



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

PROPOSED DECISION

Happy Hour Development Center

ML-09-0465

Pursuant to petition filed December 2, 2009, under Wis. Stat. §227.44, to review a decision by the Department of Children and Families, a hearing was held on February 24, 2010, at Milwaukee, Wisconsin.

The issue for determination is whether the agency has met its burden to show that it was reasonable in revoking petitioner's family child care license.

There appeared at that time and place, the following persons:

PARTIES IN INTEREST:

Petitioner:

Happy Hour Development Center
c/o Vickie Love
2815 North 39th Street
Milwaukee, WI 53210 by,

Attorney Jill Kastner
Legal Action of Wisconsin
230 W. Wells St.
Room 800
Milwaukee, WI 53203

Respondent:

Department of Children and Families, by

Attorney Nicole Bjork
Department of Children and Families
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, WI 53703

Also present: Jason Wutt, Licensing Supv., DCF and Kameal Love, petitioner's daughter/employee

Administrative Law Judge:
Kelly Cochrane
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is the owner and licensee of Happy Hour Child Development Center, a family child care center located at 2815 North 39th Street, Milwaukee, WI 53210.
2. Petitioner applied for a family child care license in August 2002. In the application, petitioner listed her son, Thomas Haydon, as one of the residents at her facility. Exhibit R-1. She also submitted a background information disclosure (BID) form for her son. Exhibit R-12.
3. On October 22, 2002 the DCF issued a probationary day care license to petitioner. Exhibit R-2.
4. On April 28, 2003 the DCF issued a second probationary day care license to petitioner. Exhibit R-4.
5. On September 24, 2003 petitioner reapplied for a continuation of her license. Exhibit R-5. In the application, petitioner listed her son, Thomas Haydon, as one of the residents at her facility.
6. On October 9, 2003 the DCF issued petitioner a license for a family day care center. Exhibit R-6. That license was to continue in effect for two years.
7. On September 24, 2004 the DCF issued an amended license for a family day care center to petitioner, adjusting the hours of operation. Exhibit R-7.
8. On September 21, 2005 petitioner submitted a license continuation application for her family day care center. Exhibit R-8. In the application, petitioner listed her son, Thomas Haydon, as one of the residents at her facility. She also submitted a background information disclosure (BID) form for her son, which was signed by him. Exhibit R-13. He reported no criminal history at that time. That application was again approved by the DCF.
9. In October 2007 petitioner submitted a license continuation application for her family day care center. Exhibit R-10. In the application, petitioner did not list her son, Thomas Haydon, as one of the residents/household members at her facility.
10. On October 26, 2007 petitioner's application was again approved by the DCF. Exhibit R-11.
11. On November 25, 2009 the DCF issued a notice to petitioner stating that it was revoking her family child care license because she failed to ensure that all information provided to the DCF is current and accurate when she failed to submit a background information disclosure (BID) form and report to the DCF that her son, Thomas Haydon, was residing at her family child care facility. Exhibit R-28.
12. Thomas Haydon has a history of arrests and convictions. Those are:
 - a. On 10/4/04 Haydon was found guilty of Possessing a Dangerous Weapon and Carrying a Concealed Weapon. Exhibit R-19.
 - b. On 8/9/06 Haydon was issued an Injunction ordering him to cease or avoid harassment of the petitioner, which is in effect until 8/9/10. Exhibit R-20.
 - c. On 8/20/07 Haydon was found guilty of Disorderly Conduct when he physically abused the mother of his child. Exhibit R-21 and R-25.
 - d. On 1/25/08 Haydon was found guilty of Endangering Safety/Use of Dangerous Weapon. Exhibit R-22.
 - e. On 1/21/09 Haydon was stopped for a traffic violation and arrested for Possession with Intent to Deliver Controlled Substance (THC). Exhibit R-23 and R-27.
13. The DCF based its decision that Haydon was living with petitioner on his arrest records in January 2009 (Exhibits R-18, R-23 and R-27), a public driver record abstract from the Wisconsin Department of Transportation (Exhibit R-15), and a Department of Justice Crime Information Bureau (CIB) report (Exhibit R-17), which show that his address was listed as his mother's address.
14. Petitioner's son has a child who attends petitioner's child care facility.

DISCUSSION

State licensing procedures and requirements for childcare are specified in Wis. Stat. §§48.65 through 48.77. A person may not operate a day care center over a certain size without a license issued by the Department. See Wis. Stat. §§48.66(1) and 48.715(2)(a). The broad bases for denial of a child day care license are stated at Wis. Stat. §48.68(1), which then cross-references §§48.67 and 48.685. Section 48.67 directs the Department to develop rules with further standards for licensure.

The Department has promulgated rules pursuant to the statutory directive. The pertinent rules for license revocation state:

(8) LICENSE DENIAL OR REVOCATION.

(a) The department may deny, revoke or suspend a license, initiate other enforcement actions specified in this chapter or in ch. 48, Stats., or place conditions on the license if the applicant or licensee, a proposed or current employee, a volunteer, a household member or any other person having regular contact with the children is, has or has been any of the following:

...

2. Convicted of a felony, misdemeanor or other offense that substantially relates to the care of children or activities of the center.

7. Violated any provision of this chapter or ch. 48, Stats., or fails to meet the minimum requirements of this chapter.

8. Made false statements or withheld information.

(b) The department may deny, revoke, refuse to renew or suspend a license, initiate other enforcement actions specified in this chapter or in ch. 48, Stats., or place conditions on the license if the applicant or licensee is not fit and qualified as determined under sub. (2).

Wis. Admin. Code §§DCF 250.11(8)(a)2, 7, 8, (8)(b); see also Wis. Admin. Code §§DHS 12.05(1) and (2)(d).

The Department alleges that petitioner failed to ensure that all the information she provided to the Department was current and accurate because she did not report her son, who has a history of convictions and arrests, was living in her home as required under the regulations for child care providers. See Wis. Admin. Code §§DCF 250.04(2)(c) and (L). The Department then revoked petitioner's family child care license, under the authority cited above, after it reviewed documents that showed her son's address as the same as hers. The documents the agency based its decision on are: his arrest records in January 2009 (Exhibits R-18, R-23 and R-27), a public driver record abstract from the Wisconsin Department of Transportation (Exhibit R-15), and a Department of Justice Crime Information Bureau (CIB) report (Exhibit R-17).

Petitioner's attorney objected to the documents the agency relied upon as hearsay. Although hearsay is admissible in administrative hearings, Wisconsin courts have long held that agencies may never base findings solely upon uncorroborated hearsay. Our supreme court reaffirmed this position in Gehin v. Wisconsin Group Insurance Board, 278 Wis.2d 111, 692 N.W.2d 572 (2005), a decision that overturned a finding based upon untestified-to medical records that were contradicted by petitioner's sworn testimony. The court's rationale was that "the purpose of allowing the admission of hearsay evidence is to free

administrative agencies from technical evidentiary rules, but at the same time this flexibility does not go so far as to justify administrative findings that are not based on evidence having rational probative force.” Id. at p.135. That decision upheld this principle even in some instances where the evidence met one of the exceptions to the hearsay rule:

Without deciding whether all or any parts of the written medical reports in the present case are admissible under a hearsay exception, we conclude that the court of appeals’ reasoning that hearsay evidence is unreliable only when it does not fall within a hearsay exception confuses the admissibility of hearsay with the issue of the probative force to be accorded the hearsay evidence by an administrative agency decision-maker. Hearsay that is subject to an exception is still hearsay, and therefore the substantial evidence rule applies even to evidence admitted as an exception to the hearsay rule.

Id. at p. 152.

Thus, even when hearsay is allowed, as was in this case, it must be of the sort that is clearly reliable. I turn to the documents themselves:

1. Arrest records in January 2009 (Exhibits R-18, R-23 and R-27).

Exhibit R-18 consists of the request for/received records from the Milwaukee County Sheriff’s Department that show the son’s address at the time of booking for the offense in January 2009. The records show the son’s address is listed as petitioner’s address. No one was present to testify to the accuracy of the address information inputted into the records.

Exhibit R-23 consists of the criminal complaint filed on February 5, 2009 regarding the January 2009 offense. That complaint shows the son’s address as 2826 N. 37th St. – not his mother’s address. It also consists of a criminal court record which shows that effective February 12, 2009 there was a change of address notification, and I am willing to assume for argument’s sake that it was filed by petitioner’s son to the court, although no evidence was provided to show how that address update occurred. The document shows his prior address at the 37th St. address, but that the current address is 2816 N. 39th St. – again not the correct address for petitioner. This shows me that at the time the February complaint was filed, the address the county had for her son was on 37th St., not petitioner’s. It also shows me that at the time the address was updated in February either her son gave the wrong address to the court or the agency entered it incorrectly – if I am supposed to believe that the address should have been listed as petitioner’s. Further, both of these documents were created *after* Exhibit 18. This causes confusion and questions the reliability of these documents as to the accuracy of the address information. No one was present to testify to the accuracy of the address information inputted into the records.

Exhibit R-27 consists of the Incident Report from the Milwaukee Police Department regarding the January 2009 arrest. It shows the son’s address as the same as petitioner’s. No one was present to testify to the accuracy of the address information inputted into the records.

2. Public driver record abstract from the Wisconsin Department of Transportation (Exhibit R-15).

Exhibit R-15 consists of a Wisconsin Department of Transportation public driver record abstract created on November 13, 2009. It states the information is current “as of this date and time”. It lists the son’s address as petitioner’s consistently from 2006-2009. Again, no one was present to testify to the accuracy of the address information inputted into the records. I question, if these documents the agency is relying on are so reliable and accurate, why they didn’t argue that the son had been living with petitioner since 2006 since that is what this record shows? Further, the agency agreed at hearing that the son did not live with petitioner during any periods of

incarceration that he had, although I do not have evidence to show when incarceration occurred. Presumably, it would have occurred some time pursuant to his criminal history (see finding of fact #12) during 2004-2009, however, Exhibit R-15 continues to list his address as petitioner's during that time.

3. Department of Justice Crime Information Bureau (CIB) report (Exhibit R-17).

Exhibit R-17 consists of a Department of Justice (DOJ) CIB report. The report date is February 3, 2010, and states it was last updated on July 27, 2009. It also states that his address was the same as his mother's as of January 21, 2009. It also provides a disclaimer as to the reliability, accuracy and completeness of the record. The disclaimer essentially says (1) the DOJ cannot guarantee the reliability of the report because the search criteria may not produce accurate information, (2) persons discriminated against in hiring practices based on such a report have the right to challenge the accuracy and completeness of any information in the record, and (3) the report may not show all arrests for the individual searched, but all information that was provided to the state repository is included in the report. See Exhibit R-17.

While tax paying citizens might hope that agencies such as courts, the DOT and the DOJ would have accurate records on the information they keep, the reality is that information like addresses is not something that is updated with those agencies on a regular basis. People move all the time and never change their address with DOT until their license expires. As I stated above, the DOT records show his address as his mother's from 2006-2009, and there was no dispute that he did not live with her during that entire time due to incarceration. While I am willing to bet virtually no one ever updates their address with DOT to show that they were incarcerated and not living at the agency's address of record, the record itself is simply not proof of residency. Presumably the DOJ record was updated through the arrest of the son in January, and I am assuming for argument that the address the agency got from that arrest was per the son's statements to the arresting officer that his address was his mother's address. The disclaimer used in the DOJ report protects the agency from inaccurate information reporting, which in and of itself might cause one to question the reliability of the information – especially when there was no direct testimony to support the information contained therein. As stated above, no one was present to testify to the accuracy of the address information inputted into the records. In fact, the DCF's witness that testified as to relying on these records to revoke petitioner's license, testified that he did not know how addresses get inputted into the records. I also add that the DCF objected to the petitioner's use of Milwaukee Municipal Court records because they were unreliable. Exhibits P004-P053. (The records show the son's address as something other than his mother's, but is the same address the petitioner testified was her son's address since 2008.) The DCF considered those court records unreliable because it states "data is current as of 12/2/09" and it was unknown as to when the information was inputted. I fail to see how these municipal court records are much different from the ones submitted by the agency itself. The DOJ CIB report date is February 3, 2010, and states it was last updated on July 27, 2009. The DOT record was created on November 13, 2009 and states the information is current "as of this date and time". I have no evidence to show when any of that information was inputted, how it is updated, or who did it.

Additionally, with respect to the arrest records from January, I am willing to assume the address information therein was provided by the son during the arrest. Clearly he has a criminal history that would make him suspect in terms of providing truthful information. He even provided inaccurate information to the DCF. See Exhibit R-13. However, now the DCF wants to believe him in January 2009 when he is being arrested on a drug charge that he lives with his mother. The Incident Report (Exhibit R-27) contains incredible statements he made to the police during that time and shows disregard for the law – (1) he was driving after his license was revoked, (2) the vehicle he was driving had expired registration, (3) he told the officers the vehicle he was driving was his, yet the DOT check showed it listed to someone else, (4) the marijuana found inside the

vehicle's steering wheel cover 'was not his and had no idea who it belonged to'. None of this makes him a credible reporter. And, let's not forget that someone who is likely selling and transporting drugs probably would not want police officers to know his correct address, lest they want to search his home. The son's criminal history shows that the 2008 conviction was brought about as a result of a "no knock" search for narcotics and weapons at his residence. See Exhibit R-22. What better place to say you live than a child care facility to make yourself look better in the eyes of the law?

Contradictory Live Testimony

Petitioner and her daughter testified at the hearing that petitioner's son had moved out of the house some time in 2005. She was able to provide general information as to where he was living from 2005-2008, with a specific address for 2008 forward. They also testified that her son and petitioner's other children have used petitioner's address for purposes of receiving mail. Petitioner's son has a child who attends petitioner's child care facility. Petitioner testified that her son would only be at her facility for purposes of picking up/dropping off his child, or a family get-together when the facility was closed.

I add that petitioner did report to the DCF that her son was a household member in 2005. Exhibit R-13. She did not submit a BID for him thereafter. Thus, while their testimony (as argued by the Department) could be considered unreliable because petitioner would have reason to lie to keep her license, and her daughter to keep her employment, at least their testimony is consistent with the information previously provided to the Department. I add that the agency argued that the 2005 BID form submitted was offered to show a pattern of petitioner's failure to submit truthful and accurate information to the agency. See Exhibit R-13. There is no argument that the son had a conviction by the time the 2005 BID was submitted, and that the BID form which asks if he has any criminal convictions/charges is answered "no." However, this is signed by the son, not petitioner. I have no evidence before me to show that petitioner was either aware of the conviction or that she knew the form was inaccurate. What it does show me is that he is untrustworthy. I also add that the application was again approved by the DCF. I must assume that agency either failed to run an independent background check on him, or accepted the conviction it found and issued the license anyway.

In all, I simply cannot find that the documents the DCF relied upon are reliable enough to show that petitioner's son was living with her as of January 2009. Not only is address information in such records unreliable, the witness who proffered them could not testify as to their accuracy, and no corroboration of the records was provided. I cannot base a finding on such evidence. As such, I must find that the DCF did not meet its burden to show that it was reasonable to revoke petitioner's license.

CONCLUSIONS OF LAW

The agency has not met its burden to show that it was reasonable in revoking petitioner's family child care license.

NOW, THEREFORE, it is

ORDERED

That the matter is remanded to rescind the revocation action taken against petitioner's family child care license. This action shall be taken within 10 days of the date of this decision.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City
of Madison, Wisconsin, this
_____ day of
_____, 2010.

Kelly Cochrane
Administrative Law Judge
Division of Hearings and Appeals

cc: Jim Bates, DCF