



**STATE OF WISCONSIN**  
**Division Of Hearings And Appeals**

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In the Matter of

Pretty's Child Care, LLC

DECISION  
ML-10-0415

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On September 20, 2010, the Department of Children and Families - Division of Early Care And Education, by the Bureau of Early Care Regulation, issued a Notice of Summary Suspension of the family child care center license issued to Thelmer Lock, licensee, pursuant to Wis. Stats. §227.51(3) and Wis. Admin. Code §DCF 250.11(10)5. To date, the Department has not issued a Notice of Revocation of respondent's license. In accordance with Wis. Admin. Code §DCF 250.11(10)(b), a hearing was held on September 27, 2010, at Madison, Wisconsin.

The issue for determination is whether the summary suspension of licensee's operation should remain in effect pending a revocation action, if any is taken.

There appeared at that time and place the following persons:

**PARTIES IN INTEREST:**

**PETITIONER:**

Wisconsin Department of Children and Families  
Division of Early Care And Education  
Bureau of Early Care Regulation –Southeastern Region  
141 NW Barstow Street, Room 104  
Waukesha, WI 53188

By: Nicole Bjork, Assistant Legal Counsel  
Department of Children and Families  
Office of Legal Counsel  
201 East Washington Avenue, Second Floor  
Madison, WI 53703

**RESPONDENT:**

Thelmer Lock

By: Craig R. Johnson, Attorney  
Sweet & Associates, LLC  
2510 East Capitol Drive  
Milwaukee, WI 53211

**ADMINISTRATIVE LAW JUDGE:**

Kenneth D. Duren, Attorney  
Division of Hearings and Appeals

## FINDINGS OF FACT

1. Thelmer Lock currently holds a license granted by the Department of Children and Families to operate a family child care center at 7120 W. Villard Avenue, Milwaukee, Milwaukee County, Wisconsin.
2. On April 1, 2010, the Wisconsin Department of Justice, Division of Criminal Investigation, by Special Agent Timothy P. Gray, executed a search warrant for the licensed premises and the attached residential unit in which Thelmer Lock resides (the building is a duplex) at 7118 W. Villard Avenue, Milwaukee, Wisconsin, including curtilage, garages and storage sheds, searching for weapons, including a black semi-automatic handgun, documents, utility bills, keys and other items that may demonstrate who is in control of the premises as well as instructions related to the storage of a handgun, and casings, gun cleaning kits, holsters, gun cases, ammunition, documents, receipts for firearms maintenance equipment and ammo.
3. In the course of the search conducted on April 1, 2010, Special Agent Gray discovered a 9mm black Taurus handgun loaded with 9 bullets, in a planter within the backyard of the building; various records and documents (otherwise unspecified); \$8,229 in cash; checkbooks and letters; a U.S. Bank account document; miscellaneous letters and financial documents (otherwise unspecified); miscellaneous letters and storage facility documents (otherwise unspecified); and other letters (also unspecified). All of these items were taken into custody by Special Agent Gray. Thelmer Lock was not present when the search was conducted.
4. On a date unknown but no more than 30 days after April 1, 2010, Special Agent Gray caused the \$8,229 in cash to be returned to Thelmer Lock because he determined that the State of Wisconsin lacked enough evidence to establish probable cause that the cash was related to illegal drug distribution or other any other crime permitting seizure by the Department of Justice.
5. On September 17, 2010, the Department was first notified by the Wisconsin Department of Justice and the Milwaukee Police Department that on April 1, 2010, at 7:18 P.M., those law enforcement agencies had served a search warrant on the residence and child care facility operated by Thelmer Lock at 7118 and 7120 W. Villard Avenue, Milwaukee, Wisconsin; and that the agencies had forced entry into the premises and seized records and documents, a loaded semi-automatic handgun, and a large quantity of currency.
6. On September 20, 2010, the Department issued a Notice of Summary Suspension to Thelmer Lock informing her that her license to operate a family child care center at 7120 W. Villard Avenue, Milwaukee, Wisconsin, was suspended because the Department had learned on September 17, 2010, that the Department of Justice and the Milwaukee Police Department had undertaken the search described in Finding of Fact #5, above, and seized a handgun, cash and records from that location.
7. On or about September 20, 2010, the Department, by its agents, issued a document entitled a "Notice of Intent to Initiate Proceedings to Revoke" to the petitioner.
8. As of the date of the summary suspension hearing on September 27, 2010, the Department had not yet served a Notice of Revocation to the petitioner stating that it was revoking the petitioner's family child care license.
9. At no time subsequent to September 20, 2010, did the Department ever issue an amended NOTICE OF SUMMARY SUSPENSION to the petitioner.

## DISCUSSION

The issue in this case is whether the public health, safety or welfare required the Department to take the emergency action of summarily suspending respondent's family child care center license under Wis. Admin. Code §DCF 250.11(10)(a)5, as authorized by Wis. Stat. § 227.51(3).

Licenses granted by the State of Wisconsin, including the instant family child care license, are subject to the requirements of Wis. Stats. §227.51(3) which states, in the parts relevant here, as follows:

(3) Except as otherwise specifically provided by law, no revocation, suspension, annulment or withdrawal of any license is lawful unless the agency gives notice by mail to the licensee of facts or conduct which warrant the intended action and the licensee is given an opportunity to show compliance with all lawful requirements for the retention of the license. *If an agency finds that public health, safety or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined.*

Wis. Stat. § 227.51(3); italicized for emphasis.

The Department has duly promulgated the following administrative rule to implement the statute stated above, which provides, in the part relevant here, as follows:

(a) Under the authority of s. 227.51 (3), Stats., the department shall summarily suspend a license and close a family child care center when the department finds that the public health, safety or welfare requires emergency action and incorporates a finding to that effect into its order. A finding of a requirement for summary suspension of the license may be based on any of the following:

(\*\*\*\*\*Administrative Law Judge's Note: §1 - §4 omitted. \*\*\*\*\*)

5. The licensee or a person under the supervision of the licensee has committed an action or has created a condition relating to the operation or maintenance of the child care center that directly threatens the health, safety or welfare of any child under the care of the licensee.

(b) An order summarily suspending a license and closing a family child care center may be a verbal order by a licensing representative of the department. Within 72 hours after the order takes effect, the department shall either permit the reopening of the center or proceed under subs. (8) or (9) to revoke the license. A preliminary hearing shall be conducted by the department of administration's division of hearings and appeals, within 10 working days after the date of the initial order to close, on the issue of whether the license shall remain suspended during revocation proceedings.

Wis. Admin. Code §§DCF 250.11(10)(a)5, (10)(b).

The Department asserted in the NOTICE OF SUMMARY SUSPENSION dated September 20, 2010, in the parts relevant here, that:

.....the Department has determined that Thelmer Lock, licensee, has created a condition in the operation of Pretty's Child Care LLC that is directly threatening to the health, safety and welfare of children in care. Thelmer Lock has harbored on the premises in space shared with the child care center a loaded handgun belonging to her son, a convicted felon, and large amounts of cash. Her actions give the Department reasonable

concern for the safety of children both due to the potential for actual harm and the risk of exposure to other criminal elements and activities.

See, Exhibit A, p. 2.

The NOTICE further stated that it reserved the right to amend the NOTICE OF SUMMARY SUSPENSION to include additional bases for summary suspension under Wis. Admin. Code §DCF 250.11(10). At no time thereafter did the Department issue such an amended NOTICE OF SUMMARY SUSPENSION. See also, Exhibits A-C.

The Department produced two witnesses at the summary suspension hearing.

Department of Justice Special Agent Timothy Gray testified that he was familiar with Michael Lock, the adult son of Thelmer Lock, from past investigation of Michael Lock, and that Michael was convicted in September 2003 for felonies for possession with the intent to distribute cocaine (40 – 100 grams) under Wis. Stat. § 961.31(1m)(cm)4 and for manufacture/delivery of THC (<= 500 grams) under Wis. Stat. §961.41(1)(h)1. Further, he testified that Michael Lock is currently incarcerated and has been so incarcerated since at least 2007. He provided a copy of an Affidavit For Search Warrant (dated April 1, 2010) that stated that he was also aware that on or about July 20, 2007, multiple search and arrest warrants were served upon members and residences in Milwaukee related to a Michael Lock drug trafficking operation, including the residence located at 7118/7120 W. Villard Avenue, and that he was present at a search of that specific premise, is familiar with the premise, and that on April 1, 2010, Thelmer Lock was confirmed by Wisconsin Gas and Electric as the resident at both addresses, and was previously so listed on July 20, 2007, as well. See, Exhibit B.

Special Agent Gray testified that he was present at an interview of Shalanda Lock that took place on April 1, 2010. He testified that he knew that Shalanda Lock is Michael Lock's wife and Thelmer Lock's daughter-in-law. He asserted that Shalanda offered numerous points of information in the interview. Shalanda stated that she had lived with Michael Lock on July 20, 2007, at 4343 N. 15th Street, Milwaukee, and that within days of the July 20, 2007, execution of searches she told Michael Lock that she was being followed; and he then produced a black semi-automatic style handgun. This was reported to have occurred at the 15<sup>th</sup> Street residence. Shalanda informed law enforcement officers during this interview that she feared guns and had children in the home, and asked Michael Lock to remove the gun from the home. Shalanda told the officers that within days thereafter, she went with Michael to Thelmer Lock's residence on West Villard Avenue, and she observed Michael provide the semi-automatic pistol to his mother. Shalanda told the officers that the pistol was wrapped in plastic and hidden in the pottery soil of a planter kept outside of Thelmer Lock's residence. Shalanda was reported to have told the officers that Thelmer Lock told her that the police did not find the pistol during the July 20, 2007 search of her residence that was concealed in the planter in the yard. Shalanda reported that she had seen the handgun at the Thelmer Lock residence on dates after July 20, 2007, and the April 1, 2010, interview, otherwise unspecified. Gray also said that Shalanda said that Thelmer Lock had told her within the then past 48 hours she had moved the planter from outside to her basement, and was concerned about it because of the presence of the firearm, and she may move it back outside.

Based upon the interview with Shalanda Lock, Gray obtained a search warrant, executed it on April 1, 2010, located the handgun in the planter, and seized it. Gray also testified that he seized \$8,229 in cash and various personal documents during the search, but the cash was returned to Thelmer Lock within 30 days because he could not establish probable cause with the evidence seized to retain the funds as the proceeds of a criminal enterprise. He also testified that none of the personal documents and records seized established that Michael Lock was directing criminal activities from jail through such correspondence or records via his mother, Thelmer Lock. There was no testimony or evidence that indicates that Thelmer Lock has been charged with a crime as a result of the April 1, 2010, search and seizure.

Shalanda Lock did not testify in the instant hearing. In fact, Special Agent Gray noted that she subsequently recanted unspecified parts of the information in a subsequent court hearing, and that because of this he considered her an unreliable witness. Apparently, neither party called her to testify in this hearing.

The only other witness presented by the Department was the Department's licensing supervisor, Jennifer Sabree, from the Southeastern Regional Office. She testified that upon the Department's learning of the April 1, 2010, search and seizure of guns and money at the licensee's residence, that the Department acted to summarily suspend her license to operate the family child care center. See, Exhibit A.

Thelmer Lock did not appear at the hearing, and her legal representative called no witnesses to testify on her behalf during the summary suspension hearing.

Finally, Attorney Bjork asserted on behalf of the Department that the summary suspension was justified by the presence of the handgun on the licensed premises; and she asserted for the first time during the hearing that the failure of the licensee to report either of the prior searches at her residence/operation site in July, 2007, or April, 2010, also supported the summary suspension of the license imposed.

The ultimate question for me to decide is whether the summary suspension is to *continue* based upon the evidence in the record.

First, the handgun has not been on the premises since it was seized by law enforcement officials 5 months and 19 days *prior* to the issuance of the NOTICE OF SUMMARY SUSPENSION. The obvious emergency threat to the health, safety and welfare of children in care represented by the uncontrolled presence of the handgun on the grounds of the child care center in April, 2010, just as obviously ceased to exist when the handgun was removed over *five months prior* to the summary suspension notice.

Second, the cash has been returned to the respondent licensee and no criminal charges related to the cash have been filed.

Third, none of the miscellaneous documentation otherwise seized in the search of April 1, 2010, has been shown to relate to any criminal enterprise involving the respondent licensee, or any criminal charges against her, other residents, employees of the child care, or even Michael Lock.

Fourth, while the licensee has an affirmative duty to report to the Department any incidents involving law enforcement that involve a licensee within 24 hours, like the instant searches of her home and child care facility under Wis. Admin. Code § DCF 250.04(3)(g), this allegation by the Department was *not stated as a ground for the summary suspension action in the NOTICE OF SUMMARY SUSPENSION* or in any amended notice; and rather, this failure to report goes to the question of whether the Department has grounds to revoke the license for rule violations, as well as the fitness to hold the license. I do note, however, that the respondent's attorney's assertion that the involvement with law enforcement on April 1, 2010, did not involve the licensee because no evidence, or only hearsay evidence, establishes that she knew the gun was there does not wash. I would have no trouble concluding that a search of a child care licensee's premises by the police *involved* her as the licensee controlling the premises and operating the child care, and triggering the reporting requirement.

Fifth, the Department's case present significant hearsay evidentiary problems, as alluded to above.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered into evidence to prove the truth of the matter asserted.

Wis. Stat. §908.02(3).

A 'statement' is (a) an oral or written assertion...of a person, if it is intended by him as an assertion.

Wis. Stat. §908.01(1).

The Wisconsin Supreme Court has ruled that hearsay is admissible in administrative proceedings. *Gehin v. Wisconsin Group Ins. Bd.*, 278 Wis. 2d 111, 133; see also, Wis. Stat. § 227.45. The Court has also ruled that administrative bodies should never base findings solely upon uncorroborated hearsay. *Ibid.* See also, *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579(Ct. App. 1987); and see, *Outagamie County v. Town of Brooklyn*, 18 Wis. 2d 303, 312(1962).

The fact that Special Agent Gray recovered a black semi-automatic handgun on April 1, 2010, in the soil of a planter on the residence property controlled by the licensee respondent corroborates Shalanda Lock's April 1, 2010, hearsay statements that a such a gun was in the soil in the planter located on property controlled by Thelmer Lock that included the child care operation. But it does not corroborate any of her other assertions as recounted by Agent Gray. It does not corroborate that Thelmer Lock knew the gun was in the planter, handled the handgun when given it by Michael, or moved it from outside to inside, and vice versa. Nothing in this record corroborates that Thelmer Lock was acting in concert with Michael Lock in furtherance of hiding the weapon or in directing criminal efforts. Shalanda Lock was not made available by the Department to testify directly in the hearing as to the veracity of these other hearsay statements, and Thelmer Lock apparently chose not to appear at the hearing or testify to deny or affirm any parts of Shalanda's allegations. No other witness nor document presented establishes anything more than these three facts are corroborated, i.e., the black semi-automatic handgun was found in the planter on the premises controlled by Thelmer Lock on April 1, 2010.

The statute authorizing summary suspension of a license granted by the State of Wisconsin specifically provides "... that public health, safety or welfare *imperatively requires* emergency action...". Wis. Stat. § 227.51(3).

Based upon the foregoing, I can only conclude that the Department has failed to present a factual foundation sufficient to establish that this standard is met by these circumstances. The handgun was removed from the premises 5½ months prior to the summary suspension. The emergency conditions essentially ended with the removal of the handgun, and the failure of any subsequent evidence to emerge that justified an amendment of the NOTICE OF SUMMARY SUSPENSION for other imperatively required public safety, welfare and health concerns. I cannot see any imminent danger to children in care or the public at this time. That fact, coupled with the fact that the Department has not actually acted to revoke the petitioner's license, leads me to conclude that the suspension should not continue at this point. My reading of the summary suspension rule and statute is that the circumstances must be so extreme that the Department knows immediately that the license deserves to be revoked. The evidence produced by the Department at this preliminary hearing does not support continued suspension of respondent's license to operate a family child care center.

This is not the same thing as saying that the Department may not act to revoke the respondent's license for demonstrable reasons under law in the future. And if it does so, then that is a matter for a separate and *new* appeal and a separate and *new* hearing, if sought by the licensee.

Rather, I conclude here that the summary suspension cannot continue under these facts, and the Department is directed to end the summary suspension of the petitioner's family child care center forthwith.

#### **CONCLUSIONS OF LAW**

That the Department has failed to establish by the preponderance of the credible evidence in the record that the presence of a hidden black semi-automatic handgun in the soil of a standing planter on premises controlled by the respondent licensee on April 1, 2010, which was removed from the premises on that date, forms a direct threat to the health, safety and welfare of any child under the care of the petitioner in

the present on October 5, 2010; and two weeks have elapsed since the NOTICE OF SUMMARY SUSPENSION the Department still has not commenced revocation proceedings against the respondent licensee; and therefore the suspension of the respondent's family child care license should not continue.

**NOW, THEREFORE, it is**

**ORDERED**

That the Department's shall rescind its order summarily suspending the respondent's family child care license, effective the date of this decision. The respondent may re-open her family child care center on the next business day.

**REQUEST FOR A NEW HEARING**

This is a final administrative decision. You may petition for an administrative rehearing by submitting a specific written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. This request must be received by the Division within 20 days of the date of this Order. The process for requesting a rehearing petition is contained in Wisconsin Statutes § 227.49.

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of a rehearing, if you ask for one). For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. The appeal must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, Second Floor, Room G200, Madison, WI 53708-8916. The process for appeals to the circuit court is in Wisconsin Statutes §§ 227.52 and 227.53.

Given under my hand at the City of  
Madison, Wisconsin, this 6th day  
of October, 2010.



Kenneth D. Duren, Administrative Law Judge  
Division of Hearings and Appeals