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DISTRICT COURT OF APPEAL
FIRST DISTRICT

VERONICA HARRIS

Appellant

v.

DEPARTMENT OF CHILDREN
AND FAMILY SERVICES

Appellee

Case No.: 1D01-2862

L.T. No.: 00-2824

Closed EJD

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HEARINGS

INITIAL BRIEF OF APPELLANT
VERONICA HARRIS

On appeal of Final Order of the Department of Children and Family Services
following an evidentiary hearing before an Administrative Law Judge
on September 15, 2000

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PRELIMINARY STATEMENT

This is an appeal from a Final Order of the Department of Children and Family Services following an evidentiary hearing before an Administrative Law Judge on September 15, 2000. The record below will be cited as: (R. pg. ____). Appellant, Veronica Harris, was the Petitioner below and will be referred to as "Appellant," or "Ms. Harris." Citations to Petitioner's exhibits 1-9, admitted at the hearing, will be: (Pet. Ex. ____). Citations to Petitioner's supplemental exhibits admitted subsequent to the hearing will be: (Pet. Supp. Ex. ____).

Appellee, Department of Children and Family Services, was the Respondent below and will be referred to as the "Agency." Citations to Respondent's exhibits will be: (Resp. Ex. ____).

The hearing transcript consists of a single volume, and will be referred to by page number, as (Tr. ____). Neither party requested a transcript at the conclusion of the hearing. (Tr. pg. 126) (App. at tab A-4.126) The Secretary of the Agency did not possess the transcript when the Final Order was rendered. The transcript was prepared at Appellant's request after the Notice of Appeal was filed.

Documents included in Appellant's Appendix will be cited as: (App. at tab A-____)

STATEMENT OF THE CASE AND FACTS

Appellant's 1996 Exemption

The Appellant has been licensed as a daycare provider in Florida since 1996. (Tr. pg. 27) (App. at tab A- 4.27) The Agency initially denied Appellant a license to provide child care because she pleaded guilty to manslaughter in the State of New York in 1973. (Resp. Ex. 1) (App. at tab A- 3.1) Appellant failed to disclose the manslaughter conviction on her 1995 Affidavit of good Moral Character. (Pet. Ex. 1) (App. at tab A- 2.1) It was discovered in the Agency's background screening of her application. (Tr. pg. 115-17) (App. at tab A- 4.115) Appellant requested an administrative hearing seeking an exemption from disqualification.

On July 21, 1996, approximately two months before the 1996 administrative hearing on Appellant's request for exemption, Appellant was involved in an altercation with Frank Fields. The Appellant pleaded guilty, and was adjudicated guilty to a charge of battery on August 28, 1996. (Tr. pg. 35, Pet. Ex. 3 & 4) (App. at tab A- 4.35) (App. at tab A- 2.7) At the hearing on her request for exemption, on September 10, 1996, Appellant did not reveal the altercation or her subsequent no contest plea to a charge of battery. Appellant was subsequently granted an exemption for the 1973 manslaughter conviction in Harris v. Department of Health and Rehabilitative Services, DOAH Case no. 96-2010 (Resp. Ex. 1) (App. at tab A-

3.1)

Appellant's Application to Renew the Daycare License

When she applied to renew her daycare license in 2000, Appellant signed an affidavit indicating that she had not committed any of the disqualifying offenses listed in the affidavit. (Tr. pg. 28, Pet. Ex. 2) (App. at tab A- 4.28, App. at tab 2.3) Subsequently, in its background screening process, the Appellee discovered that Appellant had been found guilty of battery. Based on the information in the court file, the Appellee concluded that the Appellant had committed "domestic battery," a disqualifying offense under Section 741.30, Florida Statutes. (Tr. pg. 120-21) (App. at tab A- 4.120-121)

On March 21, 2000, the Agency notified Appellant that she was ineligible to hold a position of special trust, pursuant to Section 402.305(2), Florida Statutes, because of the alleged "domestic battery" that occurred on July 21, 1996. (Pet. Supp. Ex. 10) (App. at tab A- 2.9). Appellant timely filed a request for an exemption from disqualification, (Pet. Supp. Ex. 11) (App. at tab A- 2.12) and a Request to contest Accuracy of the Record which disputed the "domestic battery" allegation. (Pet. Supp. Ex. 12) (App. at tab A- 2.14). The Agency denied the request for an exemption. (Pet. Supp. Ex. 13) (App. at tab A- 2.16). On June 26, 2000, Appellant requested a formal hearing pursuant to Chapter 120, Florida

Statutes, (Pet. Supp. Ex. 14, R. pg. 1) (App. at tab A- 2.18, App. at tab A-1.1), on a form provided by the Agency, and on June 29, 2000, Appellant filed a Petition for Formal Administrative Hearing (R. pg. R.6-14) (App. at tab A-1.2) contesting the accuracy of the allegation that Appellant committed "domestic battery" as alleged in the original notice (Pet. Supp. Ex. 10) (App. at tab A- 2.9), or, if it were determined that she did commit a disqualifying offense, Appellant should be granted an exemption.

A formal administrative hearing was held on September 15, 2000, before an Administrative Law Judge. Appellant admitted that she battered Frank Fields, an adult male, on July 21, 1996, (Tr. pg. 29-33) (App. at tab A- 4.29-33) and that she subsequently pleaded no contest to a charge of battery pursuant to Section 784.03, Florida Statutes, a misdemeanor of the first degree, (Tr. pg. 33-36) (App. at tab A- 33-36). Appellant was adjudicated guilty of battery.¹ (Resp. Ex. 2) (App. at tab A- 3.12) She presented evidence, however, that the battery was not a disqualifying offense under Section 435.04, Florida Statutes, because, among other reasons, Appellant and Frank Fields did not reside together as a family. (Tr. pg. 30, 59, 69) (App. at tab A- 4.30, 4.59, 4.69) Appellant also presented witnesses who testified

¹ Appellant also pleaded no contest to a charge of driving with a suspended license, which is not relevant to this proceeding.

that she is a caring and dedicated day care provider who loves her job, has worked consistently to improve her skills, and would never be a danger to children in her care. (Tr. 71-105) (App. at tab A- 4.71-105)

On November 17, 2000, the Administrative Law Judge entered the Corrected Recommended Order² (R. pg. 48-60) (App. at tab A-1.11) holding that Appellant and Mr. Fields did not reside together as a family, therefore, "it must be concluded that Petitioner's 1996 battery of Mr. Fields did not constitute an act of domestic violence. . . . [and] it therefore follows that Petitioner should not have been disqualified from working in a position of special trust." (R. pg. 75, para. 77-78) (App. at tab A-1.137-138)

The Agency's "Final Order Rejecting Recommended Order or, in the Alternative, Revoking Exemption."

The Secretary of the Department of Children and Family Services entered the "Final Order Rejecting Recommended Order Or, In The Alternative, Revoking Exemption" on June 18, 2001 (hereafter referred to as the Final Order). The Secretary did not have a transcript of the hearing. The Final Order consists of two paragraphs, and is in fact two orders. The first paragraph adopts the

² The Administrative Law Judge filed a Recommended Order on November 14, 2000 (R. pg. 15-47) and subsequently filed a Corrected Recommended Order on November 17, 2000. The Corrected Recommended Order recites that it is entered "Sua Sponte and solely for the sake of clarity." (R. pg. 48) Appellant's Initial Brief will cite to only the Corrected Recommended Order.

Administrative Law Judge's findings of fact and conclusions of law, and denies the Respondent's exceptions. The second paragraph is directed to the exemption granted to Appellant in an earlier proceeding in 1996. It states:

This is the second time that the petitioner has asked for an exemption from the Department. The first time was in 1996, when the petitioner sought and secured an exemption for felony manslaughter. The attached Corrected Recommended Order clearly illustrates that the petitioner committed fraud in obtaining her first exemption. Consequently, that exemption is hereby rescinded, which acts to disqualify petitioner from working in a position of special trust.

The Appellant timely filed a Notice of Appeal (R.101).

SUMMARY OF ARGUMENT

The Final Order under review is actually two distinct, severable orders. The first paragraph adopts the Administrative Law Judge's findings of fact and conclusions of law and denies Appellee's exceptions. This part of the order is a complete resolution of the issues properly raised. It should be affirmed. In the second paragraph, however, the Agency greatly oversteps its statutory authority. The second paragraph of the Final Order should be quashed. In the second paragraph, the Agency raises, for the first time in this proceeding, the validity of the Appellant's 1996 exemption; it then makes a finding that Appellant committed

fraud in the 1996 proceeding, without reviewing the transcript of the hearing below or the record of the 1996 proceeding; it summarily rescinds the 1996 exemption and declares the Appellant disqualified from holding a position of special trust.

In the second paragraph of the Final Order the Agency completely ignores the mandatory procedures of Chapter 120 that govern every agency action affecting any person's substantial interests. The Agency oversteps the statutory limits of its power by declaring the Appellant guilty of fraud, without notice, without evidence, and without allowing the Appellant an opportunity to defend against this charge. It thereby violates the well-established rule of law that agencies of the state have no inherent powers and can act only in the mode prescribed by statute.

In addition, the Agency ignores Florida law requiring that a person charged by a board or agency be informed with reasonable certainty of the charges and the facts on which the charges are based. A review of the record shows conclusively that the Agency gave the Appellant no notice whatsoever, at any time prior to the final order, that she would be charged with committing fraud in the 1996 proceeding. Every letter or pleading in the record that states the issues to be heard is limited to the allegation that Appellant committed "domestic battery." At the hearing, the Administrative Law Judge ruled that the validity of the 1996

exemption could not be contested. The Agency did not object to this ruling or seek to amend the pleadings.

The lack of notice also deprived Appellant of her right to due process of law guaranteed by both the Florida and federal constitutions. The Appellant has a constitutionally protected property interest in her child care license. The Florida and federal constitutions guarantee the Appellant timely and adequate notice of the reasons that the State seeks to terminate her license and an effective opportunity to defend against the charge. The Appellant was denied both notice and an opportunity to defend by the Agency's arbitrary procedure.

The evidence in the record does not establish the elements of fraud. There is no evidence to show that the Appellant made a false representation of fact, either affirmatively or by failing to respond truthfully to an inquiry; there is no evidence to establish she had any intent to mislead in anything she said or failed to say in the 1996 hearing; nor is there evidence proving that the hearing officer was deceived by anything Appellant said or failed to say. The Appellant acknowledged that she had not volunteered information about the battery conviction in the 1996 hearing, and she explained why she believed that the battery was not relevant. The Agency's counsel agreed that she was not obligated to reveal the information at the 1996 hearing. The Administrative Law Judge's speculative finding that Appellant

“intentionally mislead” the hearing officer in 1996 is simply without foundation and must be disregarded.

The Agency violated Section 120.57(1)(l) by increasing the penalty without reviewing the complete record. It is undisputed that the Agency did not have a transcript of the hearing below when the Final Order was entered. In order to review the complete record, the Agency must review the hearing transcript.

The Appellant’s 1996 exemption hearing concluded with a Final Order filed October 30, 1996. The Order is final and cannot be disturbed in a later, collateral proceeding. The principles of res judicata dictate that the 1996 exemption cannot be re-litigated in this proceeding. The second paragraph of the Final Order is invalid, and must be quashed.

STANDARD OF APPELLATE REVIEW FOR ALL ISSUES

On appellate review of an administrative agency's order, the appellate court must determine whether the order is supported by substantial competent evidence and whether agency action taken in the order is outside of the agency's statutory authority. Kriston v. Florida Unemployment Appeals Commission, 693 So. 2d 689 (Fla. 2d DCA 1997); University of Miami v. Zepeda, 674 So. 2d 765 (Fla. 3d DCA 1996). Florida Courts generally will defer to an agency's interpretation of statutes

and rules the agency is charged with implementing. Florida Courts will not, however, defer to an agency's interpretation that is contrary to law. Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1273 (Fla. 2000).

ARGUMENT

ISSUE 1: THE AGENCY EXCEEDED ITS AUTHORITY UNDER CHAPTER 120 WHEN IT RESCINDED APPELLANT'S 1996 EXEMPTION.

The Final Order (R. pg. 98) (App. at tab A- 1.48) is actually two distinct and severable orders. In the first paragraph the Agency adopts the findings of fact and conclusions of law set out in the Corrected Recommended Order, and denies the Respondent/Appellee's exceptions. This paragraph comes at the conclusion of the prescribed statutory process, and constitutes a complete and final determination that the Appellant is not disqualified from holding a position of special trust solely on the basis of her 1996 battery conviction because the underlying offense was not "domestic battery." (R. pg. 77, 98) (App. at tab A-1.140, A-1.148) The Court should affirm this part of the Final Order.

The Agency greatly oversteps its statutory authority, however, in the second paragraph. In the second paragraph, the Agency (1) raises an entirely new issue, the validity of the Appellant's 1996 exemption, (2) finds that the Appellant committed fraud in the 1996 proceeding without reviewing either the transcript of

the hearing below, or the record of the 1996 proceeding, (3) rescinds the 1996 exemption, and (4) declares that Appellant is disqualified from a position of special trust. In reaching this conclusion, the Agency completely ignores the procedural requirements of Chapter 120, Florida Statutes.

It is well established in Florida law that a state agency is a creature of statute, and has only the powers given to it by the Legislature in the enabling statutes. City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 495 (Fla. 1973); Florida Dept. of Insurance v. Bankers Insurance Co., 694 So. 2d 70 (Fla. 1st DCA 1997). An agency of the State, "as a creature of statute, has no common law jurisdiction or inherent power." State, Dept. of Environmental Regulation v. Falls Chase Special Taxing District, 424 So. 2d 787, 793 (Fla. 1st DCA 1983). This rule applies with equal force to an agency exercising licensing or disciplinary powers. See, Dept. of Business and Professional Regulation v. Stein, 326 So. 2d 205, 207 (Fla. 3d DCA 1976). Further, an agency exercising licensing and disciplinary powers "can only act in the mode prescribed by statute. . . [an agency] cannot rightfully dispense with any of the essential forms of proceedings which the legislature has prescribed for the purpose of investing [the agency] with power to act." State ex rel. Greenberg v. Florida State Board of Dentistry, 297 So. 2d 628, 634 (Fla. 1st DCA 1974). The Administrative

Procedure Act, Chapter 120, Florida Statutes, sets out the procedure that every agency must follow when it makes a determination that affects a person's substantial interest. Section 120.569, Florida Statutes.

In this case, however, the Agency did not give Appellant notice of its intended action, and did not afford her a meaningful opportunity for a hearing. Instead, the Agency raised and decided this issue on its own motion, after the hearing, when it was impossible for Appellant to present a defense. The Agency's obvious lack of regard for fundamental fairness, and its intentional disregard of the process required by Chapter 120, can only be characterized as an abuse of the Agency's authority. The Court should quash the second paragraph of the Final Order and order that it be stricken.

ISSUE 2: THE AGENCY'S ATTEMPT TO RESCIND THE 1996 EXEMPTION IS INVALID BECAUSE THE AGENCY DID NOT INFORM APPELLANT THAT SHE WOULD BE CHARGED WITH COMMITTING FRAUD IN THE 1996 HEARING.

It is a long-standing, fundamental requirement of Florida law that a person required to respond to the charges brought by a Board or agency must be informed with reasonable certainty of the charges and the facts on which the charges are based, so that the accused has a reasonable opportunity to defend against proof of

such charges. Hadley v. Dept. of Administration, 411 So. 2d 184 (Fla. 1982); State ex rel. Williams v. Whitman, 156 So. 705 (Fla. 1934). Additionally, Florida law imposes a special duty to inform a respondent of the facts and circumstances allegedly constituting fraud. In a civil complaint, all averments of fraud must state the circumstances constituting fraud with as much particularity as the circumstances may permit. See Fla. R. Civ. P. 1.120(b).

The Agency's decision that Appellant committed fraud and its decision to rescind her 1996 exemption, stated in the second paragraph of the Final Order, are invalid because the record shows that Appellant was never informed at any stage of this proceeding that she was accused of fraud, or that her entitlement to the 1996 exemption would be at issue. The absence of notice is clearly revealed in a review of the record of the process the Agency followed to adjudicate the domestic battery charge. The proceeding began with the Agency's letter to the Appellant advising that she was "ineligible to hold a position of special trust" because of a "Domestic Battery" that allegedly occurred on July 21, 1996. (Pet. Supp. Ex 10) (App. at tab

A-2.9) The letter contains no expression of any agency intention to revisit the 1996 exemption, nor any allegation of fraud. The Appellant's response to the letter does nothing to enlarge the scope of the proceeding. A review of the record shows that the Appellant only pursued the "avenues of appeal" described therein. She

first requested an exemption from disqualification (Pet. Supp. Ex. 11) (App. at tab A- 2.12) which was denied (Pet. Supp. Ex. 13) (App. at tab A- 2.16). The Appellant then pursued her "Request to Contest Accuracy of the Record" in which she contested the accuracy of the Agency's determination that she had committed a "Domestic Battery." (Pet. Supp. Ex. 12) (App. at tab A- 2.14)

In response to Appellant's Initial Administrative Hearing Request (R. pg.1) (App. at tab A-1.1), the Agency filed a "Notice of Department's Intention to Dismiss Petitioner's Request for Hearing Unless Additional Information is Filed by Petitioner Within Twenty-one Days." (R. pg. 2) (App. at tab A-1.44) The Notice requires that Petitioner provide "a statement, either that Petitioner does not dispute the facts upon which the district relied in making its decision to deny the exemption **OR** a statement that the Petitioner does dispute those facts along with a list of the facts in dispute." (R. pg. 3) (App. at tab A-1.45) In a footnote the Agency sets out "the fact and the law upon which the district relied in making its decision to deny the exemption in this case." (R. pg. 3) (App. at tab A-1.45) The footnote includes the following statements:

g. This is the second time that Ms. Harris has had to seek an exemption. The first time was in December of 1995. At that time, Ms. Harris was disqualified for a 1973 offense of manslaughter, and the department denied her request for an exemption. Ms. Harris requested a

Chapter 120 hearing on that denial, and the case was heard by an administrative law judge in September of 1996. The administrative law judge recommended that the exemption be granted, and the department entered its final order granting the exemption.

h. Ms. Harris failed to inform the administrative law judge in that case that, even as the hearing was being held, she was being prosecuted for the battery against Mr. Fields.

(R. pg. 3, fn 1) (App. at tab A-1.45) The Notice allows Petitioner twenty-one days to file the additional information. As with the initial letter notification, (Pet. Supp. Ex 10) (App. at tab A- 2.9) there is no allegation of fraud, nor any indication that the Agency would contest the validity of the 1996 exemption.

The Appellant responded to the Notice by filing a Petition for Formal Administrative Hearing. (R. pg. 6) (App. at tab A-1.2) In the Petition, Appellant admitted the allegations of paragraph "g," quoted above, regarding her first exemption. (R. pg. 8) (App. at tab A-1.4) She admitted that she did not volunteer the information, and stated "because the offense was not a disqualifying offense, [appellant] had no legal obligation to do so." (R. pg. 9) (App. at tab A-1.5) The remainder of the Petition presents statements of ultimate fact and law to establish that Appellant's battery of Mr. Fields did not constitute domestic battery, or, in the event that it was determined that Appellant did commit a disqualifying offense, that she should be granted an exemption. (R. pg. 8-12) (App. at tab A-1.4-8) The

Administrative Law Judge ultimately agreed with the Appellant that the battery of Mr. Fields was not a disqualifying offense. (R. pg. 75) (App. at tab A-1.38) The Administrative Law Judge did not reach the question of whether Appellant should be granted a second exemption. (Id.)

A review of the transcript reveals that the Administrative Law Judge ruled at the outset of the evidentiary hearing that the validity of the 1996 decision could not be contested. In his opening statement the Agency's counsel referred to the fact that Appellant did not volunteer information about her battery offense in the 1996 exemption hearing. (Tr. pg. 24) (App. at tab A- 4.24) In response, the Administrative Law Judge stated: "Okay, folks, we're not going to re-litigate the earlier exemption case that is final. To the degree that may have some bearing on MO, we'll see where this goes." (Tr. pg. 25) (App. at tab A- 4.25) The Agency's counsel did not object to this ruling, nor was it amended during the remainder of the hearing.

During the hearing Appellant was questioned about why she did not volunteer information in the 1996 hearing, (See, e.g., Tr. pg. 36, 55-57) (App. at tab A- 4.36, 4.55-57) even though she never denied this fact. Another witness needlessly confirmed that Appellant did not volunteer the information. (Tr. pg. 118) (App. at tab A- 4-118) In final argument the Agency's counsel referred to the

testimony to impeach Appellant's credibility. Counsel did not argue, however, that the 1996 exemption should be overturned. Nor did he object to the Administrative Law Judge's instruction that the 1996 case could not be re-litigated.

ISSUE 3: THE FINAL ORDER VIOLATES PETITIONER'S RIGHT TO DUE PROCESS OF LAW GUARANTEED BY THE FLORIDA AND FEDERAL CONSTITUTIONS.

It is clear from the record that in reaching the conclusions stated in the second paragraph of the Final Order, the Agency totally disregarded Appellant's constitutionally protected right to due process of law. Both the Federal and Florida Constitutions guarantee that every person shall receive due process of law when the state seeks to deprive a person of life, liberty, or property. Amendment 5, U.S. Const.; Art. 1, Sec.9, Fla. Const. It is well established in both Florida and federal law that a license to practice an occupation is a constitutionally protected property interest. See, e.g., In re Ruffalo, 390 U.S. 544 (1968); Delk v. Dept of Professional Reg., 595 So. 2d 966 (Fla. 5th DCA 1992). It cannot be disputed that Appellant has a constitutionally protected property interest in her license to provide child care.

It is well established that fundamental rights of due process include notice

adequate to inform a person of the substance of the agency's complaint. As stated by the United States Supreme Court, the fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner, and "these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (citations omitted).

Florida Courts are in accord with the federal rule. In Conklin Center v. Williams, 519 So. 2d 38 (Fla. 5th DCA 1998), the Court invalidated a final order because the Commission on Human Relations found the Conklin Center guilty of a charge of which it never received notice. The Court held: "It is elementary that parties to civil and criminal proceedings, whether judicial or administrative, are entitled to notice of the issues, as a matter of due process. At no time was Conklin charged with having 'a discriminatory work environment,' and that issue was not litigated before the hearing officer. Hence, it could not be an issue on appeal before the Commission, and the order was entered without any vestige of jurisdiction." 519 So. 2d at 39. In this case, as in Conklin, Appellant was not charged with committing fraud, and the issue was not litigated before the Administrative Law

Judge.

This rule applies with equal force in licensing proceedings. In Chrysler v. Dept. of Professional Regulation, 627 So. 2d 31 (Fla. 1st DCA 1993) the Board of Clinical Social Work, Marriage, and Family Therapy and Mental Health Counseling revoked Chrysler's license based on allegations that arose in another state, that were not included in the complaint against him in Florida. Chrysler argued that the Board's consideration of the Nebraska allegations denied him due process as they were not raised in the complaint, and he was not given notice that such allegations would form part of the administrative proceeding or form the basis for revocation of his license. The Court held: "We agree with Chrysler, and find the Board improperly considered matters not formally charged in the complaint in imposing Chrysler's penalty." Id. at 33. See, also, Klein v. Department of Business & Professional Regulation, 625 So.2d 1237, (Fla. 2d DCA 1993) (Board of Medicine erred when it considered matters not charged in the complaint); Celaya v. Department of Professional Regulation, Board of Medicine, 560 So.2d 383 (Fla. 3d DCA 1990)(Board strayed outside the scope of the charges in the complaint); Decola v. Castor, 519 So.2d 709 (Fla. 2d DCA 1988)(Education Practices Commission violated teacher's due process rights by considering matters outside the stipulated record in imposing its penalty).

In this case, the due process violation could not be more clear. The second paragraph of the Agency's Final Order finds that Appellant committed fraud in a 1996 hearing, and rescinds an exemption granted in 1996. The only notice provided to Appellant, however, relates that she is ineligible to hold a position of special trust because of domestic battery. There is no mention of the 1996 exemption, nor any allegation of fraud. The notice afforded Appellant is plainly constitutionally deficient, and the second paragraph of the Final Order is invalid, and must be quashed.

Appellant could not have known that the Agency had any intention to rescind the 1996 exemption until she read the Agency's Final Order. The validity of the 1996 exemption was not raised in the Notice (Pet. Supp Ex. 10) (App. at tab A- 2.9) or in any subsequent pleading. Moreover, at the outset of the hearing the Administrative Law Judge ruled that "we're not going to re-litigate the earlier exemption case that is final." (Tr. pg. 25) (App. at tab A- 4.25) It could not be more clear that Appellant was denied a meaningful opportunity to present evidence in her defense. The second paragraph of the Final Order is invalid and must be stricken because it violates Appellant's constitutional right of due process.

ISSUE 4: THE AGENCY'S FINDING THAT APPELLANT COMMITTED FRAUD IN THE 1996 HEARING IS NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

The elements of fraud in a civil case are: (1) false representation of fact known by the party making it to be false at the time it was made; (2) that the representation was made for the purpose of inducing another to act in reliance on it; (3) actual reliance on the representation; and (4) resulting damage to the plaintiff. Hollywood Lakes Country Club, Inc. v. Community Assn. Services, Inc., 770 So. 2d 716 (Fla. 4th DCA 2000); Essex Insurance Co. v. Universal Entertainment & Skating Center, Inc., 665 So. 2d 360 (Fla. 5th DCA 1995).

The evidence in the record is insufficient to prove fraud in the 1996 proceeding. Appellant acknowledged that she had not volunteered information about the 1996 battery conviction in the 1996 hearing. She explained that she was not legally obligated to reveal the information because the battery was not a disqualifying offense (R. pg. 9) (App. at tab A-1.5), and that she did not believe that the battery was relevant to her 1996 exemption request “[b]ecause that was part of my personal life and I just felt it had nothing to do with the care I provide for the children.” (Tr. pg. 36) (App. at tab A- 4.36) There is nothing in the record to establish whether Appellant made a false representation in the 1996 hearing, or failed to respond truthfully to a question that should have elicited this information.

The Agency's counsel admitted that Appellant was under no obligation to reveal the battery in the 1996 hearing. (Tr. pg. 139) (App. at tab A-4.139)

The Administrative Law Judge acknowledges the lack of evidence of misrepresentation (R. pg. 78, endnote 3) (App. at tab A-1.141), but then offers a baseless, speculative conclusion based on her reading of the prior order (Resp. Ex. 1) (App. at tab A- 3.1) that Appellant "intentionally misled the trier of fact in the prior proceeding." (R. pg. 78, endnote 4) (App. at tab A-1.141) There is simply no competent, substantial evidence to support this conclusion. Even if there were such evidence, there is no way to determine on this record whether the Hearing Officer in the 1996 hearing relied on any such representation. Finally, there is no evidence from which it could be determined that the 1996 hearing would have reached a different result, and therefore no way to determine whether the agency suffered damage. Therefore, the elements of fraud are not proved, and the Agency's finding of fraud is without merit and should be quashed.

ISSUE 5: THE DECISION TO INVALIDATE THE 1996 EXEMPTION IS INVALID BECAUSE THE AGENCY CHANGED THE PENALTY WITHOUT REVIEWING THE ENTIRE RECORD

The Administrative Procedure Act specifically prohibits an agency from reducing or increasing the penalty in a recommended order "without a review of

the complete record.” Section 120.57(1)(1). Criminal Justice Standards and Training Commission v. Bradley, 596 So. 2d 661 (Fla. 1992). In order to review the complete record, the agency must review the hearing transcript. Roberts v. Dept. of Corrections, 690 So. 2d 1383 (Fla. 1st DCA 1997); Edwards v. Dept. of Health & Rehabilitative Services, 592 So. 2d 1249 (Fla. 4th DCA 1992). It is undisputed that the transcript was not produced until after the Final Order was rendered. Therefore, the Agency did not review the transcript of the hearing below before it severely increased the penalty in the second paragraph of the Final Order. The second paragraph, which rescinds the Appellant's 1996 exemption, should be quashed and stricken from the Final Order.

ISSUE 6: THE AGENCY'S ATTEMPT TO RESCIND THE 1996 EXEMPTION IS INVALID BECAUSE THE 1996 DECISION IS RES JUDICATA.

In Veronica Harris v. Department of Health and Rehabilitative Services, Case No. 96-2010, Final Order filed October 30, 1996 (Resp. Ex. 1) (App. at tab A- 3.1), the Appellant was granted an exemption from disqualification in connection with her initial application for a child care license. The order was not appealed and became final. It cannot be disputed that the Respondent in this proceeding is the successor of the Agency that was the respondent in the 1996

proceeding. The principles of res judicata apply to administrative proceedings. Those principles dictate that the 1996 Final Order granting Appellant an exemption from disqualification cannot be re-litigated in this proceeding. Hays v. Dept of Business Reg., 418 So. 2d 331 (Fla 3d DCA 1982); Metropolitan Dade County v. Rockmatt Corp., 231 So. 2d 41 (Fla. 3d DCA 1970); Buchanan v. City of Winter Park, 226 So. 2d 860 (Fla. 4th DCA 1969); Rubin v. Sanford, 168 So. 2d 774 (Fla. 3d DCA 1964). The second paragraph of the Final Order is invalid, and must be quashed.

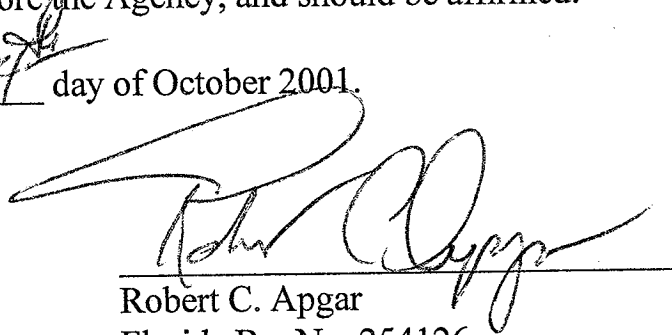
CONCLUSION

The Agency's violations of statutory and constitutional law in the second paragraph of the Final Order are so plain and unmistakable that the Final Order can only be seen as overbearing, oppressive, and an abuse of the Agency's power. The Agency improperly considered matters that were not charged in the notice to the Appellant, or in any subsequent pleading, after the Administrative Law Judge ruled that the 1996 proceeding could not be re-litigated in this proceeding. The Agency found the Appellant guilty of fraud in a 1996 proceeding without hearing evidence or reviewing the record of the 1996 hearing, or giving the Appellant a meaningful

opportunity to defend against the charge. The Agency increased the penalty without reviewing the transcript of the hearing below, a clear violation of Section 120.57(1)(l), Florida Statutes. Finally, the Agency ignored the principles of res judicata which dictate that the Agency could not re-litigate the 1996 case in this proceeding. The Court must quash the second paragraph of the Final Order.

The first paragraph of the Final Order, on the other hand, is a complete adjudication of all issues properly before the Agency, and should be affirmed.

Respectfully submitted this 24th day of October 2001.

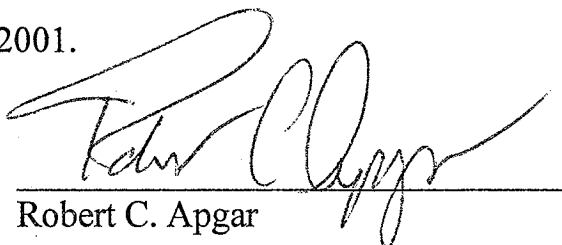


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CERTIFICATE OF SERVICE

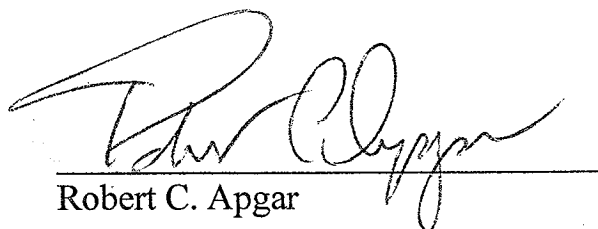
I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand delivery to John R. Perry, Department of Children & Family Services, 2639 N. Monroe St., Ste. 252-A, Tallahassee, FL 32399-2949, to Josie Tomayo, General Counsel, Dept. of Children & Family Services, Bldg. 2, Room 205, 1317 Winewood Blvd., Tallahassee, FL 32399-0700, to Ella Jane P. Davis,

Administrative Law Judge, Division of Administrative Hearings, 1230 Apalachee Parkway, Tallahassee, FL 32399-3080, and to Thomas Koch, Office of General Counsel, Department of Health, 4052 Bald Cypress Way, Bin #A02, Tallahassee, FL 32399-1703, this 24th day of October, 2001.


Robert C. Apgar

CERTIFICATE OF COMPLIANCE WITH RULE 9.210

The undersigned certifies that Times New Roman 14-point font or Courier New 12-point font was used in this Brief and that this Brief complies with the font requirements of Fla.R.App.P. 9.210.


Robert C. Apgar

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