

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
15 DHR 09330

Elaine B Shelton, Positive Beginnings Petitioner, v. Division Of Child Development And Early Education Respondent.	FINAL DECISION
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THIS MATTER came on for hearing before Hon. J. Randolph Ward, Administrative Law Judge, on April 14, 2016 in Charlotte, N.C. on the Petitioner's appeal of a summary suspension of her license to operate a home child care facility. Following preparation of a transcript, and the opportunity for the parties to submit additional written arguments and proposed decisions, this Final Decision was prepared.

APPEARANCES

Petitioner: Elaine B. Shelton, *pro se*
Charlotte, N.C.

Respondent: Alexandra Gruber
Assistant Attorney General
N.C. Department of Justice
Raleigh, N.C.

APPLICABLE STATUTES AND RULES

N.C.G.S. §§ 110-90(9), 110-98, 110-102.2(4), and Child Care Rule 10A NCAC 09 .2207.

ISSUE

Whether the Respondent exceeded its authority or jurisdiction, or otherwise substantially prejudiced Petitioner's rights when it summarily suspended Petitioner's license to operate a home child care facility.

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner's Exhibits 1 through 7.

Respondent's Exhibits 1 through 5, and 8 through 15.

EVIDENTIARY MOTION

On April 29, 2016, following the close of the evidence on April 14, 2016, the undersigned's office received from a real estate agent a "Residential Rental Contract Renewal and/or Amendment," for the residence used for Petitioner's home child care business. The instrument was executed by the parties on March 15 and 16, 2016, and extended the term of the rental agreement in force since April 1, 2015 from March 31, 2016 to March 31, 2017. As this lease was in Petitioner's sole name, the undersigned presumes that Petitioner was offering it as evidence of living apart from her husband, as she had sought to demonstrate with a Separation Agreement and a Support Order, admitted as Petitioner's Exhibits 1 and 2. In light of Respondent's objections to admission of this item on procedural grounds, and the fact that the document's evidentiary value is merely cumulative, admission of this exhibit is **DENIED**.

FINDINGS OF FACT

UPON DUE CONSIDERATION of the arguments and stipulations of counsel; the exhibits admitted; and the sworn testimony of each of the witnesses, viewed in light of their opportunity to see, hear, know, and recall relevant facts and occurrences, any interests they may have, and whether their testimony is reasonable and consistent with other credible evidence; and, upon assessing the preponderance of the evidence from the record as a whole in accordance with the applicable law, the undersigned makes the following:

1. At all times relevant to this matter, Petitioner Elaine B. Shelton operated Positive Beginnings, a home child care facility, under a five-star rated license issued by the Division. Petitioner's facility is located in Ms. Shelton's residence in Charlotte, N.C. (R. Ex. 1)

2. The Respondent Division of Child Development and Early Education of the N.C. Department of Health and Human Services (hereinafter, "Respondent," the "Division" or "DCDEE") is charged with administering the licensing program for child care facilities in the State.

3. Pursuant to N.C.G.S. § 110-85, the Division has a mandate to ensure that children in child care facilities are in physically safe and healthy environments where the developmental needs of the children are met.

4. On May 31, 2015, DCDEE reissued a "Five Star Child Care License" to the Petitioner to operate, in her home, a daycare program for up to eight children, with a maximum five of preschool age. The five-star rating was based on the award of 14 out of a possible 15 points for "staff education" and "program standards." As of June 9, 2015, DCDEE rated Petitioner's "Compliance History" at 94%. *See*, Respondent's Exhibit 1, at pages 1 and 2 (hereinafter, "R Ex 1, p 1 & 2").

5. On June 9, 2015, Ms. Lisa Martin, a child care consultant for the Division, made an unannounced annual compliance visit to New Beginnings, and noted in her "Visit Summary" that she had observed "children ... playing in the family room with the provider's husband." (R Ex 1, p 7.) During the visit, Petitioner initialed and signed a "Verification of Required Information for Operator and Additional Staff" form prepared Ms. Martin, acknowledging the statement, "I will

notify my DCDEE consultant if any person that is in the home during the operating hours receives a pending criminal charge or criminal conviction or substantiation of abuse or neglect,” in a list of obligations in the section entitled “Operator’s Statement of Responsibility”: (R Ex 1, p 12.) Ms. Martin also discussed with Petitioner her obligation to obtain criminal background checks every three years for each member of the household age 16 and older, pointing out that one of her sons living in the home, Avery, would turn 16 in August. (R Ex 1, p 9; Tr p 20:4-7.)

6. On July 16, 2015, Petitioner’s husband, Alfonzo Shelton, was stopped for operating an automobile without proper registration and license plate. At the police station, he surrendered a small quantity of marijuana to police officers, and was charged with misdemeanor possession of less than a half ounce of marijuana. When the matter came on for hearing in February 19, 2016, Mr. Shelton entered a plea, was granted deferred prosecution, and the charge was subsequently dismissed. (Tr p 21:3-20, 55:9-22, 138:3-20; R Ex 4, p 4.)

7. On October 12, 2015, the mother of an estranged girlfriend of one of Petitioner’s older sons contacted Respondent and made accusatory statements about the Petitioner’s family. These included statements that Respondent categorized as, “alleges neglect” of a child. (R Ex 2.) This neglect allegation was never substantiated, and it was not cited as grounds for the summary suspension effected that day. However, investigating “a report alleging child neglect” was “[t]he purpose” of the unannounced visit to Petitioner’s premises on October 13, 2015 by an investigations consultant for DCDEE. (R Ex 3, p 1; Tr p 86:21-87:22.)

8. The accuser also told DCDEE the son was recently charged with assault on a female, and that Petitioner’s husband “got 2 DUIs recently.” The Division’s criminal history searches on October 12, 2015 revealed that Ms. Shelton’s husband, Alfonzo Shelton, had a pending misdemeanor charge of possession of less than a half ounce of marijuana. Additionally, the criminal history check for Ms. Shelton’s son, Alfonzo Shelton II, a resident of Petitioner’s home, showed a charge of assault on a female that had been dismissed. (R Ex 4 & 5.) Based upon the marijuana charge, Alfonzo Shelton was disqualified from being a child care provider. Petitioner had not notified DCDEE of these charges. *See*, the Transcript of the Administrative Hearing, page 46, lines 2 through 4 (“Tr p 46:2-4”).

9. Ms. Walker went to the family child care home on October 13, 2015 and spoke with Petitioner, Elaine Shelton. At that time, Ms. Shelton informed Ms. Walker that she was aware of the charges against her husband. She told Ms. Walker that her husband had been “driving in his truck with a friend, that they were pulled over... [and] that the friend had marijuana that had fallen out on the floor of the truck. And because it was Mr. Shelton’s truck, that’s why he was charged.” (T. pp. 50-51, R. Ex 3 & 8) While it appears that her husband misled Petitioner about the events of that evening, she was aware that he was charged, and thus had a duty to report the event to the Division, if he was a member of her household.

10. There is conflicting evidence over whether the Petitioner’s husband, Alfonzo Shelton, was a resident of the subject child care home. Petitioner testified that he had not lived in the home since December 2014, coinciding with a *Voluntary Support Agreement and Order* dated December 16, 2014. (P Ex 2.) She also testified that she and her husband had “renewed their vows” earlier in 2014, and she put into evidence a 2009 separation agreement. (P Ex 1.) A former

girlfriend of Petitioner's son Alfonzo (and the alleged victim of his assault, which she denied) told a Division investigator that Petitioner's husband did not live in the residence, but was there from time to time to visit Petitioner and their children.

11. However, Petitioner signed a form saying her husband was a member of her household on June 9, 2015, and he was seen on the premises that date. Another member of the Division staff understood from Petitioner's references to him that he a resident there on October 13, 2015. The greater weight of the conflicting evidence tends to show that Petitioner's husband, Alfonzo Shelton, was a member of the household, at least temporarily, during the relevant period.

12. The Petitioner was unable or unwilling to comply with her obligation as a child care operator to promptly notify the Division of criminal charges against members of her household where child care is provided.

13. Petitioner has a history of failing to timely obtain criminal history background checks for child care providers and household members. In her testimony, she generally did not controvert evidence to this effect, but said she took care of it when violations were brought to her attention.

14. Over several years of operation, Ms. Shelton's facility was been cited for failure to obtain criminal background checks, as required by N.C. Gen. Stat. § 110-90.2 ("CRC"). In 2015, Ms. Shelton and her husband were cited for not having current CRC letters on file because they failed to submit paperwork for their three-year criminal background re-check. (R. Ex. 1, p. 7) Ms. Shelton's son, Avery, did not have a timely CRC check done when he turned sixteen (16), and Ms. Shelton was cited for not having a current check done at the October 13, 2015 visit made by Hillary Walker. (R. Ex. 3, p. 2) Ms. Shelton was also cited in April of 2014 for failing to have CRC letters on file for her other two sons. (R. Ex. 13, p.2) Prior to that, Ms. Shelton failed to provide a CRC check for Ashley Spears, who was assisting Ms. Shelton at her facility. (R. Ex. 15, p. 1)

15. On October 13, 2015, the Respondent summarily suspended Petitioner's child care license, citing her failure to notify the Division of her husband's arrest, and failure to obtain a criminal background check for her son, Avery, when he turned 16 in August 2015, despite her discussion with Division staff about this obligation on June 9, 2015. (R. Ex. 10.)

16. Petitioner timely requested a contested case hearing in the Office of Administrative Hearings.

Based upon the foregoing findings of fact, the undersigned concludes as a matter of law:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to N.C. Gen. Stat. §§ 110-94 and 150B-3 of the North Carolina General Statutes, and all parties received due notice of the hearing.

2. The Respondent N.C. Department of Health and Human Services, Division of Child Development and Early Education (the “Division” or “Respondent”) regulates the State’s “Child Care Facilities” pursuant to Chapter 110, Article 7, N.C. Gen. Stat. §§ 110-85, *et seq.*, to “ensur[e] that these facilities provide a physically safe and healthy environment where the developmental needs of these children are met and where these children are cared for by qualified persons of good moral character.”

3. At all times pertinent hereto, Petitioner Elaine B. Shelton, doing business as Positive Beginnings, operated a “child care facility” at her residence subject to the Division’s regulation. N.C. Gen. Stat. § 110-86(3)b.

4. The Division is charged with requiring that each “child care provider” produce a criminal back ground check prior to caring for children, and every three years thereafter. In addition to disqualifying any sex offenders, or persons convicted or deemed responsible for child abuse or neglect, *see* N.C. Gen. Stat. § 110-90.2(5)(a1), the Division must make a “determination” of each “child care provider’s fitness to have responsibility for the safety and well-being of children based on the criminal history.” N.C. Gen. Stat. § 110-90.2(5)(b). For the purposes of this section, “criminal history” includes a “pending ... criminal charge ... that bears upon an individual’s fitness to have responsibility for the safety and well-being of children.” The statutory “Notice [to] Child Care Provider [of] Mandatory Criminal History Check” in this section specifically states that such “Criminal history” includes “violation of the North Carolina Controlled Substances Act, Article 5 of Chapter 90 of the General Statutes” -- which encompasses possession of marijuana, § 9095(d)(4) – “and alcohol-related offenses such as sale to underage persons in violation of G.S. 18B302 or driving while impaired in violation of G.S. 20-138.1 through G.S. 20-138.5.” N.C. Gen. Stat. § 110-90.2(5)(c).

5. N.C.G.S. § 110-90.2 provides in relevant part:

[T]he Department shall ensure that, prior to employment and every three years thereafter, the criminal history of all child care providers is checked and a determination is made of the child care provider’s fitness to have responsibility for the safety and well-being of children based on the criminal history. The Department shall ensure that all child care providers are checked for county, State, and federal criminal histories.

N.C.G.S. § 110-90.2(b).

6. N.C.G.S. § 110-90.2 defines “criminal history” as “a county, state, or federal criminal history of conviction or pending indictment of a crime or criminal charge, whether a misdemeanor or a felony, that bears upon an individual’s fitness to have responsibility for the safety and well-being of children.” N.C.G.S. § 110-90.2(a)(3). Such crimes include “alcoholrelated offenses such as sale to underage persons in violation of G.S. 18B-302”, as well as “possession or sale of drugs in violation of the North Carolina Controlled Substances Act.” *Id.*

7. Household members in a family child care home who are “over 15 years old, including family members and nonfamily members who use the home on a permanent or temporary basis as their place of residence” are subject to the criminal record check requirements. N.C.G.S. § 110-90.2(a)(2).

8. Individuals can be criminally “disqualified” under N.C.G.S. § 110-90.2 if they have “a county, state, or federal criminal history of conviction or pending indictment of a crime or criminal charge, whether a misdemeanor or a felony.” N.C.G.S. § 110-90.2(a)(3).

9. A “pending charge” for purposes of N.C.G.S. § 110-90.2 “includes, but is not limited to, a charge that has been deferred pursuant to G.S. 15A-1341(a1).” 10A NCAC 09 .2702(5).

10. The North Carolina Child Care Rules provide, “Disqualification of a child care provider living in a family child care home shall be grounds for issuance of a summary suspension of the family child care home license in accordance with 10A NCAC 09 .2207.”

11. The North Carolina Child Care Rules require child care facility operators to report:

all child care providers and household members who have incurred any pending charges, indictments or convictions (other than minor traffic offenses) since the last qualification letter was issued by the Division to notify the operator of such charges within five business days or before returning to work, whichever comes first.

10A NCAC 09 .2703(j). That Rule further provides, “The operator shall notify the Division of any such pending charges, indictments or convictions within one business day of being notified.” *Id.* (emphasis added).

12. Rule 10A NCAC 09 .2207 provides in relevant part, “Summary suspension of a permit may be ordered in accordance with G.S. 150B-3(c) when, in the Division's determination, emergency action is required to protect the health, safety, or welfare of children in a child care facility regulated by the Division.”

13. The Division may revoke of a child care permit when the operator has committed a violation of any section of the child care statutes or rules in a manner that is willful, continual, or hazardous to health or safety, or the operator has not made reasonable efforts to conform to standards or is unable to comply with the child care rules or statutes. 10A NCAC 09 .2206.

14. The Petitioner was unable or unwilling to comply with her obligation as a child care operator to promptly notify the Division of criminal charges against persons in her household where child care is provided, in violation of her obligation to do so.

15. The Petitioner was continuously unwilling or unable to comply with her obligation as a child care operator to timely obtain criminal background checks on child care providers and members of her household where child care is provided, in violation of her obligation to do so.

16. A summary suspension of a child care permit may be ordered when, in the Division's determination, emergency action is required to protect the health, safety, or welfare of children in a child care facility regulated by the Division. N.C. Gen. Stat. 150B-3(c); 10A NCAC 09 .2207.

17. The Respondent did not exceed its authority or jurisdiction by summarily suspending Petitioner's child care license. N.C. Gen. Stat. §§ 110-90(9); 150B-3(c); 150B-23(a).

18. The Respondent's decision to summarily suspend Petitioner's child care license was not arbitrary and capricious. *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980); *Watson v. N. Carolina Real Estate Com'n*, 87 N.C. App. 637, 649, 362 S.E.2d 294, 301 (1987) ([A]gency action is considered arbitrary and capricious only if it indicates a lack of fair and careful consideration and fails to indicate any course of reasoning and the exercise of judgment.)

19. Petitioner failed to show by a preponderance of the evidence that Respondent violated her rights.

20. To the extent that the foregoing Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011).

Upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The Respondent's decision to summarily suspend Petitioner's child care license must be, and hereby is, **AFFIRMED**.

NOTICE

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the provisions of North Carolina General Statute § 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C.

Gen. Stat. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 19th day of August, 2016.

J Randolph Ward
Administrative Law Judge