead's list of approved adults for pick-up, but rather, the fact that her leaving the facility meant there were no employees there to care for the remaining children.

43. Ms. Smith and Ms. Brown prepared lunch for the children and remained at Joyful Hearts until approximately 11:45, when the last two children were picked up for the day. They checked the facility to make sure that no one remained, and then left. Joyful Hearts closed as of January 15, 2019, and was not open as of the date of the hearing.

Ms. Martin's Defenses

44. Ms. Martin testified on her own behalf and her statements have been carefully considered, given the gravity of the allegations against Joyful Hearts.

45. Ms. Martin admitted that she has spanked J.M., but insists that she has only done so in her home when she has kept him in the evenings or on weekends. This claim is not credible, given her admission that she kept a belt and spatula at the daycare in order to keep the children in line. Moreover, while the statements of other children have not been considered for the truth of those statements, it is illogical that the other children would know of any spankings occurring at Ms. Martin's home as opposed to something happening in their presence at the daycare.

46. Ms. Martin admitted to going to the daycare before receiving the restriction letter. She stated that after receiving the letter, she would go into the daycare before and after hours to clean up and set things up for the day. Given that the restriction letter was not offered into evidence, and Ms. Brown's testimony that she could not be there during hours Joyful Hearts was open, it appears that Ms. Martin being there when the daycare was closed would be permissible.

47. Ms. Martin also admitted that while she was absent, she kept the door of the office locked, but put the books with

records in a chair, upside down outside the office. Neither party offered evidence that DCF staff asked Ms. Martin for the whereabouts of the records and that she refused to provide them. Given that she was not allowed to be at the facility when the DCF staff was there, it would be incumbent upon them to inquire of her where to locate any records that they needed. DCF presented no evidence that its staff inquired, so Ms. Martin cannot be faulted for not providing the appropriate records.

48. Ms. Martin claimed that Mercedes Daughtry was a volunteer as opposed to an employee, and that she would volunteer when they were short of staff. This claim is not credible. Ms. Daughtry was in the daycare at times when no other adult was present in the room where she was located, working directly with children. She was identified as an employee of the daycare by another employee. It is found that Ms. Daughtry was teaching at Joyful Hearts without proper screening. Even if she did volunteer when they were short of staff, she was working unsupervised by a screened employee, which is impermissible.

49. Ms. Martin acknowledged that Ms. Lewis was ineligible to work with children, but claimed that she was hired to be a cook. Given that on more than one occasion, she was one of the only workers present and was clearly supervising children, this claim is not credible.

50. With respect to Mr. Watkins' presence at the daycare, Ms. Martin testified that he was an employee of a vendor that she used, and was not employed by the daycare. Her testimony is consistent with others who testified, and moreover, no one testified seeing Mr. Watkins interacting with children or working near them. The only testimony placing Mr. Watkins on the premises of the daycare was hearsay.

51. Ms. Martin acknowledged that she knew Ms. McCray was not screened when she asked her to pitch in at Joyful Hearts, but felt there were extenuating circumstances. She also claimed that some of her workers did not show up for work because Ms. Brown told them if they came to work, they would go to jail. However, no person to whom Ms. Brown allegedly made this extraordinary statement testified, and no one asked Ms. Brown if she had made such a statement. Without someone with first-hand knowledge testifying to it, the statement is hearsay that cannot be considered. Even if true, if there are not enough screened employees to meet ratios for the care of children, the proper course of action is not to bring in unscreened people, but to close until properly screened workers can be retained.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this

case pursuant to sections 120.569 and 120.57(1). This proceeding is de novo pursuant to section 120.57(1)(k).

53. The Department is seeking to revoke Joyful Hearts' license to operate a child daycare facility in Florida. It must demonstrate that the allegations in the Administrative Complaint are supported by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 520 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). Accord Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) ("Although this standard of proof may be met where the evidence is in conflict . . . it seems to preclude evidence that is ambiguous.").

54. The Administrative Complaint charges Respondent with 10 Class I violations and three Class II violations. There is no clear definition of what constitutes a Class I violation as

compared to a Class III violation. However, Florida Administrative Code Rule 65C-22.010(1)(e) provides that Class I violations are the most serious in nature, and Class III are less serious than either Class I or Class II violations. Rule 65C-22.010(2)(a) provides that "the classification of standard violations within the Child Care Facilities Standards Classification Summary and the progressive disciplinary actions prescribed for each class by this rule are based on the provisions of Section 402.310(1)(b), FS." Section 402.310(1)(b) provides:

> (b) In determining the appropriate disciplinary action to be taken for a violation as provided in paragraph (a), the following factors shall be considered:
> 1. The severity of the violation, including the probability that death or serious harm to the safety of any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of ss. 402.301-402.319 have been violated.
> 2. Actions taken by the licensee or registrant to correct the violation or to remedy complaints.
> 3. Any previous violations of the licensee or registrant.

55. Paragraph 4.I(a) of the Administrative Complaint alleges that on January 4, 2019, Angela McCary, an unscreened individual, was "left alone to care for children, in violation of Section 435.06(2)(a), Florida Statutes."

56. Section 435.06(2) provides:

> (a) An employer may not hire, select, or otherwise allow an employee to have contact with any vulnerable person that would place the employee in a role that requires background screening until the screening process is completed and demonstrates the absence of any grounds for the denial or termination of employment. If the screening process shows any grounds for the denial or termination of employment, the employer may not hire, select, or otherwise allow the employee to have contact with any vulnerable person that would place the employee in a role that requires background screening unless the employee is granted an exemption from disqualification by the agency as provided under s. 435.07.
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> * * *
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> (c) The employer must terminate the employment of any of its personnel found to be in noncompliance with the minimum standards of this chapter or place the employee in a position for which no background screening is required unless the employee is granted an exemption from disqualification pursuant to s. 435.07.
> (d) An employer may hire an employee to a position that requires background screening before the employee completes the screening process for training and orientation purposes. However, the employee may not have direct contact with vulnerable persons until the screening process is completed and the employee demonstrates that he or she exhibits no behaviors that warrant the denial or termination of employment.

57. All child care personnel, as defined in section 402.302(3) to include all owners, operators, employees and volunteers working in a daycare facility, are required to be

screened pursuant to section 402.305(2). Having an unscreened individual left alone with children in care is identified as a Class I violation at 4.18 of the Child Care Facility Standards Classification Summary (Classification Summary), incorporated by reference into rule 65C-22.010.[6/]

58. The Department proved by clear and convincing evidence that Angela McCray was not screened on January 4, 2019. This Class I violation has been proven.

59. Paragraph 4.I(b) of the Administrative Complaint also alleged a Class I violation for having three children left unsupervised on the outside playground area. As noted in the Findings of Fact, the evidence was not clear and convincing that the three children on the playground were children enrolled at Joyful Hearts or in any way under their care. The greater weight of the evidence indicated that these children were school-aged children, as opposed to children four and under. This violation has not been proven by clear and convincing evidence.

60. The third Class I violation, charged at paragraph 4.I(c), alleges that Belle Lewis had 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 any offense noted in Section 435.04, Florida Statutes, which disqualifies the person employmentz';

that Respondent failed to take appropriate action in that Ms. Lewis was hired as a staff member; and that on January 4, 2019, was found to be supervising children at the facility.

61. Employing a disqualified individual to work with children is identified as a Class I violation at paragraph 45.3 of the Classification Summary. The Department proved by clear and convincing evidence that Belle Lewis was an employee working with children, that she was disqualified from employment with children by her past criminal conduct, and that her request for an exemption had been denied because she was ineligible. The Department also proved that Ms. Martin knew of her status and allowed her to work with children nonetheless. This Class I violation has been proven by clear and convincing evidence.

62. The fourth Class I violation in the Administrative Complaint, identified in paragraph 4.I(d), alleges that Timothy Watkins, an unscreened individual, cared for children on January 4, 2019. This allegation was not proven. First, no competent evidence was presented to demonstrate that Timothy Watkins ever cared for children at Joyful Hearts. Second, no credible evidence was presented to demonstrate that Mr. Watkins was an employee of Joyful Hearts. The more credible evidence indicated that Mr. Watkins worked for a vendor Ms. Martin hired to complete maintenance at the daycare. The Department has pointed to no statutory or rule provision requiring daycare

facilities to screen the employees of all vendors they employ. No Class I violation has been demonstrated with respect to Mr. Watkins.

63. The fifth Class I violation, charged in paragraph 4.I(e) of the Administrative Complaint, alleges that Belle Lewis, whose criminal history disqualified her from working with children, was found to be supervising children on January 11, 2019. As noted previously, employing a disqualified individual to work with children is identified as a Class I violation at paragraph 45.3 of the Classification Summary. This violation was proven by clear and convincing evidence.

64. Paragraph 4.I(f) alleges a sixth Class I violation and charges that on January 11, 2019, one or more children were not adequately supervised in that staff left children alone, unattended in a room while one child was eating food, which posed an imminent threat to a child. The evidence showed that on this day, Belle Lewis left three children alone in the building while she went outside. Leaving children unattended is identified as a Class I violation at paragraph 4.2 of the Classification Summary. A Class I violation is supported in this instance by clear and convincing evidence.

65. The next alleged Class I violation, found in paragraph 4.I(g) of the Administrative Complaint, involves Mercedes Daughtry, an unscreened individual, being left alone to care for

children on January 14, 2019. The facts demonstrated at hearing revealed that not only was Ms. Daughtry not properly screened, but she was serving probation for a third-degree felony. This felony would disqualify her from employment at a daycare facility.

66. Ms. Martin claimed that she did not know about the felony record, and that Ms. Daughtry only volunteered at Joyful Hearts. Whether or not Ms. Martin knew about the felony, she knew that Ms. Daughtry was not screened. Her claim that Ms. Daughtry was a volunteer is not supported by the more persuasive evidence presented at hearing. Moreover, even if she was a volunteer, she clearly exceeded that role. Section 402.302(3) defines "child care personnel" to include "all owners, operators, employees and volunteers working in a child care facility." With respect to volunteers, it further provides that "[a] volunteer who assists on an intermittent basis for less than 10 hours per month is not included in the term "personnel" for the purposes of screening and training <u>if a person who meets the screening requirement of s. 402.305(2) is always present and has the volunteer in his or her line of sight</u>." (emphasis added:. The evidence in this case indicates that Ms. Daughtry was in a classroom by herself with children, at a time when the only other adult was Belle Lewis, who was

screened but disqualified. This Class I violation was proven by clear and convincing evidence.

67. Paragraph 4.I(h) alleges that the owner, Jenail Martin, "struck M.J. [who is actually M.H.] in the face with a spatula, leaving a bruise." However, the evidence at hearing demonstrates that while M.H. had a bruise on his face, it could not be determined whether Ms. Martin caused the bruise or whether it resulted from a fight between M.H. and another child, J.M. While hitting a child with a spatula would be a Class I violation if proven, there is no clear and convincing evidence to substantiate this charge.

68. In the alternative, paragraph 4.I(h)(a) alleges that "alternatively, a form of discipline used by staff included the use of spanking or some other form of physical punishment." There is not clear and convincing evidence presented demonstrating that Jenail Martin used corporal punishment in some form with respect to M.H. For reasons discussed below, the CPT interview of J.M. cannot be a basis for a finding of fact, and all of the other evidence presented to demonstrate that Ms. Martin hit M.H. is hearsay that cannot form the basis for a finding of fact. § 120.57(1)(c), Fla. Stat. Accordingly, the Department did not prove the allegation in paragraph 4.I(h)(a) by clear and convincing evidence.

69. Paragraph 4.I(i) charges Respondent with a Class I violation for using a form of discipline which "included the use of spanking or other form of physical punishment, in that the owner, Jenail Martin, struck J.M. with a belt and punched J.M. in violation of CCF Handbook, Section 2.8, F.1."

70. After careful consideration, the Department has not proven this violation by clear and convincing evidence.

71. This determination requires consideration of two separate legal concerns, both of which favor Joyful Hearts. First, a proceeding against a licensee is a penal proceeding, and is strictly construed in favor of the licensee. Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Moreover, Joyful Hearts can only be found guilty with what is actually charged in the Administrative Complaint. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); and Willner v. Dep't of Prof'l Reg., 563 So. 2d 805 (Fla. 1st DCA 1990). Here, the Administrative Complaint specifically alleges that Ms. Martin "struck J.M. with a belt and punched J.M." There is no evidence to support a claim that Ms. Martin punched J.M., even considering her admission that she spanked him in her home, and the only evidence regarding use of a belt was her admission that she threatened children with a belt to

keep them in line, and the hearsay statements of the children that she hit them with the belt. While it may be inferred that Ms. Martin did more than threaten the children with the belt while at the daycare, that inference is simply not strong enough to meet the clear and convincing evidence standard. If the Department had simply alleged that Ms. Martin hit J.M., as opposed to punching him, the result might be different, but the language of the Administrative Complaint controls.

72. Second, after careful consideration of the requirements of section 90.803(23), Florida Statutes, the interview of J.M. cannot be used as a basis for a finding of fact.

73. Section 90.803(23) is very specific and provides in pertinent part:

> (23) HEARSAY EXCEPTION; STATEMENT OF CHILD VICTIM.—
> (a) Unless the source of information or the method or circumstances by which the statement is reported indicates a lack of trustworthiness, an out-of-court statement made by a child victim with a physical, mental, emotional, or developmental age of 16 or less describing any act of child abuse or neglect, any act of sexual abuse against a child, the offense of child abuse, the offense of aggravated child abuse, or any offense involving an unlawful sexual act, contact, intrusion, or penetration performed in the presence of, with, by, or on the declarant child, not otherwise admissible, is admissible in evidence in any civil or criminal proceeding if:

> 1. The court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability. In making its determination, the court may consider the mental and physical age and maturity of the child, the nature and duration of the abuse or offense, the relationship of the child to the offender, the reliability of the assertion, the reliability of the child victim, and any other factor deemed appropriate; and
> 2. The child either:
> a. Testifies; or
> b. Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. Unavailability shall include a finding by the court that the child's participation in the trial or proceeding would result in a substantial likelihood of severe emotional or mental harm, in addition to findings pursuant to s. 90.804(1). (Emphasis added).

74. Section 90.804(1) defines "unavailability as a witness" as meaning that the declarant is exempted by ruling of a court based upon privilege; the declarant persists in refusing to testify despite an order to do so; the declarant has suffered a lack of memory on the subject matter of his or her statement; is unable to be present or testify because of death or then-existing physical illness or infirmity; or is absent from the hearing, and the proponent of the statement has been unable to procure his or her attendance by process or other reasonable means. The Department alleged in its Motion to Allow Child Victim Hearsay that requiring J.M. to testify would result in substantial likelihood of severe emotional or mental harm, but

presented no evidence to support this assertion. No evidence to support a claim of unavailability as defined in section 90.804(1) and specifically required under section 90.803(23) was offered at hearing. Therefore, while Department's Exhibit 16 was admitted into evidence, it cannot, standing alone, form the basis for a finding fact. Inasmuch as there is no evidence of the allegations in the Administrative Complaint that it corroborates or supplements, the charge alleged at paragraph 4.I(i) cannot be sustained.[7/]

75. Paragraph 4.I(j) charges Joyful Hearts with a Class I violation, stating that Ms. Martin "struck J.J. with a black flip flop, in violation of CCF Handbook, Section 2.8, F.1." The only evidence to support this specific violation is the hearsay statements of the children and the observation by the investigator that Ms. Martin was wearing flip flops. This evidence falls far short of the clear and convincing standard.

76. Of the 10 Class I violations alleged in the Administrative Complaint, the Department established five by clear and convincing evidence.

77. Three Class II violations were also charged. The Department did not address the Class II violations in its Proposed Recommended Order, but each one will be addressed here.

78. The first one, in paragraph 4.II(a), alleges that "a ratio of one staff to four children was required when a ratio of

one staff to six children was observed on November 9, 2018," in violation of section 402.305(4). No evidence was presented regarding any activities taking place on November 9, 2018. Accordingly, this alleged violation was not proven by clear and convincing evidence.

79. Paragraph 4.II(b) charges that a ratio of two staff to 13 children was required when a ratio of one staff to 13 children was observed on January 4, 2019. The evidence indicates that there were 11 children in one room, including an infant.

80. Section 402.305(4) addresses staff-to-children ratios, and provides that for children from birth to one year, there must be one staff member for every four children; from one year but under two, one staff member for every six children; from two years old but under three, one staff member for every 11 children; from three years old but under four, one staff member for every 15 children; and for children five or older, one staff member for every 25 children. Section 402.305(4)(a)7. specifies that for children two years of age and older, the ratio is based on the age group with the largest number of children within the group. Notably, this rationale does not apply when infants are included in the group.

81. As applied to the facts of this case, the presence of an infant required a one-to-four ratio, at least for that child.

Eleven children would have required at least two child care workers present and eligible to work. Joyful Hearts did not meet that requirement on January 4, 2019. This violation has been proven by clear and convincing evidence.

82. Finally, paragraph 4.II.c alleges that a ratio of one staff member to three children was required on January 11, 2019, and the staff ratio observed was zero staff members to three children. Although not well articulated, it appears that this corresponds to the incident recounted when Belle Lewis left three children in the building while going out to her car. This violation is identified in the Classification Summary at Section 3.2 as a Class II violation, and has been proven by clear and convincing evidence.

83. Section 402.310(1)(b) provides factors to be considered in imposing discipline, and charges the Department with establishing a uniform system of procedures to provide for the consistent application of disciplinary actions with a view toward progressive discipline. Rule 65C-22.010(2)(d) provides that for the third and subsequent Class I violations, the Department shall suspend, deny, or revoke the license. In addition, it shall impose a fine of $100 to $500 for each of the first two Class I violations, and may impose an additional fine in the same amount for any additional Class I violations. For Class II violations, the rule provides that for the second

violation of the same Class II standard, the Department shall impose a fine of $50 for each such violation.

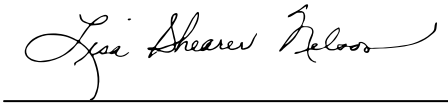
84. The Department proved a total of five Class I violations, and two Class II violations. The undersigned has considered the factors identified in section 402.310((1)(b), namely, the severity of the actions, including the probability that death or serious harm to the health and safety of any person; the severity of the actual or potential harm; the actions taken by the licensee or registrant to correct or remedy the complaints; and any previous violations of the licensee. Here, Joyful Hearts had a clean record before the series of incidents giving rise to this case. However, the deficiencies identified as a result of this investigation are frightening, and it is merely fortuitous that no child suffered serious harm. Parents should be able to rest assured that the people caring for their children are properly screened and eligible to care for them. That clearly was not happening here.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order finding Respondent guilty of five Class I violations and two Class II violations. It is further recommended that Respondent be fined a total of $1,350.00 ($250 for each Class I and $50 for

each Class II), and that its license to operate as a daycare facility be revoked.

DONE AND ENTERED this 19th day of June, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2019.

ENDNOTES

[1/] Florida Administrative Code Rule 28-106.103 provides in part, "[i]n computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the day of the act from which the period of time begins to run shall not be included. . . . When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

[2/] The children that were interviewed in this case are all approximately four years old and none of them testified at hearing. The children and their parents or guardians are identified by initials in order to protect their identity. Further, it is noted that one of the victims is referred to in the Administrative Complaint as M.J. when all evidence related to this little boy identify him as M.H. There is no indication that anyone was confused by the wrong initials, and all parties knew the identity of the child.

[3/] These statements are included not for the truth of the matter asserted, but for the purpose of describing the children's claims during the interviews.

[4/] The "restriction letter" was not offered into evidence by either party.

[5/] Ms. Hair testified at hearing approximately four and a half months after this event, and at that time she was heavily dependent on a walker, and going any distance at all seemed to be a challenge for her. She had difficulty going from the back of the courtroom to the witness chair, so she was allowed to testify from the nearest chair in order to shorten her walk. It is distressing to imagine anyone with such limited mobility attempting to care for infants.

[6/] The Administrative Complaint is replete with references to the CCF Handbook. However, neither the Handbook nor any excerpts from the Handbook were offered into evidence. Similarly, while the Administrative Complaint cites to rule 65C-22.010, it would have been helpful to include citations to the specific statutes that the rule implements. However, there is sufficient detail in the Administrative Complaint to place the licensee on notice of the charges in this case.

[7/] Even assuming that the video could form a basis for a finding of fact, the video does not include any statement that Jenail Martin punched J.M.

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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.