



committed fraud, a felony or other offenses involving violence" may not be a daycare provider.

3. The petitioner was also advised in the letter that she could request a variance to exempt her from the above prohibition and was advised how to do so. According to other correspondence sent to the petitioner, "the purpose of variances is to give caregivers the opportunity to propose alternatives to strict compliance to the regulations, which provide for equal care or protection of children."

4. The petitioner requested a variance on March 3, 2005. Her request was based on her daughter's trust and reliance on her to care for her children, her availability to care for them at all hours, the difficulty of finding other babysitters in the remote area in which they live and her ability to provide transportation to her daughter who is involved with work activities in the RUFA program.

5. On May 2, 2005, the variance was denied by the licensing supervisor because the petitioner did "not provide sufficient information to warrant approval." She was given an opportunity to appeal this denial to the Commissioner.

6. The Commissioner authorized the licensing unit director to conduct the review which was accomplished by interviewing the petitioner at her home and reviewing the

criminal records and prior correspondence in the case.

During the interview, the petitioner reiterated the reasons set forth in her letter and protested that her felony conviction has no bearing on her ability to care for her grandchildren.

7. On July 25, 2005, the Commissioner's representative sent a written letter to the petitioner which upheld the CDD's denial of the LECC application. The letter reviewed the evidence and concluded that the variance would not be granted for two reasons: (1) the petitioner's conviction was for a serious crime involving obtaining money through fraudulent means, a concern for a program which relies on providers to submit accurate attendance records, and (2) the petitioner had not completed a successful period of court ordered probation for the crime.

8. At the Board hearing held on July 28, 2005, the petitioner reiterated the arguments she had made before the Commissioner. Her daughter also appeared at the hearing to say that she only trusts her mother to care for her children, that she has been caring for them since last year and does a good job and that it is only fair for her mother to be paid for her work by CDD.

9. CDD stood by the reasons set forth in the Commissioner's review letter as set forth in paragraph seven above.

10. The record was left open for CDD to submit relevant documents<sup>1</sup> and argument which was filed on August 29, 2005. The petitioner was given two weeks to file a response to the submissions. As no response was filed by September 21, 2005, more than three weeks after the submission, all documents submitted by CDD were admitted into evidence and the record was closed.

ORDER

The decision of CCD denying the petitioner's application for an LECC certificate based on prohibitions in its regulations is affirmed. Its decision to deny a variance is also affirmed.

REASONS

The Legally Exempt Childcare program exists to certify persons for daycare payments through CDD who are caring for specific children, often relatives, who are eligible for daycare payments and who do not wish to become general daycare

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<sup>1</sup> The hearing was originally set as a status conference but the parties agreed that the matter could be heard at once as the facts in the matter were undisputed although the conclusions were contested.

providers to the public. Regulations adopted by CDD to govern its Legally Exempt Childcare provider program prevent certain persons from receiving certification for payment by CDD for providing daycare:

The following persons may not be providers, be present in, or reside in the home of the Provider:

- a person found by the court to have committed fraud, a felony, or other offenses involving violence or unlawful sexual activity or other bodily injury to another person including, but not limited to, abuse, neglect or sexual activity with a child;

. . .

Legally Exempt Child Care Provider  
Requirements, July 1, 1998  
Section B Health & Safety, Number 1

Although the above provisions are labeled "health and safety", CDD argues that the regulations are also designed to prevent persons of adjudicated dishonesty from participating in the program in order to protect the fiscal health of the program. This is because the program relies upon the honesty of providers with regard to reporting the number of hours worked and payments due. This argument has been made by the Department in many prior appeals and the Board has accepted that reasoning based upon the specific inclusion of fraud in the disqualifying crimes found in the regulation. See e.g. Fair Hearings No. 15,652 and 17,322.

The petitioner does not dispute that she was convicted of a felony involving fraud (forgery) just last year and that she is still completing a probationary period for that crime. Given those facts, CDD followed its regulation in finding that the petitioner is a prohibited provider under the regulations and cannot be granted a LECC certificate. The Board is bound to affirm any decision by CDD which is consistent with its regulations. 3 V.S.A. § 3091(d), Fair Hearing Rule 17.

CDD has a specific provision in its regulations granting the Commissioner the authority to grant a variance, if requested to do so, of any LECC regulation:

The SRS or DSW Commissioner<sup>2</sup>, or his or her designee, may grant a variance to these requirements under unique and exceptional circumstances when literal application of a part of these requirements will result in an unnecessary hardship and the intent of the requirement can be achieved by other means.

Legally Exempt Child Care Provider  
Requirements, July 1, 1998  
Section G. Certification, Number 8

This regulation requires the Commissioner to find in favor of the petitioner on two counts: (1) that there is a hardship<sup>3</sup> necessitating the variance, and (2) that the

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<sup>2</sup> SRS is the predecessor organization to CCD.

<sup>3</sup> The Board has held in past decisions that the "hardship" in the regulation is the hardship experienced by the ANFC recipient who relies

concerns of CDD expressed in the regulation can be met some other way. The Commissioner in this case never reached the hardship question in denying the variance because he determined that the concerns of CDD with regard to honest and accurate billing could not be met in these circumstances. Since this is a question requiring the Commissioner to exercise his judgment and discretion, the Board may not substitute its own judgment unless the decision of the Commissioner is arbitrary or capricious. Fair Hearing No. 15,652.

Given the fact that the petitioner is still on probation for a crime committed last year which involved obtaining money through forging a document, it cannot be said that the Commissioner's concern that the petitioner may defraud CDD as well is an unreasonable one. The petitioner has presented no evidence which would allay this fear. As the Commissioner's decision not to grant the variance is within his discretion and is based on a reasonable and relevant concern, the Board is bound to affirm it. Fair Hearing No. 15,652. If and when the petitioner successfully completes her probation, she is

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upon the LECC applicant, and not the hardship to the would-be-provider who may lose income. Fair Hearing No. 17,322.

encouraged to renew her request for a variance and receive a new consideration.

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