

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA EATON-TYSON,

Petitioner-Appellee,

v

DEPARTMENT OF HUMAN SERVICES,
OFFICE OF CHILDREN & ADULT
LICENSING,

Respondent-Appellant.

UNPUBLISHED

June 17, 2008

No. 273506

Ingham Circuit Court

LC No. 06-000483-AA

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

Respondent appeals by leave granted the circuit court’s decision to set aside respondent’s order revoking a day-care license held by petitioner. We reverse and remand.

I

Petitioner is licensed by respondent to operate two childcare facilities—“Pam’s Pre School Program” and “Pam’s Academy of Champions.” In October 2004, petitioner pleaded guilty to receiving money under false pretenses (\$200 or more but less than \$1,000), MCL 750.218(3)(a). Pursuant to the plea, petitioner agreed to repay \$100,860 in over billings. In April 2005, respondent notified petitioner that it intended to revoke her day-care license, and petitioner filed an administrative appeal. Citing the over billing, a false statement contained on petitioner’s license renewal application, and a misdemeanor conviction for disorderly conduct, respondent revoked petitioner’s license. On appeal, the circuit court concluded that the disorderly conduct plea “should not be considered in any way in any decision in this case” because, in the circuit court’s judgment, the disorderly conduct plea was not related to petitioner’s ability to provide licensed day-care services. The circuit court also concluded that it was “inequitable” to proceed with the licensing revocation after petitioner had pleaded guilty to obtaining money by false pretenses, because petitioner’s explanation that she just signed the renewal application after a staff person had filled it out was “credible,” and because respondent did not tell petitioner that as a consequence of her guilty plea, she could lose her license. On the record before it, the circuit court held that respondent’s decision was not supported by competent evidence and set aside respondent’s order.

II

A circuit court's review of an administrative agency's decision is limited to determining whether the decision was contrary to law, was supported by competent, material, and substantial evidence on the whole record, was arbitrary or capricious, was clearly an abuse of discretion, or was otherwise affected by a substantial and material error of law. [*Dignan v Michigan Pub School Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002).]

We review "a lower court's review of agency action . . . [to] determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Boyd v Civil Service Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). The substantial evidence test "is indistinguishable from the clearly erroneous standard of review." *Id.* at 234-235. "A finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Id.* at 235.

III

The issue considered by respondent was whether petitioner's license should be revoked based upon her failure to meet certain requirements in MCL 722.121(2) and 1999 AC, R 400.5104. Rule 400.5104(1) provides in part that "[a]ll staff shall be of responsible character and suitable to meet the needs of children." MCL 722.121(2) provides in part as follows:

The department may . . . revoke, or refuse to renew a license . . . of a child care organization when the licensee . . . falsifies information on the application or *wilfully and substantially* violates this act, the rules promulgated under [MCL 722.111 to MCL 722.128], or the terms of the license or certificate of registration. . . . [Emphasis added.]

1999 AC, R 400.16001 defines substantial and willful noncompliance as follows:

(d) "Substantial noncompliance" means repeated violations of [MCL 722.111 *et seq.* or MCL 400.701 *et seq.*] or an administrative rule promulgated under [MCL 722.111 *et seq.* or MCL 400.701 *et seq.*], or noncompliance with [MCL 722.111 *et seq.* or MCL 400.701 *et seq.*], a rule promulgated under [MCL 722.111 *et seq.* or MCL 400.701 *et seq.*], or the terms of a license or a certificate of registration that jeopardizes the health, safety, care, treatment, maintenance, or supervision of individuals receiving services or, in the case of an applicant, individuals who may receive services.

(e) "Willful noncompliance" means, after receiving a copy of [MCL 722.111 *et seq.* or MCL 400.701 *et seq.*], the rules promulgated under [MCL 722.111 *et seq.* or MCL 400.701 *et seq.*] and, for a license, a copy of the terms of a license or a certificate of registration, an applicant or licensee knew or had reason to know that his or her conduct was a violation of [MCL 722.111 *et seq.* or

MCL 400.701 *et seq.*], rules promulgated under [MCL 722.111 *et seq.* or MCL 400.701 *et seq.*], or the terms of a license or a certificate of registration.

The record contains substantial evidence to support respondent's findings that petitioner falsified information on her license renewal form, and substantially and willfully violated MCL 722.111 *et seq.*, thereby justifying the revocation of her license under MCL 722.121(2). Petitioner testified that she told a DHS consultant that "it was mistake" to indicate on the renewal application that she had not "Been Convicted of an Offense Other Than A Minor Traffic Violation," and attempted to minimize this error as an oversight, claiming that she just signed the form after it had been prepared by her office manager. The hearing referee expressly accorded little weight to the testimony of petitioner and her witnesses, concluding that "[b]ased on the testimony and demeanor of the Petitioner and her witnesses . . . much of their testimony was evasive, contradictory, untruthful, and inconsistent with the Petitioner's criminal convictions and other written documents in the hearing record." "If the administrative findings of fact and conclusions of law are based primarily on credibility determinations, such findings generally will not be disturbed because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). In attempting to make a contrary finding that petitioner's explanation was credible, the circuit court misapprehended its role in applying the substantial evidence test to the agency's factual findings.

Moreover, even assuming that petitioner was unaware that the application contained false information, that does not absolve her of the responsibility to submit an accurate form. As the hearing referee observed, "the Petitioner should have read the application for the renewal of her license before signing it."

The record also contains substantial evidence to support respondent's findings that the repeated over billings submitted by petitioner constituted willful and substantial violations of MCL 722.111 *et seq.* One DHS employee testified that after she explained to petitioner in May 2002 that when a child started day-care with petitioner in the middle of the week, she could only bill for the remaining days in the week, petitioner indicated that she understood this requirement but then billed for the entire week nonetheless. Another DHS employee testified that from his investigation he determined that petitioner had been billing for day-care hours during which certain children would have been in school, and that she billed for five days of day care per week for one child that attended only three days per week. Petitioner admitted that despite being told by respondent's employees before the investigation that she could not bill for certain times of the day for certain children, she continued to bill during those times. She also admitted that she "billed for hours that there couldn't have been . . . because we weren't open that long." Despite initially claiming that her billing practices were consistent with pronouncements of the Michigan Supreme Court, petitioner eventually acknowledged that she had been overpaid \$100,860, and agreed to repay that sum. Additionally, a DHS auditor testified that petitioner did not keep adequate records to insure she billed only for actual hours as opposed to maximum allowable hours, despite petitioner's averment on her license application that she "keep[s] permanent and accurate records for four years of daily attendance of all children served" and that the "records indicate the time each child arrived and departed."

The hearing officer concluded from this evidence that petitioner repeatedly violated MCL 722.11 *et seq.* and the rules promulgated thereunder, that petitioner “had reason to know that . . . her conduct was a violation of . . . the terms of a license, ” Rule 400.16001(e), and “that [petitioner] cannot be trusted to comply with the Act and its promulgated rules for operating a child care center.” Because the hearing officer’s findings are not clearly erroneous, the circuit court grossly misapplied the substantial evidence test in reaching a contrary conclusion.

The circuit court also erred as a matter of law in holding that it was “inequitable” to revoke petitioner’s license after she pleaded guilty to obtaining money by false pretenses. In reversing respondent’s decision utilizing its own view of equity, the circuit court failed to apply correct legal principles, *Boyd, supra* at 234, and exceeded its limited review authority. *Dignan, supra* at 576.

Finally, the circuit court also erred in holding that petitioner’s disorderly conduct conviction was improperly considered by respondent in reaching its decision to revoke petitioner’s license. MCL 338.43(1) provides in relevant part:

(1) The following criminal records shall not be used, examined, or requested by a licensing board or agency in a determination of good moral character when used as a requirement to establish or operate an organization or facility regulated by this state, or pursuant to occupational or professional licensure:

* * *

(c) Records of an arrest or conviction for a misdemeanor or a felony unrelated to the person’s likelihood to serve the public in a fair, honest, and open manner.

Even assuming that the records of petitioner’s arrest and conviction were by themselves “unrelated to the person’s likelihood to serve the public in a fair, honest, and open manner,” MCL 338.42(1)(c) only precludes use of such records to determine whether an applicant or licensee has good moral character. Respondent made no finding that petitioner did not have good moral character and did not cite to petitioner’s alleged lack of moral character as a reason for revoking her license. Instead, the conviction was clearly relevant to the questions whether petitioner falsified her renewal application, and whether petitioner was of responsible character to operate her day-care facilities. Rule 400.5104 (1). Respondent’s consideration of petitioner’s conviction for this purpose was permissible, and the circuit court failed to apply correct legal principles in finding to the contrary.

Reversed and remanded for further proceedings consistent with the opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Peter D. O’Connell
/s/ William C. Whitbeck