

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

LAURA'S LEARNING AND ENRICHMENT
CENTER,

Petitioner,

vs.

Case No. 20-0149

DEPARTMENT OF CHILDREN AND
FAMILIES,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (DOAH) heard this case by Zoom conference on February 2 and 3, 2021.

APPEARANCES

For Petitioner: Hannah George, Esquire
Law Firm of Gil Colon, Jr.
325 East Davidson Street
Bartow, Florida 33830

For Respondent: Raquel Ramos, Esquire
Department of Children and Families
1055 U.S. Highway 17 North
Bartow, Florida 33830

STATEMENT OF THE ISSUE

Did Respondent, Department of Children and Families (Department), correctly deny the application of Petitioner, Laura's Learning and Enrichment Center (Laura's Learning), for licensure renewal for failure to meet the minimum licensing standards for child care facilities?

PRELIMINARY STATEMENT

On November 21, 2019, Laura's Learning applied to renew its child care facility license. By letter dated December 3, 2019, the Department announced its intent to deny renewal. Laura's Learning contested that action. On January 15, 2020, the Department referred the dispute to DOAH for conduct of a hearing to resolve the disputed facts. The undersigned scheduled the hearing to begin March 11, 2020. After six uncontested continuances for good cause which included coordination of a minor's deposition in a related criminal case and obtention of counsel by Laura's Learning, the final hearing was scheduled for and conducted on February 2 and 3, 2021.

Department Exhibits A through K were accepted into evidence. The Department presented the testimony of Ruth McConnell-Bailey, Nancy Ebrahimi, James Lewis, Thia Lomax, Heather Recchia, Shada Tobie, and Erik D. Riks. Laura's Learning Exhibits A through D were accepted into evidence. Dr. Jeffery Johnson, Antonio Miles, Jayda Miles, Chaundi Parham, and Laura Smith testified on behalf of Laura's Learning. A Transcript of the hearing was filed on March 22, 2021. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Legislature has charged the Department with regulating and licensing child care facilities.
2. Laura Smith owns and operates Laura's Learning in Lake Wales, Florida. Since 2009, the Department has licensed Laura's Learning as a child care facility. The charges involved in this proceeding are the first time that the Department has acted against Laura's Learning's license. Ms. Smith submitted an amended application to renew her license on November 21, 2019. The Department proposes to deny renewal of the license because

Ms. Smith failed, the Department asserts, to protect her adopted son, B.S., from bizarre punishment and resulting physical and emotional harm. It also alleges that Ms. Smith failed to provide a required update to her renewal application.

3. In its case number 2019-197752-01, the Department made a verified finding of abuse by Ms. Smith of B.S., her adopted son, by failing to protect him from bizarre punishment and physical injury. Because of this, the Department revoked Ms. Smith's license to operate a family foster home. However, Ms. Smith did not oppose revocation and wished to surrender her license. Ms. Smith did not amend her application to advise the Department that it had revoked her foster home license. Ms. Nancy Ebrahimi learned of the verified finding and license revocation during her routine review of Department registries during the license renewal process.

4. August 7, 2019, after a shelter hearing in which Ms. Smith said that she did not want B.S. in her home any longer, the court ordered that B.S. be placed in the shelter custody of the Department. An August 8, 2019, Shelter Order at Review continued this placement. On September 18, 2019, the court granted the Department's Petition for Termination of Parental Rights of B.S. This decision included consideration of the fact that Ms. Smith signed an Affidavit and Acknowledgment of Surrender, Consent to Termination of Parental Rights, and Waiver of Notice form before the Department filed its Termination of Parental Rights Petition.

5. Ms. Smith's relationship with B.S. began when she served as his foster parent. She adopted him when he was about seven (born March 11, 2005). B.S. lived in Ms. Smith's home in Lake Wales, Florida. He occasionally helped with chores, such as yardwork, at Laura's Learning. He was also responsible for chores at home.

6. Ms. Smith had other children, including an adult biological daughter, Jayda Miles, who, at the times involved here, lived in Cocoa Beach, Florida, and visited Ms. Smith's home regularly, often with her husband, Antonio

Miles. Mr. and Ms. Miles lived on Patrick Air Force Base because of his service in the Air Force. Another adult sibling, Chaundi Parham, lived at Ms. Smith's home and worked sometimes at Laura's Learning.

7. Young twins who were Ms. Smith's foster children lived in the home with a third foster child.

8. On June 17, 2019, B.S. was doing yardwork at Laura's Learning. Ms. Parham was overseeing him. B.S. could not complete mowing because the mower was flooding. Ms. Parham directed him to sit on a bench and wait for Ms. Smith to arrive. B.S. removed a bag of Cheetos from the back pack of the twins, who were also at Laura's Learning. Ms. Parham caught him eating the Cheetos in the bathroom. She scolded him and called Ms. Smith. Ms. Parham was unable to reach Ms. Smith, so she called her older sister, Ms. Miles. Ms. Parham then told B.S. to sit on a bench to await Ms. Smith. B.S. jumped the fence surrounding the child care center and ran away. B.S. was 14 years old at the time. Ms. Parham reported B.S. as a runaway.

9. During the preceding year, B.S. had started regularly having trouble at school. He frequently got in fights.

10. Lake Wales police officer, Edgar Claros, responded to the report of B.S. running away. On June 18, 2019, Ms. Smith reported to the police that B.S. had returned home. She also reported that he said he wanted to live on the streets and left home again. B.S. had run away two or three times before.

11. The Department assigned Ms. McConnell-Bailey to investigate. On June 18, 2021, Ms. McConnell-Bailey visited Ms. Smith to question her about the runaway report. She also questioned Ms. Smith about reports from an unidentified source, possibly a caller to the Department's abuse line, about maltreatment of B.S. including use of a "taser"¹, striking him with various

¹ "Taser" is a brand name for a stun gun and likely not the brand involved here. The device was a stun gun that required contact of its electrode prongs with the subject's skin, called "drive tasing." There is no evidence that any of the tasing involved darts. "Taser" and "tase" are used in this Order because that is the description the witnesses used.

objects including a wooden spoon, and making him sleep in the garage and laundry room.

12. Ms. Smith was visibly angry. She denied the allegations and said B.S. was not going to ruin her business and take everything she had worked so hard for. She said B.S. was lying and that she had no idea where he was, except that some people told her he was somewhere in the neighborhood of a Publix. Ms. Smith did not express concern for B.S.'s well-being. She did tell Ms. McConnell-Bailey that she had removed all pictures of B.S. from displays of family photographs because they upset her.

13. Ms. Smith began crying during the interview. She said the situation upset her and was causing her to get sick. She said she felt she was too old for the troubles B.S. caused and she did not want to deal with him anymore.

14. On June 21, 2019, Ms. Smith called Detective James Lewis and advised him she had heard that B.S. was near the area of G. Street and Lincoln Avenue. Ms. Smith told Detective Lewis that she hoped the officers did not find B.S. and that he keeps running. Ms. Smith also said B.S. had been lying about her family, specifically her daughter, Jayda, falsely claiming abuse. And she said she wanted to file for an injunction against him.

Ms. Smith did not express or display any concern for B.S.

15. Ms. Smith, however, told Detective Lewis that she was going to the area where B.S. might be, but that he would run from her. Detective Lewis passed the information about B.S.'s location on to Officer Eric Ricks, who located B.S. in the area.

16. Officer Ricks located B.S., picked him up, and spoke with him. Officer Ricks asked B.S. why he ran away and did not want to return home. B.S. told Officer Ricks that his sister, Ms. Miles, tased him and pepper sprayed him on June 16 in the presence of Ms. Smith, Mr. Miles, and Ms. Parham. B.S. indicated that it was because he had tried to steal something to eat. B.S. was apprehensive about returning to Ms. Smith's home. B.S. appeared to be on

the verge of tears. B.S. did not say anything about being tased earlier in the year, around Memorial Day, on the patio.

17. Officer Ricks transported B.S. to the police station where Detective Lewis assumed responsibility for the investigation. Detective Lewis interviewed B.S. with Child Protective Investigator Ruth McConnell-Bailey, for forty-five minutes to an hour, the night of June 21, 2019. B.S. told Detective Lewis that Ms. Miles had repeatedly tased him on his left chest area and on his upper left arm and sprayed him with pepper spray on June 16, 2019. He said this was because he had been caught preparing to steal a honeybun. This, he said, was the reason he ran away and did not want to return. B.S. did not say anything about being tased earlier in the year, around Memorial Day, on the patio.

18. Detective Lewis inspected B.S.'s chest and left arm. He found injuries and scabs that he thought were consistent with the injuries made by a taser. The pain from tasing that B.S. described was consistent with the pain Detective Lewis experienced when he was tased during training. Detective Lewis did not measure the distance between scabs or other injuries to determine if they corresponded with the typical separation of the prongs of a taser. B.S. also told Detective Lewis that he was wearing snowman pajamas the night of June 16.

19. After the interview, Detective Lewis and Ms. McConnell-Bailey transported B.S. to the home of Cheryl Jennings who had agreed to provide him lodging. B.S. was happy to be taken there instead of Ms. Smith's home. B.S. said that he felt unsafe at Ms. Smith's home.

20. Detective Lewis and Ms. McConnell-Bailey then went to Ms. Smith's home to obtain clothes for B.S. and to obtain the snowman pajamas. The pajamas had been washed, dried, and folded. Detective Lewis examined the pajamas. He identified one small burn hole on the chest area of the pajamas. He thought the hole was consistent with use of a taser with its prongs placed directly on the person being tased. Although B.S. claimed he had been

repeatedly tased on his left chest and left arm, the pajamas had only one possible burn hole.

21. A few days later, Detective Lewis interviewed Ms. Miles. She denied the claims of B.S. She also allowed Detective Lewis to search her car. He did not find a taser or pepper spray.

22. On June 25, 2019, Thia Lomax, Children's Home Society Children's Advocacy Center Case Coordinator, Child Protection Team, interviewed B.S. Ms. Lomax is a trained and experienced forensic interviewer. Ms. Lomax noticed marks on B.S.'s neck. He told her they were from a recent fight.

23. Ms. Lomax interviewed B.S. for about an hour. The record contains a video recording of the interview. The interview is neutral and undirected. Ms. Lomax does not suggest or imply responses by her questions or body language. However, Ms. Lomax also does not test or challenge B.S.'s statements. B.S. basically made the same report about events the night of June 16 as he made earlier to Detective Lewis. He also made a new claim that Ms. Miles tased him on the patio earlier in the year, around Memorial Day, in the presence of Ms. Smith and Ms. Parham. His description did not identify a number of tasings or how long the experience lasted. B.S. also made claims about being struck by a broom and a spoon and made to "work like a slave."

24. On August 6, 2020, the parties deposed B.S. A transcript of the deposition is also part of the record. B.S. did not testify at the hearing. B.S.'s deposition testimony differed from the interviews. B.S. demonstrated confusion and changed the details of his reports.

25. The evidence about the initial events of the night of Sunday, June 16, 2019, is consistent. Mr. and Ms. Miles were spending that night at Ms. Smith's home.

26. On June 16 Ms. Smith took B.S. to Walmart sometime after midnight to buy a Sprite. Antonio Miles was at the Walmart, having arrived

separately. He observed B.S. preparing to steal a honey bun. When B.S. saw Mr. Miles watching him, he abandoned his plan to steal a honey bun.

27. Afterwards B.S. returned home with Ms. Smith and went to bed, wearing pajamas with snowmen on them. When Mr. Miles returned to the home, he told Ms. Smith about the honey bun. Ms. Smith called B.S. into the family room. From this point forward, the evidence and the testimony of the witnesses differs significantly.

28. According to Ms. Smith, Ms. Miles, and Mr. Miles, Ms. Smith called B.S. into the family room and asked him about the honey bun incident. He told her he was just looking at the pastry. They further testified that Ms. Smith talked to B.S. about "making bad choices" and sent him back to bed. Ms. Smith, Ms. Miles, Ms. Parham, and Mr. Miles all testified that Ms. Parham was not present because she was with friends in Orlando. Mr. Miles, Ms. Miles, and Ms. Smith are adamant that Ms. Miles did not tase or pepper spray B.S. They also agree that Ms. Parham was not present during the conversation with B.S. about the honey bun because she was in Orlando. And they agree he was not made to sleep in the laundry room.

29. According to B.S., when Ms. Smith called him from his room, all the adults, including Ms. Parham, were present in the family room. He says that when he denied preparing to steal the honey bun, Ms. Smith stated, "No you are lying."

30. In his interviews, B.S. stated that Ms. Miles went to her car and returned with a pink can of pepper spray and a pink "taser" and began tasing him. He said that Ms. Miles tased him five or six times on his upper left arm and the left side of his chest. The taser got tangled in his pajamas he said. Then Ms. Miles began spraying him with pepper spray. According to B.S.'s statements, the adults sent him outside to wash the pepper spray from his face. He then went to bed in the laundry room. He said that Ms. Smith did not intervene.

31. In deposition, subject to cross examination, B.S. amplified and expanded his claims to the point of incredulity. For instance, in his interviews he said Ms. Miles had tased him five or six times the night of June 16. In his deposition testimony, B.S. testified "they were tasing me all over the house." (R. Ex. K, p. 52). He also testified that the tasing went on for two or three hours. He volunteered that Ms. Miles tased him 50 times. He also said that it could have been 100 times. He said his pajamas had 50, maybe 100 holes from the tasing. (R. Ex. K, p. 52). These claims differ significantly from those made in his interviews. Detective Lewis found only one hole that he thought could have been caused by a taser.

32. According to B.S., Ms. Smith did not attempt to intervene to stop Ms. Miles. She also did not report the alleged incident to law enforcement.

33. Ms. Miles, Mr. Miles, and Ms. Smith all firmly denied the allegations of tasing and pepper spraying the night of June 16.

34. During the videotaped interview, B.S. first claimed that Ms. Miles tased him three or four times when on the patio Memorial Day. He did not mention this in his earlier interviews. His deposition testimony about tasing on the patio was very different from his interview statements.

35. He testified that Ms. Miles tased his entire chest and stomach up to his neck Memorial Day. He said Ms. Smith was on the patio and Ms. Parham was sitting on a couch inside looking out. At first, he said Ms. Miles tased him 20 times. He went on to say it was more than 20, maybe 50 or 100 times. He said the Memorial Day tasing lasted from about 6:00 p.m. to 11:00 p.m. He also testified that Ms. Smith and Ms. Miles stayed on the patio the entire time. Ms. Parham, he said, stayed sitting on the couch watching the entire time. Nobody took a break, went to the restroom, or got something to drink, according to B.S.'s testimony.

36. Ms. Miles, Ms. Smith, and Ms. Parham all credibly deny this account. In addition, the claims are implausible because of the varying numbers of

tasings claimed and the length of time B.S. said the tasings went on, as well as nobody leaving the patio for five hours.

37. In the course of the interviews and his deposition, B.S. made claims of being hit by a broom, hit by a spoon, made to sleep in the garage, and made to sleep in the laundry room. Ms. Smith denied these allegations. They are not corroborated. The evidence to support these claims is not clear and convincing.

38. B.S.'s shifting version of events, the firm, convincing denials of all other witnesses, and the inconsistency of only one burn on the pajamas from four to six tasings, let alone 50 to 100, keep the evidence of the tasing and pepper spraying from being clear and convincing.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

39. Sections 120.569 and 120.57(1), Florida Statutes (2020), grant DOAH jurisdiction over the parties to and the subject matter of this proceeding.²

40. The Department must prove its charges by clear and convincing evidence. *See, e.g., Cristal Palace Resort PB, LLC v. Ag. for Health Care Admin.*, Case No. 19-1667 (Fla. DOAH Mar. 17, 2020), *modified in part*, AHCA No. 2019000548 (AHCA May 5, 2020), *appeal docketed*, No. 5D20-1168 (Fla. 5th DCA May 15, 2020), ¶¶ 222-226.

41. The opinion in *Evans Packing Company v. Department of Agriculture and Consumer Services*, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), described clear and convincing evidence as follows:

[C]lear 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 evidence 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

² All references to Florida Statutes are to the 2020 codification unless noted otherwise.

trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established. *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

42. In disciplinary proceedings, the statutes and rules for which a violation is alleged must be strictly construed in favor of a respondent. *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). Also, an agency may not take penal action based on legal or factual matters not specifically alleged. *See Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005).

Elements

43. Sections 402.301 through 402.319, Florida Statutes, establish general guidelines for Department regulation of child care facilities. Section 402.310 empowers the Department to administer disciplinary sanctions, up to and including license revocation or denial.

44. The Department maintains that Ms. Smith does not meet the good moral character requirement of section 402.305(2)(a) because she failed to protect her adopted son, B.S, from bizarre punishment and physical and emotional harm. Specifically, the Department's Amended Notice of Denial charges that Ms. Smith did not "maintain good moral character based upon screening as defined in section [402.302(15)]." (R. Ex. A, ¶4). The Department further intends to deny renewal of the license of Laura's Learning because Ms. Smith did not amend her pending application for license renewal when her foster care license was revoked.

Good Moral Character

45. Section 402.302(15) describes screening as follows:

"Screening" means the act of assessing the background of child care personnel, in accordance with state and federal law, and volunteers and includes, but is not limited to:

(a) Employment history checks, including documented attempts to contact each employer that employed the applicant within the preceding 5 years and documentation of the findings.

(b) A search of the criminal history records, sexual predator and sexual offender registry, and child abuse and neglect registry of any state in which the applicant resided during the preceding 5 years.

46. Section 402.308(3)(d) prohibits issuing or renewing a facility license "if any of the child care personnel at the applicant facility have failed the screening required by ss. 402.305(2) and 402.3055." "Child care personnel" includes owners, operators, employees, and volunteers working in a child care facility. § 402.302(3), Fla. Stat. Ms. Smith is child care personnel.

47. Section 402.305 establishes minimum standards for child care personnel. Section 402.305(2)(a) requires demonstration of "[g]ood moral character 'based upon' screening as defined in section 402.302(15)." The section further requires that:

[t]his screening shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter, and include employment history checks, a search of criminal history records, sexual predator and sexual offender registries, and child abuse and neglect registry of any state in which the current or prospective child care personnel resided during the preceding 5 years.

48. The law does not state that the screening statute defines "good moral character." It states that the determination of "good moral character" shall be "based upon" the screening. In other words, the screening provides the information for making the "good moral character" determination.

49. Sections 402.301 through 402.319 do not define "good moral character."³ Nor do the Department's rules. Here the parties plainly agree

³ The Legislature has defined "good moral character" in other chapters. The definitions all use the words "means a personal history of honesty, fairness, and respect for the rights of

that if Ms. Smith observed Ms. Miles tase and pepper spray B.S. and did nothing to protect him or report the acts, that inaction would establish that she lacked the required good moral character. There is, therefore, no need for an extended consideration of the meaning of "good moral character."

50. Section 435.04, Florida Statutes, establishes Level 2 screening standards. This statute says that background investigations must ensure:

that no persons subject to the provisions of this section have been arrested for and are awaiting final disposition of, have been found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, or have been adjudicated delinquent and the record has not been sealed or expunged for, any offense prohibited under any of the following [52] provisions of state law or similar law of another jurisdiction[.]

51. The evidence did not prove Ms. Smith has been arrested for, has been found guilty of, entered a plea of nolo contendere, or entered a plea of guilty to any of the listed provisions.

52. Clear and convincing evidence did not prove that Ms. Smith observed Ms. Miles tase and pepper spray B.S. and took no action. Therefore, clear and convincing evidence did not prove that Ms. Smith lacked the required "good moral character."

Application Amendment

53. Section 402.3055 creates child care personnel requirements. Section 402.3055(1)(a) requires the Department to include an application question asking: "the applicant, owner, or operator if he or she has ever had a license denied, revoked, or suspended in any state or jurisdiction or has been the subject of a disciplinary action or been fined while employed in a child care facility."

others and for state and federal law." See §§ 468.8413(4)(a), 489.513(1)(c)1., 468.525(2)(a), and 473.308(6)(a), Fla. Stat.

54. Section 402.3055(2)(a) directs the Department to "deny, suspend, or revoke a license" for failure to comply with the section. The Department reasons that this statute required Ms. Smith to amend her license renewal application when the Department revoked her foster care license.

55. The Department argues that section 402.3055(4) required Ms. Smith to update her renewal application by advising of the revocation of her foster parent license. There is no section 402.3055(4).

56. The Department says that by not reporting the revocation of her foster parent license Ms. Smith violated section 402.3055(1)(a). That section requires applicants to attest to the accuracy of information provided in the license application. The information the application solicits includes whether an applicant ever had a license revoked in any jurisdiction. Ms. Smith submitted her amended application for renewal on November 21, 2019. The Department revoked her foster care license December 9, 2019. Thus, when Ms. Smith submitted her application, her attestation that she had not had a license revoked, suspended, or otherwise sanctioned was correct. The Department has not identified a statute or rule requiring an applicant to update an application.

Conclusion

57. After repeated and thorough reviews of the evidence, the undersigned cannot reach a "firm belief of conviction, without hesitancy" that Ms. Miles committed the acts alleged. There are several reasons. Three are prominent. One reason is the universal, unwavering denial by all possible witnesses other than B.S. Recognizing that the number of witnesses does not determine the weight of their testimony,⁴ the consistency and certainty of their testimony still has convincing force. So does their demeanor. The differences between B.S.'s testimony in deposition and his statements to the police

⁴ The number of witnesses testifying to a fact does not determine its weight. The convincing force of the evidence does. *S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC*, 139 So. 3d 869, 875, n.1 (Fla. 2014).

officers and Ms. Lomax are another reason. The third reason is that despite the claimed number of tasings there is only one barely visible hole in the pajamas.

58. The Department did not prove by clear and convincing evidence that Ms. Smith observed Ms. Miles tasing or pepper spraying B.S. Consequently, it did not prove the charged lack of good moral character.

59. The Department did not establish that Ms. Smith was required to amend her application for renewal. Consequently, it did not prove that her failure to amend the application is grounds for denying renewal.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that Respondent, Department of Children and Families, enter a Final Order granting the license renewal application of Petitioner, Laura's Learning and Enrichment Center.

DONE AND ENTERED this 19th day of April, 2021, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2021.

COPIES FURNISHED:

Lacey Kantor, Agency Clerk
Department of Children and Families
Building 2, Room 204Z
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Hannah George, Esquire
Law Firm of Gil Colon, Jr.
325 East Davidson Street
Bartow, Florida 33830

Raquel Ramos, Esquire
Department of Children and Families
1055 U.S. Highway 17 North
Bartow, Florida 33830

Javier A. Enriquez, Esquire
Department of Children and Families
Building 2, Room 204F
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

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.