

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,092

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Appeal of)

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INTRODUCTION

The petitioners appeal the decision by the Department of Social and Rehabilitation Services to terminate their foster care license when the two foster children currently residing in their home leave their home through the normal course of events. The issue is whether the Department abused its discretion in not granting the petitioners a permanent variance to retain their foster home license as well as their registration for a day care home.

FINDINGS OF FACT

The facts are not in dispute. The petitioners are registered to operate a day care in their home and, in fact, provide day care for various children every day, sometimes on a "round the clock" basis. The petitioners are also licensed foster care providers, and presently provide foster care full time in their home for two foster children.

In April, and again in July, 1993, the Department notified the petitioners (and other affected individuals) that it was considering implementing a policy prohibiting the dual licensing of foster care and day care homes. Those notified were invited to submit comments to the Department regarding this proposed change.

In February, 1994, the Department notified all "dually licensed care providers" that it had finalized its policy prohibiting dual day care and foster care licensing. The notice advised those individuals that they could apply to the Department for a variance to be allowed to continue providing both types of care. The petitioners applied for that variance.

On September 8, 1994, the Department notified the petitioners that their request for a variance to retain dual licensure had been denied, but that they could request a hearing before the Commissioner or his designee to appeal that decision. The petitioners requested and were provided with such a hearing.

On September 28, 1994, the Department notified the petitioners that it was granting them a conditional foster care license limited to the two children presently in their foster care, and that when both those children leave their home through "the normal course of events" the petitioners' foster care license would expire. The petitioners appealed this decision to the human services board.

Documents submitted by the Department (see attachments) establish that its decision in this matter was reached only after a lengthy and deliberative process during which the petitioners were given a full opportunity to present their position on the adaptation of the policy and why they should be exempt from it. The Department has advised the petitioners that they may continue to be registered to provide day care in their home. The petitioners maintain, however, that the two licenses should be considered "interrelated", and that they can adequately provide love and care to both day care and foster children in their home.

ORDER

The Department's decision is affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services is charged by the legislature with the administration of the foster care program. See, generally, 33 V.S.A. § 304(b)(2), and 3501. The statutes specifically give the Commissioner the duty and authority to:

"issue regulations governing application for, and issuance, revocation, term and renewal of licenses and registration. In the regulations he may prescribe standards and condition to be met, records to be kept and reports to be filed.

33 V.S.A. § 306 (1)

Pursuant to this authority, the Department has adopted the following pertinent regulations:

046 The total allowable number of children living in or regularly cared for in a foster home will be determined by evaluation of the family's ability to provide appropriate care and supervision and by the amount of living space in the home.

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035 The state licensing authority may grant a variance from a specific regulation upon its determination that the applicant or licensee will otherwise meet the goal of the regulation. A variance may contain provisions or limitations.

Pursuant to these regulations the Department has promulgated Policy No. 440 in its Administrative Manual that includes the following provisions:

A. Child Care by Foster Families

The following families shall not provide child care in their homes:

1. Licensed foster families;
2. Provisionally approved families;
3. Families approved to provide kinship care;
4. Families approved to provide respite care;

B. Care of Children in Custody by Child Care Providers

Persons providing child care shall not provide:

1. Foster care or kinship care for a child in custody on a licensed or provisionally approved basis except that they may provide kinship care or foster care on a provisionally approved basis for up to 45 days for a child for whom they are providing child care;
2. Respite care for a child in custody except for a child for whom they are already providing child care.

C. Applications for Exemptions

There shall be no exemptions to this policy except under the following circumstances:

1. Families holding both foster care and child care licenses and/or registrations as of February 1, 1994 may apply to the Residential Licensing Unit by March 15, 1994 for an exemption. The Commissioner or designee may grant an exemption based on the Department's history and experience with the applicant family as a provider of both foster care and child care. The applicant may continue to provide both foster care and child care pending a decision regarding exemption from this policy.
2. Other exemptions may be granted by the Commissioner or designee only in unusual or extreme circumstances in which (1) the best interests of a particular child strongly warrant the exemption and (2) care of children in foster care and child care can be provided without undue risks to either. Applications for exemptions should be made to the Residential Licensing Unit.

The board has repeatedly held that its role in reviewing a discretionary decision or policy of the Department is to determine whether the decision reached has some reasonable basis. See, e.g., Fair Hearing No. 12,790. There is no question in this matter that the Department considered and reviewed all the pertinent facts and circumstances regarding the petitioners' situation, and that the Department's decision was in accord with its duly promulgated regulations and policies (see supra). Therefore, it must be concluded that the Department's decision was both procedurally and substantively reasonable and that, as a matter of law, the board is bound to affirm it. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19.

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