

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,242

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) denying her a registration certificate to operate a Registered Family Day Care Home. The issue is whether a preponderance of evidence supports the Department's decision.

FINDINGS OF FACT

The petitioner is a young woman who applied to the Department on June 7, 1993, for a certificate to operate a Registered Family Day Care out of her home. The petitioner was known to the Department at that time because in July, 1991, she had been the subject of an investigation by the Department into allegations of improper discipline while she was employed at a licensed day care facility.

The incident involved the petitioner putting soap in the mouth of a ten-year-old child who had sworn at her. By the time the Department investigated the incident (a week or two after it had occurred) the petitioner had been discharged from that day care and was working at another. A memorandum from the Department's investigator indicates that the petitioner admitted the allegations and realized that she had acted inappropriately. It does not appear that the Department took any further action against the petitioner or any facility where she was subsequently employed.⁽¹⁾

However, two years later, when it received the petitioner's application to operate her own day care, the Department decided to contact two of the petitioner's former employers for references. One was the owner of the day care where the soap incident had taken place; the other was the operator of another licensed facility where the petitioner had recently worked for over a year and a half. The first employer responded with the following:

In response to your inquiry about the employment and subsequent termination of [petitioner] the following is a brief account.

[Petitioner] worked for us as an assistant teacher for a short period of time. She was working in a supervised, trial situation. Both myself and other head teachers were concerned about her attitude. She was moody, grumpy, and seemed to have a negative attitude. I was watching her closely and was concerned that this attitude would be carried over into her care of the children. I felt she was too hard on and impatient with children, especially for someone just entering the field.

[Petitioner's] employment was terminated when she lost her temper with a 10-year-old child. This child had emotional problems and could be mouthy. She said something rude to [petitioner], [petitioner] became angry and went into the center--came out with soap on her hands and put it in the child's mouth. I fired her and later answered a report about this for the division of licensing.

The second employer submitted the following reference:

[Petitioner] was dismissed after 2 years of child care due to her inability to solve issue (sic) which I considered disrespectful to children. She would make statements which were disrespectful, such as get your grubby little hands off or stay away from [child] you nasty thing. When [child] started to crept (sic) she would tap her on the back of hand as a form of discipline. When a number of staff meetings were held at last one (sic) she refused to participate and left while center was full so we needed to arrange staff to cover numbers. She can do a beautiful job if she wants to but is difficult to deal with.

Based on the above references the department notified the petitioner (on August 12, 1993) that it had denied her application for a day care home registration. The petitioner then requested and was given a meeting with the Department's licensing director, after which the Department refused to reconsider its denial. Although the Department discussed the above references with the petitioner at this meeting, it was not until after her meeting with the Department that the petitioner was shown them or given copies of them. This appeal followed.

At the hearing (held on October 1, 1993) the Department indicated that its denial of the petitioner's application was based entirely on the above references. The Department admitted that it sometimes conditions licenses on an individual's compliance with a "corrective action plan" imposed by the Department, but that it did not offer this to the petitioner because it felt the above references were evidence of a "pattern" of problematic behavior by the petitioner that would not be amenable to conditions placed on her registration. Other than the references themselves, however, the Department offered no evidence relative to the petitioner's ability to adequately care for children.

At the hearing the petitioner admitted again that she had put soap in the mouth of a child at the day care where she was working two years ago, and again indicated her contrition and understanding that this type of discipline is unacceptable. She maintained, however, that this was an isolated incident and that she has been working with children for the last two and a half years without any other such problems. She denied all the other allegations relating to her "attitude" that were contained in the first reference, and she denied totally all the allegations contained in the second reference.

The evidence submitted by the petitioner at the hearing consisted of her own testimony, the testimony of five parents and two former coworkers (including one who directly supervised the petitioner), and written testimonials submitted by another three parents and another former coworker. That evidence is summarized below.

The petitioner and two former employees ("teachers") at the day care where the petitioner was working

at the time of the soap incident, one of whom was the petitioner's direct supervisor, testified that the petitioner was a caring and competent provider of care to the children in the day care. The petitioner's supervisor stated that except for the soap incident the owner of the facility had never expressed or indicated any problems with the petitioner's ability to work with and relate to the children in her care. The petitioner and her supervising teacher indicated, however, that there was continuous tension between the owners of the day care and staff, including the petitioner, regarding children/ staff ratios at that facility, and that this may have colored the owner's reference (supra) regarding the petitioner's "attitude". The petitioner and both coworkers contradicted strongly that the petitioner was ever "moody, grumpy, and seemed to have a negative attitude" with children, and both coworkers (one of whom had her own children at that facility at the time) testified that they would not hesitate to have the petitioner care for their own children. A third former coworker at that facility wrote that the petitioner never verbally or physically mistreated any of the children in her care, and that she was good at seeing that the children had a good time.

The petitioner testified that after she was discharged from this facility she "volunteered" for a short time at another day care (where she was working when she was interviewed by the Department during its investigation of the soap incident); but that she then took a job at a facility owned by her fiancé's aunt (the author of the second reference), where she worked for over a year and a half. At first, she was a "co-teacher" of a group of two-year-olds, but after a month she was placed in sole charge of a group of seven or eight children of that age. The petitioner states that she complained to the owner that she felt "overwhelmed" by being solely responsible for this many two-year-old children, but that the owner encouraged her by saying she could "handle it", and did nothing to reduce the number of children in the petitioner's charge.

In June, 1992, after she had been working at this facility for about ten months, the petitioner went on maternity leave. While she was gone, the facility was expanded to include another building, which was next door to the original one. When the petitioner returned from her maternity leave in August, 1992, she was made "co-director" of the day care and put in charge of the new building.

As noted above, the owner of this day care facility was an aunt of the petitioner's fiancé with whom the petitioner had a personal as well as professional relationship. During this time the owner began having an extra-marital affair. The owner asked the petitioner, and the petitioner agreed, to take the owner's boyfriend's calls for her on the phone in the petitioner's building. In January, 1993, however, the petitioner began receiving obscene phone calls at her home. From the sound of the voice she suspected the owner's boyfriend. She told her fiancé (the owner's nephew), who then called the boyfriend and told him to stop. The petitioner was never able to confirm the identity of the obscene caller, but immediately after her fiancé confronted his aunt's boyfriend the calls stopped. The petitioner testified, however, that the owner learned of the petitioner's suspicions, and that from that point on the petitioner's relationship with her employer deteriorated. The petitioner stated that she abruptly quit working at the day care in April, 1993, following a disagreement with the owner over her attendance at a staff meeting.

At the hearing, the petitioner's fiancé corroborated the petitioner's testimony regarding the incidents that led to the deterioration in the petitioner's relationship with the owner of the day care. The petitioner disputes every allegation contained in the owner's written reference to the Department (supra),⁽²⁾ beginning with the claim that she was "fired". Two parents of children at that day care testified glowingly of the petitioner's care for their children while she was there, and two other parents submitted similar written testimonials. Three of them specifically stated they would switch their day care to the petitioner if she were available.

Since leaving that day care, the petitioner has provided regular babysitting services in her home for a limited number of children. Three parents testified and another submitted a written testimonial that the petitioner has provided excellent care for their children in this capacity.

The hearing officer deemed all the witnesses who testified on behalf of the petitioner to be credible individuals who appeared unbiased,⁽³⁾ competent, and well-positioned to evaluate the petitioner's ability to care for children. The testimony of the petitioner, herself, and of her fiancé regarding the circumstances surrounding her leaving her most recent employer was also deemed highly credible.

As noted above, the petitioner admits to the incident of putting soap in a child's mouth. However, the Department investigated that incident at the time and allowed the petitioner to continue working as a day care employee. Since that incident the petitioner has worked continuously in day care situations for more than two years. The only evidence of any problem in that time is the written reference (supra) provided to the Department by her most recent employer. However, based on the credible testimony submitted by the petitioner and several witnesses it is found that that reference is most likely biased, retaliatory, and factually inaccurate. It simply strains credulity that if this employer truly thought the petitioner was "disrespectful to children" she would have kept the petitioner in her employ for more than a year and a half, hired the petitioner back after a maternity leave, and promoted the petitioner to the position of co-director of her facility, a position the petitioner held for nine months.

As for the allegations contained in the first reference (supra), in the face of the testimony to the contrary from three of the petitioner's coworkers at the time (one of whom was the petitioner's direct supervisor, and who was in the employ of that facility for three and a half years, well before and long after the petitioner's tenure there), it is also difficult to credit the written statement of the petitioner's first employer that the petitioner was "moody, grumpy, and seemed to have a bad attitude". This employer may have been understandably upset about the soap incident and the ensuing investigation of her facility by SRS, but her assessment of the petitioner's overall "attitude", at least as it relates to caring for children, is clearly contrary to the weight of the evidence.

This leaves the board with the soap incident that occurred in July, 1991, as the only credible blemish on the petitioner's record of more than two and a half years of providing child care. While this incident was serious, as noted above the Department, itself, after interviewing the petitioner at the time, did not think this incident merited any further significant action against the petitioner or any of her subsequent employers. The evidence from parents and coworkers (eleven witnesses in all) that the petitioner is a caring and competent provider of day care is persuasive and impressive. Therefore, it cannot be found that the soap incident, in and of itself, "indicates" that the petitioner has "an inability to care adequately for children" (see infra).

ORDER

The Department's decision is reversed.

REASONS

Section VI. 7 of the Department's Regulations for Family Day Care Homes provides:

The Division may deny the issuance of a Registration Certification if it has found that the person who

has submitted the Application has not complied with these regulations or has demonstrated behavior which indicates an inability to care adequately for children.

In the absence of any other evidence, the two negative references (supra) received by the Department regarding the petitioner may well have been sufficient to support the Department's decision under the above regulation. At the hearing, however, the petitioner produced substantial and compelling evidence that the above references were, for the most part, biased and inaccurate, and, therefore, not credible. As noted above, the petitioner admits to a serious violation of the Department's regulations when she was an employee of the first day care more than two years ago. As found above, however, and as appeared to have been conceded by the Department at the hearing, this incident, in and of itself, if weighed against two years afterwards of the petitioner providing good care for children in her charge, does not provide an adequate basis to conclude that the petitioner "has demonstrated behavior which indicates an inability to care adequately for children".

At the hearing the petitioner appeared to concede, however, that the Department would be within its discretion if, based on any lingering concerns regarding this incident, it chose to attach "conditions" to the petitioner's registration such as requiring her to receive additional education and/or training in child discipline or in managing children with challenging behaviors. Section VI. 17 of the Regulations states that: "The Division (of Licensing) may attach conditions to a Registration when circumstances warrant". Therefore, even though the board reverses the Department's decision in this matter it appears that the Department would still have the discretion under the regulations to modify or make conditional its issuance of a registration to the petitioner and to monitor her compliance

with those conditions. With this understanding, the Department's decision is reversed.

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1. The Department's records indicate only that the investigator "suggested" to the petitioner's employer at that time that the petitioner "be supervised by other staff at all times".
2. The name of the child referred to in the owner's reference is the petitioner's own infant daughter.
3. One of the witnesses, the parent of a young child the petitioner now babysits, is the petitioner's stepmother. Another parent who uses the petitioner for babysitting has a trailer on the petitioner's land. Except for the petitioner's fiancé, these were the only witnesses whose relationship with the petitioner appeared to be more than friendship or professional.