

Before the
Administrative Hearing Commission
State of Missouri



DEPARTMENT OF HEALTH AND)
SENIOR SERVICES,)
)
Petitioner,)
)
vs.)
)
JOANNA JAMISON,)
D/B/A NINA’S NOOK,)
)
Respondent.)

Case No. 12-0878 DH

DECISION

Petitioner Missouri Department of Health and Senior Services has cause to place the Group Child Care Home license of Respondent Joanna Jamison, d/b/a Nina’s Nook, on probation.

Procedure

The Department filed its complaint herein on May 22, 2012 and Ms. Jamison answered on June 18, 2012. We held a hearing on May 17, 2013. The Department appeared through its attorneys, Kathleen Robertson and Rachel Meystedt, and Ms. Jamison appeared in person and through her attorney, Kenneth C. Hensley. The case became ready for our decision on July 15, 2013, when the parties concluded briefing.

Findings of Fact

1. The Department of Health and Senior Services (the Department) issued Joanna Jamison, doing business as Nina's Nook, a license to maintain a Group Child Care Home. The license has been current at all times relevant to the instant case.

2. The license permits Ms. Jamison to care for up to 20 children, between the ages of birth through 12 years, from the hours of 6 a.m. to 9 p.m., subject to the limitation of the number of children under the age of 24 months to four years, and the number of full-day preschool children to 16.

3. Under the terms of the license, Ms. Jamison agrees to comply with Missouri law, specifically, §§ 210.201—.259, RSMo, and Department licensing rules for Group Child Care Homes.

4. Nina's Nook is located in a building that was a house before it was a child care facility. The building contains the following (described from the perspective of a person standing outside of the building and facing the front):

- the preschool room, spanning the front half of the building;
- the infant room, on the back left corner;
- the kitchen, on the back right corner;
- the bathroom and utility room, in between the infant room and the kitchen;
- a hallway, separating the preschool room (the front half of the building) from the other areas (the back half of the building);
- the office, built on the back of the building and accessed through the bathroom and utility room; and

- the front door of the building, in the preschool room, slightly off center of the building and to the right.

5. The interior of the building is not an open floor plan. But there are no interior doors hung between the hallway and the preschool room, the infant room, or the kitchen. The opening from the preschool room into the hallway is flanked by walls and is a wide opening. The opening from the kitchen into the hallway has no walls; but the kitchen area is blocked off from the hallway by a thigh-high, mesh-covered baby gate. Because of the walls that flank the opening of the preschool room into the hallway, a person standing in the infant room or kitchen could see into some, but not all, areas of the preschool room.

The Area of Belton Surrounding Nina's Nook

6. Nina's Nook is located at 302 B St., Belton, Missouri, and stands at the intersection of B Street and Chestnut Street.

7. Several businesses, including a church and a Sonic Drive-In, and other buildings are within a few blocks of Nina's Nook.

8. One block west of Nina's Nook, at the corner of Highway 58 and Cherry Street, is a church. Cherry Street is to the west of the church.

9. Two blocks west of Nina's Nook, at another corner of Highway 58 and Cherry Street, is a Sonic Drive-In. The church and the Sonic Drive-In are separated by Cherry Street. The Sonic Drive-In is not visible from Nina's Nook.

10. An adult could walk from Nina's Nook to the Sonic Drive-In in about three to four minutes, and a four-year-old child could walk there in about four minutes.

11. Highway 58 is the main road through Belton and is fairly heavily traveled.

12. The speed limit on Highway 58 near the Sonic Drive-In is 25 miles per hour. Master Patrolman Witherspoon, with the Belton Police Department, frequently patrols the area to stop speeding vehicles.

Elopement of Child A on May 13, 2011

13. Chelsea Cartwright and Kelly Sosebee, who are both adults, were working at Nina's Nook on May 13, 2011. Ms. Jamison was also in the building, working in her office.

14. Nina's Nook was caring for 12 children that day: two infants and ten preschool-aged children. One of those children was Child A, a four-year-old.

15. At 1:00 p.m., Ms. Cartwright and Ms. Sosebee laid down all of the infants and preschoolers for naps. Ms. Cartwright was assigned to watch the preschoolers while they napped in the preschool room, and Ms. Sosebee was assigned to watch the infants in the infant room.

16. In the preschool room, each child naps on his or her own cot. Extra cots are not set out.

17. Nap time lasts until 3:30 p.m. While most of the preschoolers sleep the full two and a half hours, a child sometimes gets up to go to the restroom or do something else.

18. At about 2:20 p.m., Ms. Cartwright heard an infant crying in the infant room, left the preschool room, and went to the infant room to assist.

19. When Ms. Cartwright entered the infant room, Ms. Sosebee was diapering one infant, and the other one was crying. Ms. Sosebee told Ms. Cartwright that the crying infant needed a bottle.

20. Ms. Cartwright went to the kitchen to prepare the bottle. To prepare it, she had to scoop powdered formula into the bottle; turn on the tap at the sink and wait for the water to

warm up; fill up the bottle with the required amount of water; and then shake the bottle. She was in the kitchen preparing the bottle for about five minutes.

21. Ms. Cartwright then went back to the infant room and began feeding the crying infant with the bottle.

22. After Ms. Cartwright left the preschool room, Child A got up from her cot, walked out the front door of the building, and walked away from the premises. No adult saw or heard Child A get up and leave.

23. At about 2:35 p.m., when Ms. Cartwright was feeding the infant, Ms. Sosebee was free so she went to the preschool room to cover Ms. Cartwright's area. By that time, the preschoolers had been left without adult supervision in the preschool room for about 10 to 15 minutes.

24. When Ms. Sosebee arrived in the preschool room, she saw that Child A was missing from her cot and that the front door to the building was ajar. Ms. Sosebee called out to alert the other staff.

25. Ms. Jamison was in her office at the back of the building when she heard Ms. Sosebee call out that Child A was missing. Ms. Jamison went outside to look for the child.

26. Whatever route she took, which is not known, Child A crossed at least one street and arrived at the Sonic Drive-In, two blocks to the west.

27. At around 3 p.m., Master Patrolman Witherspoon and another member of the Belton Police Department, Officer Emberton, were dispatched to the Sonic Drive-In to respond to a report that a woman had found a four-year-old child roaming near the drive-in and Highway 58. Highway 58 is very busy around 3 p.m.

28. Master Patrolman Witherspoon arrived at the drive-in and met with the woman and the child. The child was upset and scared, and had been crying.

29. Master Patrolman Witherspoon drove around the area to find out where the child had come from. While he was driving by Nina's Nook, a woman¹ flagged him down and told him a child had walked away from the day care and they were trying to find her. He told her a child had been found at the Sonic Drive-In and they went there to meet with Officer Emberton and the child.

Aftermath

30. Ms. Jamison reported Child A's elopement to Connie Ferro, a child care facility specialist with the Department, and Ms. Ferro investigated the incident.

31. The Department notified Ms. Jamison on January 25, 2012 of its intent to place her Group Child Care Home license on probation for 12 months.

32. Pursuant to § 210.245.2, RSMo², Ms. Jamison submitted her appeal of the decision to the Department on February 22, 2012, and the Department initiated the proceedings before the Administrative Hearing Commission on May 22, 2012.

Conclusions of Law

We conclude the Department has cause to place Ms. Jamison's license on probation.

¹ There is a discrepancy in the record concerning the identity of the woman who flagged down Master Patrolman Witherspoon. He testified it was Ms. Cartwright, Tr. 35:17-21, but Ms. Jamison testified that she flagged down the officer herself, Tr. 91:2-4. Either way, someone from Nina's Nook flagged down the officer, and whether it was Ms. Cartwright or Ms. Jamison is not material.

² All references to "RSMo" are to the Revised Statutes of Missouri (Supp. 2012), unless otherwise noted.

Background

Under § 210.221.1(2), RSMo (2000), the Department may issue or deny a license to operate a child care facility; or may suspend, place on probation, or revoke a license if the licensee “fail[s] to obey the provisions of sections 210.201 to 210.245 or the rules and regulations made by the” Department.

When the Department makes a decision that will adversely affect a licensee, the review procedure under § 210.245 is triggered: if the licensee submits a request for a hearing to the Department, it in turn files a complaint with this Commission. That is what happened here. Accordingly, we have jurisdiction under § 210.245.

In their briefing herein, the parties do not address the burden of proof. We conclude the Department bears it in this case. Section 621.120, RSMo (2000), provides that when the Department denies a license or refuses to renew an existing one, the applicant or licensee bears the burden of proving its entitlement to licensure. But no statutory provision allocates the burden in a case in which, as here, the Department decides to take some action against an existing license.

As a general proposition of administrative law, the party seeking a change is “the ‘moving party’ or the party having the affirmative[,]” and so bears the burden of proof. *Tonkin v. Jackson Co. Merit System Comm’n*, 599 S.W.2d 25, 31 (Mo. App. W.D. 1980). Here, the Department seeks a change, that is, to impose probation against Ms. Jamison’s existing license. Therefore, we conclude the Department bears the burden of proof.

And in a civil proceeding such as this one, the preponderance-of-the-evidence standard applies. *See Kerwin v. Mo. Dental Bd.*, 375 S.W.3d 219, 230 (Mo. App. W.D. 2012) (applying preponderance standard in case concerning discipline of dental license).

Here, the Department alleges Ms. Jamison violated three regulations:

- 19 CSR 30-62.182(1)(A)1: “Caregivers shall not leave any child without competent adult supervision[.]”
- 19 CSR 30-62.182(1)(A)3: “Caregivers shall provide frequent, direct contact so children are not left unobserved on the premises.”
- 19 CSR 30-62.182(1)(A)5: “A caregiver shall remain in the room with preschool and school-age children while they are napping or sleeping and shall be able to see and hear them if they have difficulty during napping or when they awaken.”

We conclude she violated all three.

19 CSR 30-62.182(1)(A)1

Ms. Jamison violated 19 CSR 30-62.182(1)(A)1, because Nina’s Nook caregivers “[left]” Child A “without competent adult supervision.”

All words in a regulation are given effect. *Beverly Enterprises-Missouri Inc. v. Dept. of Social Svs., Div. of Medical Svs.*, 349 S.W.3d 337, 352 (Mo. App. W.D. 2008). And the words used are afforded their plain and ordinary meaning, as found in the dictionary. *Collins v. Dept. of Social Svs., Family Support Div.*, 141 S.W.3d 501, 504-505 (Mo. App. S.D. 2004). “Competent,” as used in 19 CSR 30-62.182(1)(A)1, means satisfactory, adequate, or sufficient. WEBSTER’S THIRD NEW INT’L DICTIONARY UNABRIDGED 463 (1986).

It is undisputed that Child A was laid down on a cot for a nap in the preschool room; that Ms. Cartwright, an adult employee of Nina’s Nook, was supervising her and the other preschoolers for some period of time; and that Ms. Cartwright left the preschool room. Between the time when Ms. Cartwright left the room and Ms. Sosebee later went into the preschool room, no adult was in the preschool room and no adult was supervising the preschoolers. Child A arose

from her cot, walked out of the building by herself, crossed at least one street, and was found at a business located a few minutes' walk and two blocks away.

Had Child A been subject to competent—that is, satisfactory, adequate, or sufficient—supervision by an adult during naptime, Child A would not have been able to wander away from the building alone. But she was not.

Ms. Jamison violated 19 CSR 30-62.182(1)(A)1.

19 CSR 30-62.182(1)(A)3

Ms. Jamison violated 19 CSR 30-62.182(1)(A)3, because Nina's Nook caregivers failed to "provide frequent, direct contact" to ensure that Child A was "not left unobserved on the premises."

The same evidence that demonstrates violation of subsection (A)1 of 19 CSR 30-62.182(1), discussed immediately above, demonstrates violation of subsection (A)3.

Regardless of whether Ms. Cartwright was always within "a few feet" of the preschool room, as Ms. Jamison argues,³ Child A was in fact left unobserved on the premises: But for the failure of Nina's Nook employees to observe Child A, Child A would not have wandered away from the building alone.

Ms. Jamison violated 19 CSR 30-62.182(1)(A)3.

19 CSR 30-62.182(1)(A)5

Finally, Ms. Jamison violated 19 CSR 30-62.182(1)(A)5. The requirements of subsection (A)5 are particular:

- "A caregiver shall remain in the room with preschool and school-age children while they are napping or sleeping"
- "and"
- "shall be able to see and hear them if they have difficulty during napping or when they awaken."

³

Respondent's Proposed Findings of Fact and Conclusions of Law, p. 8, ¶ 3.

Addressing the first portion of the subsection, we conclude a Nina’s Nook caregiver was not “in the room” while the preschool children were napping. The floor plan of the building was not an open floor plan—the preschool room was separated from the other rooms by walls and a hallway. Ms. Cartwright left the preschool room, crossed the hallway, and went into another room. Accordingly, a preponderance of the evidence demonstrates that a caregiver failed to remain in the room with the preschool children while they were napping.

Using the conjunction “and,” subsection (A)5 additionally requires that a caregiver “shall be able to see and hear [the children] if they have difficulty napping or when they awaken.” Whether a Nina’s Nook caregiver *could have* seen and heard the children, as Ms. Jamison argues⁴, is not the standard. The standard requires a caregiver to be able to see and hear the children. And Child A was neither seen nor heard when she arose and left the building. Had she been seen and heard, she could have been prevented from leaving the building.

As with the other two subsections of the regulation, we reach our conclusion based on the language of subsection (A)5 as written and giving effect to all of the language it contains. But we additionally observe that the particular requirements of subsection (A)5—that a caregiver remain in the room with napping preschoolers and school-age children, and that a caregiver be able to see and hear children during naptime—recognize that such children are capable of getting out of bed by themselves, and aim to avert the mischief or tragedy that can occur in an instant if an unsupervised child does not in fact nap during naptime and leaves his or her bed. Accordingly, even if technical, our plain-language reading of subsection (A)5 is fortified by the purpose of the subsection.

Ms. Jamison violated 19 CSR 30-62.182(1)(A)5.

⁴ Respondent’s Proposed Findings of Fact and Conclusions of Law, pp. 8-9, ¶ 4.

Summary

The Department has cause under § 210.221.1(2) to place Ms. Jamison's license on probation because she violated 19 CSR 30-62.182(1)(A)1, 3, and 5.

SO ORDERED on September 5, 2013.

\s\ Alana M. Barragán-Scott
ALANA M. BARRAGÁN-SCOTT
Commissioner