STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 21-1687

JILL JOHNSON, d/b/a A TO Z CHILD DEVELOPMENT CENTER,

Respondent.
_____/

RECOMMENDED ORDER

On July 15, 2021, pursuant to notice, a final hearing was conducted in this case via Zoom teleconference, before Yolonda Y. Green, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: David Gregory Tucker, Esquire
Department of Children and Families
5920 Arlington Expressway
Jacksonville, Florida 32211

For Respondent: Jill Johnson, pro se
A to Z Child Development Center
1049 East 8th Street
Jacksonville, Florida 32206

STATEMENT OF THE ISSUES

The issues in this matter are whether Respondent, the owner of a child care facility, committed the violations alleged in the Administrative Complaint; and, if so, what is the appropriate sanction for the violation.

PRELIMINARY STATEMENT

On April 27, 2021, Petitioner, Department of Children and Families (Petitioner or DCF), issued a one-count Administrative Complaint against Respondent, Jill Johnson d/b/a A to Z Child Development Center (Respondent or Jill Johnson). The Administrative Complaint alleged that a background screening had not been completed after a 90-day break in employment for staff member E.L. If proven, the alleged conduct would constitute a Class II violation of the child care facility standards classifications. The Administrative Complaint proposed a civil penalty of $50.00 based on the allegation that this would be Respondent's second Class II violation.

Respondent timely contested the Administrative Complaint, which resulted in this proceeding. On May 25, 2021, this matter was referred to DOAH for a final hearing.

The undersigned scheduled this case for a hearing on July 15, 2021, and it commenced as scheduled. Petitioner's Exhibits A through C were admitted into evidence. Petitioner also presented the testimony of Gretrell Marshall (DCF licensing counselor). Respondent's Composite Exhibit 1 was admitted into evidence, and Respondent presented the testimony of Crystal McMillion.

The one-volume Transcript of the hearing was filed at DOAH on July 30, 2021. Petitioner timely filed its Proposed Recommended Order on July 30, 2021, and it was considered in preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

The events related to the issues in this proceeding occurred in April 2021. This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. *See McCloskey v. Dep't of Fin. Servs.*,

115 So. 3d 441 (Fla. 5th DCA 2013). Thus, unless otherwise noted, all statutory and regulatory references shall be to the 2020 versions.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the complete record, the following Findings of Fact are made:

1. DCF is authorized to regulate child care facilities pursuant to sections 402.301 through 402.319, Florida Statutes. Section 402.310 authorizes DCF to take disciplinary action against child care facilities for violations of sections 402.301 through 402.319.

2. A to Z Child Development Center (A to Z) is a child care facility owned and operated by Jill Johnson at 1049 East 8th Street, Jacksonville, Florida. The license number is C04DU1409.

3. It is undisputed that on December 20, 2020, Respondent received a citation for employing a person for which she had not conducted a background screening following a 90-day break in employment.

4. At all times material to this matter, E.L. was a child care provider working at A to Z. She began working with the facility on February 2, 2021. E.L. had been cleared and found "eligible" to work as a child care provider on April 6, 2017, at a different child care facility.

5. On April 22, 2021, Gretrell Marshall, a DCF licensing counselor, conducted a routine inspection of the child care facility.

6. Ms. Marshall has 20 years working with DCF. She has worked as a family services counselor for three years and has been trained to inspect child care facilities. Before working with DCF, Ms. Marshall owned a family day care home for two years and served as a director for a child care facility for seven years.

7. During her inspection of A to Z, Ms. Marshall reviewed the employment records for each employee of the facility. Specifically, she reviewed the file for

E.L. and discovered that the background screening for E.L. was completed on April 9, 2021.

8. This was a concern for Ms. Marshall as child care personnel should update their background screening if there is more than a 90-day absence from working as a child care provider.

9. Ms. Marshall reviewed the completed background screening report and employment history form for E.L. The background screening report dated February 3, 2021, reflected that E.L. had successfully passed a background screening on April 6, 2017. The employment history and reference form reflected that E.L. was last employed as an assistant teacher at Nono's Home Daycare (Nono's). The employment dates were listed as October 2019 to Present. Although there is a question regarding whether E.L. had a 90-break in employment or worked at Nono's, she was subsequently she was deemed eligible to work with children.

10. Ms. Marshall then reviewed the DCF Child Care Administration, Regulation and Enforcement System (CARES). CARES maintains employment history information for child care personnel, including new employee information, verifying existing employees, and checking employment history. The information input in the system is reported by employers. However, employees do not have access to review information in the system. Ms. Marshall's review of CARES reflected that E.L.'s most recent employer was with T and A Learning Center, which terminated in February 2020. CARES did not reflect that E.L. worked at Nono's.

11. After review of E.L.'s employee records, Ms. Marshall concluded that E.L.'s background screening should have been completed on February 2, 2021, when E.L. began working at A to Z. Ms. Marshall testified that the form reflected that Jill Johnson was identified as the person contacted to verify employment. The evidence of record demonstrated that the person contacted was actually Nono Johnson (owner of Nono's) instead of Respondent's owner, Jill Johnson.

12. Ms. Marshall also reviewed the renewal application records for Nono's. There was no record in the renewal applications that E.L. was an employee.

13. Relying upon her review of E.L.'s records maintained by Jill Johnson, the renewal applications for Nono's, and the CARES records, Ms. Marshall determined that a background screening was warranted for E.L. because it appeared that she had a 90-day break in employment.

14. Ms. Marshall did not interview Nono Johnson and she did not interview E.L. In addition, neither person testified at the final hearing.

15. Ms. Marshall testified that a factor in making her decision was that the employment history form for E.L. did not clearly indicate the person contacted for employment verification. However, the record reflects that Nono Johnson was listed as the person contacted to verify the background reference check.

16. The threshold issue in this matter is whether E.L. worked for Nono's. If E.L. worked for Nono's, the background screening would not be required. On the other hand, if E.L. did not work for Nono's, E.L. would be required to perform the background screening due to the 90-day break in employment.

17. Ms. Johnson presented the testimony of Crystal McMillion, who assisted Ms. Johnson with the reference checks. She testified that she spoke to Nono Johnson and verified that E.L. worked at Nono's during the dates provided on the employment history form.

18. Ms. McMillion testified that she then logged into the background screening portal and verified that E.L. had previously successfully completed a background screening in 2017.

19. Ms. McMillion was the only witness with direct knowledge of the employment verification for E.L. Ms. McMillion has experience as a child care facility operator and understands what is required to conduct employment verification. The undersigned found her to be credible and truthful. However,

her testimony was uncorroborated hearsay.[1] Such evidence may not be considered by the undersigned as a basis for findings of fact.

20. Assuming Ms. McMillion made an error in her employment verification as argued by Petitioner, the question remains whether Nono's failed to properly disclose all its employees and E.L. was in fact an employee.

21. The undersigned finds it unlikely, but possible, that E.L. presented erroneous employment history information. Another possibility is that the records for Nono's did not accurately reflect all of its employees and, thus, such information was not put into CARES. Neither Nono Johnson nor E.L. testified at the hearing. Likewise, the record does not include any interview statement made by Nono Johnson or E.L. The only evidence presented by DCF to demonstrate that E.L. had a 90-day break in employment was the absence of records for Nono's, a facility over which Respondent has no control. This evidence is not sufficient to meet the clear and convincing evidence burden in this matter.

Ultimate Finding of Fact

22. Based on the evidence presented at the hearing, the undersigned finds that there was no clear and convincing evidence to establish that E.L. had a 90-day break in employment. As a result, there is no clear and convincing evidence to establish that Respondent was required to obtain background re-screening for E.L.

23. DCF's burden in this case is to prove the facts alleged in the Administrative Complaint by clear and convincing evidence, and the credible admissible evidence did not meet that burden.

[1] Because Nono Johnson did not testify during the final hearing, the portion of Ms. McMillion's testimony concerning Nono's verification of employment is uncorroborated hearsay that cannot support a finding of fact. *See* § 120.57(1)(c), Fla. Stat. (2020)(providing that "[h]earsay evidence may be used for the purpose

CONCLUSIONS OF LAW

24. DOAH has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

25. DCF is the state agency granted the responsibility of licensing child care facilities. §§ 402.301-.319, Fla. Stat. DCF's duties include responsibility for imposing sanctions for violations of statutes or rules. § 402.310, Fla. Stat.

26. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The Florida Supreme Court further enunciated the standard:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> > 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 Davey, 645 So. 2d 398, 404 (Fla. 1994) (*quoting Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence

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of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.")

that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros.*, 590 So. 2d 986 (Fla. 1st DCA 1991).

27. Sections 402.301 through 402.319 establish "statewide minimum standards for the care and protection of children in child care facilities, to ensure maintenance of these standards, and to approve county administration and enforcement to regulate conditions in such facilities through a program of licensing." § 402.301(1), Fla. Stat.

28. Pursuant to its authority under section 402.310, DCF has adopted Florida Administrative Code Rule 65C-22, "Child Care Standards." Rule 65C-22.001(6) provides that child care programs must follow the standards found in the "Child Care Facility Handbook" (CCFH), May 2019, incorporated herein by reference.

29. Section 5.2.C of the CCFH provides:

> Child care personnel must be re-screened following a break in employment in the child care industry that exceeds 90 days. Child care personnel/individual with a break in service that exceeds 90 days are considered unscreened child care personnel/individuals until completion of re-screening. These child care personnel/individuals shall not have unsupervised contact with children in care.

30. Rule 65C-22.010 provides:

> This rule establishes the grounds under which the Department shall issue an administrative fine, deny, suspend, revoke a license or registration or place a licensee or registrant on probation status as well as uniform system of procedures to impose disciplinary sanctions.

31. Rule 65C-22.010(1)(e)2. defines a class II violation as:

> (e) "Violation" means noncompliance with a licensing standard as described in an inspection report resulting from an inspection under Section

> 402.311, F.S., as follows with regard to Class I, Class II, and Class III Violations.
>
> * * *
>
> 2. "Class II Violation" is an incident of noncompliance with an individual Class II standard as described on CF-FSP Form 5316. Class II violations are less serious in nature than Class I violations.

32. The Licensing Standards Classification (Licensing Standards) implements the statutory mandate by setting out the component parts of each standard. The Licensing Standards classifies the severity of violations and repeat violations following criteria DCF has established in rule 65C-22.010.

33. The Licensing Standard 45.7.2 references the rule requiring background screening after a 90-day break in employment and classifies the act as a Class II violation.

34. Section 402.310 and rule 65C-22.010 are penal in nature and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008); *Latham v. Fla. Comm'n on Ethics*, 694 So. 2d 83 (Fla. 1st DCA 1997).

35. The allegations set forth in the Administrative Complaint are those upon which this proceeding is predicated. *Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits DCF from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. *See Shore Vill. Prop. Owner's Ass'n v. Dep't of Envtl. Prot.*, 824 So. 2d

208, 210 (Fla. 4th DCA 2002); *Delk v. Dep't of Pro. Regul.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

36. The Administrative Complaint alleges Respondent violated the CCFH by failing to obtain an updated background screening for E.L., in violation of section 5.2.C. as implemented through Licensing Standard 45.7.2.

37. If proven, this allegation would constitute a Class II violation of the child care licensing standards set forth in rule 65C-22.010(1)(e)2., as it would be Respondent's second similar violation.

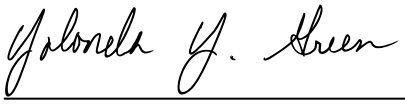
38. DCF did not establish by clear and convincing evidence that E.L. was required to be re-screened because she had a 90-day break in employment prior to being hired by A to Z.

39. For the reasons set forth in the Findings of Fact above, DCF failed to carry its burden of proving that Respondent committed any acts or omissions that constitute failure to comply with the CCFH.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families enter a final order dismissing the Administrative Complaint against Jill Johnson d/b/a A to Z Child Development Center.

DONE AND ENTERED this 30th day of August, 2021, in Tallahassee, Leon County, Florida.



YOLONDA Y. GREEN
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2021.

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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.