STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 9, 2017)

JOHN HOPE SETTLEMENT HOUSE, INC., d/b/a JOHN HOPE DAY CARE CENTER *Appellant*	:	
v.	:	**C.A. No. PC-2017-0843**
RHODE ISLAND DEPARTMENT OF CHILDREN, YOUTH & FAMILIES; JAMIA MCDONALD in her Capacity as Acting Director; LAURA KIESLER in her Capacity as Chief of the Licensing Division *Appellees*	:	

DECISION

LICHT, J. John Hope Settlement House, Inc., d/b/a John Hope Day Care Center (John Hope or the Center) appealed the revocation of its Child Care Program License by the State of Rhode Island Department of Children, Youth and Families (DCYF or the Department). Jurisdiction is pursuant to G.L. 1956 § 42-35-15.

I

Facts and Travel

John Hope has operated a day care in Providence for over forty-five years. Starting in August 2013, DCYF placed them on probationary status for reasons not in the record.[1] R. Ex. 3 at 1; see also R. Ex. 5 at 1. Since that time, the Center has been on probation, except for a two-week period and a four-week period. R. Ex. 14, Hr'g Tr. 10:15-11:5, Dec. 9, 2016 (hereinafter Hr'g Tr.). By August 31, 2016, the Center was approaching a continuous one-year period of

[1] Specifically, they were given a "probationary license" pursuant to the DCYF Child Care Program Regulations for Licensure, section two, II.C.

having been on probation. R. Ex. 5.[2] As probationary licenses are only valid for twelve months, with a possible six-month extension, DCYF required John Hope to prepare and discuss a corrective action plan towards attaining compliance. Sec. 42-72.1-5(6); R. Ex. 5.

After a meeting in mid-September, John Hope submitted a corrective action plan. However, during a site visit on October 27, 2016,[3] DCYF identified three regulatory violations that they claimed "impacted the safe operation of the program." R. Ex. 9. First, DCYF "found that there was one child care staff person," Charmaine Roberts, "working with children notwithstanding a notice of disqualification for child care employment." Id. Second, a different child care worker, Margaret Valerio,[4] had been employed "without any documentation that [that] employee had been subjected to a criminal background check." Id. Finally, the Center failed to inform DCYF that its site coordinator had resigned, creating a vacancy in a key position. Id.; R. Ex. 13 at 11 (hereinafter Hr'g Decision). Based on these discoveries, on October 28, 2016, DCYF sent John Hope a letter informing the Center of the Department's intention to revoke its child care license. R. Ex. 9.

DCYF and John Hope representatives met on November 7, 2016 to discuss these violations. Hr'g Tr. 41:7-17. However, the Department notified John Hope via a letter dated November 15, 2016 that DCYF had revoked its license pursuant to the DCYF Child Care Program Regulations for Licensure (Regulations), section two, IV.A. R. Ex. 3 at 2. This revocation was to be effective at the end of business on November 29, 2016. Id. at 1. John Hope

[2] In his decision, the Hearing Officer, in the course of summarizing a witness's testimony, states that the Center had most recently been "placed on probationary status in July 2016." Hr'g Decision 2. However, this is incorrect: the July 2016 date is when the allegations that precipitated the investigation at the heart of this case were made.

[3] The Hearing Officer mistakenly stated the date as October 27, 2017 in his decision. Hr'g Decision 3.

[4] Although the record reflects a number of spellings of Ms. Valerio's first name, e.g. R. Ex. 11 ("Margarite"); Hr'g Decision 9 ("Margarita"); R. Ex. 6 at 3 ("Margaret"), the parties consistently use "Margaret" in its memoranda.

sought an administrative appeal. During the pendency of this appeal, the parties agreed to stay the revocation. DCYF's Mem. at 4.

Hearings were conducted on December 9 and 23, 2016 before Hearing Officer Benjamin Copple. A total of six witnesses testified at the hearings.[5] DCYF called Veronica Davis, Chief of Licensing Regulation for the Department, as its first witness. She testified to the events that led to the issuance of the revocation letter, Hr'g Tr. 8:13-9:1, 9:23-10:8, the probationary history of the Center, Hr'g Tr. 10:9-12:6, and the monitoring a day care facility undergoes when on probation, Hr'g Tr. 13:7-15:18. She also testified about a meeting discussing with John Hope "a plan of corrective action which would outline the steps and how the program would come into compliance." Id. at 18:1-3. Additionally, Ms. Davis discussed two subsequent monitoring visits, both conducted by Margy Ryan, a DCYF Licensing Specialist. It was during the latter visit, on October 27, 2016, that the violations that led to the revocation of the Center's license were discovered. Id. at 28:3-32:12. Ms. Davis then described the steps the Department took after discovering the violations, including verifying the underlying information, deciding the appropriate course of action, and meeting with Center representatives. Id. at 38:4-39:16, 41:7-44:13, 45:8-48:9.

Ms. Ryan was the Department's second witness. She first described how the monitoring process worked generally, starting with a check of "each classroom, viewing the classroom staff/child ratios, checking the condition of the classrooms, [and] checking the bathroom facilities for the children." Id. at 63:20-23. Next, she followed with an examination of the required records, including "child records, staff records, fire drills, professional development

[5] In addition to the three violations that were cause for the revocation of the Center's license, both parties asked the witnesses about other incidents involving a janitor and a cook. Given that these issues are not germane to the appeal at hand, and so as not to confuse the issues, the Court will omit that testimony from the summary below.

plans and certifications from staff." Id. at 64:1-3. After summarizing the general procedure, Ms. Ryan went on to describe her two visits to the Center. Specifically, she discussed the violations she discovered that day: the disqualifying information in Ms. Roberts's file, id. at 66:19-68:24; the missing fingerprint records for Ms. Valerio, id. at 70:3-14; and the absence of a site coordinator, id. at 70:16-72:4.

The Department's final witness was John Duggan, a Licensing Aid for the Department. He testified to his practice when performing background checks on prospective child care employees. Namely, he "run[s] a DCYF clearance and a master file clearance, and [then] send[s] the results letters of those clearances to the respective agencies." Id. at 79:12-14, 87:11-90:20, 92:24-97:20. At 10:55 AM on September 1, 2016, Mr. Duggan e-mailed a clearance result letter for Ms. Roberts to the Center. Id. at 82:7-8; R. Ex. 10 at 1. This letter stated that Ms. Roberts "had indicated involvement in investigation(s) that were not of a disqualifying nature." Hr'g Tr. 82:9-15; R. Ex. 10 at 2. However, Mr. Duggan sent a follow-up e-mail seven minutes later asking the recipient to "[p]lease disregard my previous e-mail," noting that "[t]he wrong box was checked off." Hr'g Tr. 82:20-83:22; R. Ex. 10 at 3. The corrected clearance results letter, attached to this e-mail, indicated that "Department Records show that there is disqualifying information on record for this applicant." Hr'g Tr. 83:6-8; R. Ex. 10 at 4. Mr. Duggan further testified that he could not recall whether he received a subsequent phone call about the matter. Hr'g Tr. 84:1-13, 85:10-16.

John Hope's first witness was Tracy Richotte,[6] an Administrative Assistant at the Center. After describing her job duties, id. at 101:21-103:8, Ms. Richotte turned to the issue of Ms. Roberts. She testified that the Center received two e-mails in short succession regarding Ms.

[6] While the Hearing Decision uses the spelling "Rouchet," the transcript and the memoranda reflect the spelling "Richotte."

Roberts's background check, and that she "was informed of the second one the day after" receiving the first. Id. at 103:20-104:19. Ms. Richotte stated that she indeed did call Mr. Duggan, who told her that "there was just a complaint, nothing else." Id. at 104:20-106:4. She also testified that the requisite documentation was in Ms. Valerio's file, contrary to DCYF's allegations. Id. at 112:4-8. Ms. Richotte also admitted that she had "received nothing after the second notification that said that [Ms. Roberts] was therefore qualified." Id. at 122:17-19.

After Ms. Richotte, John Hope called Vanessa Dailey, the Center's Operations Finance Manager. Ms. Dailey testified that upon being informed that Ms. Valerio did not have a criminal background check in her file, she looked into Ms. Valerio's file and found such a check there. Id. at 125:5-15, 127:4-15. However, Ms. Dailey conceded that her examination of the file occurred after Ms. Ryan's visit. Id. at 148:1-4.

The final witness to testify was JoAnn McDowell, Director of the John Hope day care and after school programs. Ms. McDowell testified first about the departure of the Center's site coordinator. Id. at 157:19-159:22. She asserted that the Center delayed notifying DCYF of the site coordinator vacancy because they "were advertising" and hoping they "would be able to take what was a permanent site coordinator." Id. at 160:3-6. Ms. McDowell agreed that the Center "had the intention of telling DCYF of what was going on." Id. at 160:10-12. Upon cross-examination, however, Ms. McDowell admitted that John Hope did not notify DCYF of the site coordinator's departure, despite knowing that they were required to report any significant changes to the Department as soon as it occurred. Id. at 178:11-18. Ms. McDowell also testified to what she had heard regarding Ms. Roberts's hiring and her disqualification. Id. at 168:9-173:3. Finally, Ms. McDowell agreed that if there were something "untrue" on Ms. Ryan's monitoring report, Ms. McDowell would point that out to Ms. Ryan. Id. at 180:6-20.

Hearing Officer Copple issued a decision on February 21, 2017 upholding DCYF's decision. Subsequently, John Hope appealed to this Court, which stayed the final revocation of the Center's license until resolution of this appeal.

II

Standard of Review

The standards by which the Court reviews an administrative appeal are clear. The General Assembly has outlined them in § 42-35-15(g), which reads:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error or [sic] law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

"In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994)). "Legally competent evidence is defined as 'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance.'" Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1012 (R.I. 2004) (quoting R.I. Temps, Inc. v. Dep't of Labor & Training, Bd. of Review, 749 A.2d 1121, 1125 (R.I. 2000) (citation omitted)). This Court "must

defer to the agency's determinations regarding questions of fact." Town of Burrillville v. R.I. State Labor Relations Bd., 921 A.2d 113, 118 (R.I. 2007).

III

Analysis

A

Probationary License

Many of the Center's complaints with the decision below are based on the evidence presented to the Hearing Officer, as well as evidence that John Hope claims should have been presented but was not. Before delving into the Hearing Officer's decision with regard to the three violations for which the Center's license was revoked, the Court will address one overarching issue.

John Hope attacks the testimony of Ms. Davis, who testified to the Center's probationary status. John Hope contends that the probationary license itself was not entered into the record. John Hope's Mem. 2. This argument is irrelevant. The license may be subject to judicial notice. See Massachusetts v. Westcott, 431 U.S. 322, 323 n.2 (1977). On the other hand, if John Hope seeks to call this hearsay, "hearsay evidence is admissible in administrative proceedings." DePasquale v. Harrington, 599 A.2d 314, 316 (R.I. 1991). Thus, the failure of DCYF to produce the document at the hearing, and the decision by the Hearing Officer to accept Ms. Davis's testimony in its stead, were neither prejudicial nor erroneous.[7]

[7] The Court also questions whether this issue was properly raised before the Hearing Officer, as no objection appears in the transcript. However, given the Court's reasoning on the merits, there is no need to address the raise-or-waive question.

B

Disqualification of Ms. Roberts

The first violation the Hearing Officer upheld was for allowing Ms. Roberts to work "with children even though she had received a notice of disqualification from the Department for child care employment[.]" Hr'g Decision 4. At the hearing, Mr. Duggan attested to the veracity and accuracy of his e-mails to the Center describing Ms. Roberts's disqualification, as well as to what occurred that day. Hr'g Tr. 80:21-83:22. However, the Center protests that "at the time of his testimony at the hearing no documentation was presented to indicate what he had found that was 'disqualifying' about Ms. Roberts." John Hope's Mem. 3. The Center suggests that Mr. Duggan may have been mistaken in his second e-mail, and that it is unclear if Mr. Duggan "checked the wrong box or if there was in fact non[-]disqualifying information on Ms. Roberts's record." Id. In fact, John Hope objects to Mr. Duggan's testimony even having been admitted, arguing that "Appellant's counsel has absolutely no way to cross[-]examine or impeach Mr. Duggan because the State failed to place any documents in evidence of the steps Mr. Duggan did or did not follow." Id.

This argument fails. Mr. Duggan testified before the Hearing Officer, and the Center could—and did—cross-examine (and recross-examine) Mr. Duggan. See State v. Vento, 533 A.2d 1161, 1164 (R.I. 1987) (observing that, in the criminal context, "'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish'" (quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985))). He testified to his standard procedures and what he saw. The Department provided the e-mails and documents sent, which were admitted without objection. Hr'g Tr. 85:19-24. The Hearing Officer had ample evidence to support his conclusion that

"Petitioner received notice from the Department on September 1, 2016 that Ms. Roberts had disqualifying information on her record," and that "Mr. Duggan's subsequent email clearly stated to disregard his first email." Hr'g Decision 7; see Envtl. Sci. Corp. v. Durfee, 621 A.2d 200, 207 (R.I. 1993) (discussing the ability and necessity of a hearing officer's credibility determinations).

At the Hearing, John Hope also suggested that Ms. Richotte had discussed Ms. Roberts's disqualification with Mr. Duggan, and that Mr. Duggan had orally indicated that "he could not find disqualifying material concerning Ms. Roberts." Hr'g Decision 7. This was despite the fact that John Hope's "human resources staff were aware of Mr. Duggan's second email." Id. Additionally, Mr. Duggan testified that he could not recall whether anyone from the Center had called him with respect to Ms. Roberts. Hr'g Tr. 84:1-13, 85:10-16. The Hearing Officer ultimately "found Ms. [Richotte's] testimony on this point to be vague and unpersuasive," Hr'g Decision 7, and, combined with the lack of any written evidence "that the Department reversed its September 1, 2016 final notification disqualifying Ms. Roberts[,]" id. at 8, found that the last formal communication between the Department and the Center regarding Ms. Roberts was Mr. Duggan's second e-mail. "A court must not substitute its judgment for that of the agency in regard to the credibility of the witnesses or the weight of the evidence concerning questions of fact." Costa v. Registrar of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988). The Hearing Officer weighed the testimony and facts before him and came to the conclusion that John Hope "chose to hire Ms. Roberts without a Department clearance and violated Department regulations." Hr'g Decision 8. His decision had sufficient evidence to support his conclusion and therefore will not be disturbed.

C

Missing Documentation for Ms. Valerio

DCYF also cited the Center for a second worker, Ms. Valerio, who "was working as a child care employee without documentation that a criminal background check had been conducted[.]" Hr'g Decision 4. With respect to this charge, the Hearing Officer heard testimony from Ms. Ryan, Ms. Dailey, and Ms. McDowell, the Center's Director. In short, Ms. Ryan testified that Ms. Valerio's file was missing the required documentation, while Ms. Dailey and Ms. McDowell both testified that it was present. Id. at 9.

John Hope objects to Ms. Ryan's testimony, protesting that Ms. Ryan "only testified to what she saw"—that Ms. Valerio's background check was not in the appropriate file. John Hope's Mem. 2. Of course, witnesses are expected to testify to what they have seen, and thus about that of which they have personal knowledge. See R.I. R. Evid. 602. However, John Hope characterizes such an event as "unfathomable" given that the documentation had supposedly been missing at that point for three years, implicitly arguing that if it had been particularly important, if it really were absent, such absence would have been discovered earlier. John Hope's Mem. 3; Hr'g Tr. 183:16-184:3.

Ultimately, John Hope's complaint here boils down to another disagreement with the Hearing Officer's determination as to credibility. The Center suggests that Ms. Ryan's testimony should not have been believed and that its witness should have been believed. The Hearing Officer, however, "found Ms. Ryan to be credible based on her demeanor and forthright answers." Hr'g Decision 9. This led to his conclusion that the required documents were "not in Ms. Valerio's personnel file" on the relevant date. Id. Moreover, the Hearing Officer determined, based "on Ms. McDowell's experience and demeanor at the Hearing," that had the documents

been in the file, Ms. McDowell would have brought them to Ms. Ryan's attention. Id. The Court repeats that it "must not substitute its judgment for that of the agency in regard to the credibility of the witnesses[.]" Costa, 543 A.2d at 1309. The Hearing Officer had sufficient evidence before him, in the form of witness testimony, to find that the Center "did not have a criminal background check in Ms. Valerio's file on October 27, 2016" and thus "violated the Department's rules[.]" Hr'g Decision 10. Thus, the Court affirms the decision of the Hearing Officer with respect to this violation.

D

Non-Notification of Vacant Site Coordinator Position

The final violation upheld by the Hearing Officer was that John Hope had "failed to notify the Department that the Site Coordinator was no longer employed by the Petitioner in violation of Department regulations." Id. at 4. The Center's site coordinator resigned on October 20, 2016, and left the position on October 24, 2016. Id. at 10. However, the Center did not inform DCYF of the vacancy until Ms. Ryan conducted an inspection on October 26, 2016. Hr'g Tr. 159:21-160:6. Ms. McDowell admitted as much. Id. at 178:11-18. In fact, John Hope admitted that this violation occurred in its closing arguments to the Hearing Officer. Id. at 186:17-18. Thus, there was certainly "'some' or 'any' evidence supporting the agency's findings" that the Center "violated the Department's rules with respect to providing notice to the Department concerning a vacancy in the site coordinator position." Envtl. Sci. Corp, 621 A.2d at 208; Hr'g Decision 11.

E

Consequence of Violations

Finally, the Center contends that despite the three violations found, the Hearing Officer erred by affirming DCYF's penalty—the revocation of its day care license. Specifically, John Hope argues that these three violations do not merit the "death sentence" that revocation would bring. Hr'g Tr. 184:4-13; John Hope's Mem. 4. To that end, the Center points to Jake & Ella's, Inc. v. Dep't of Bus. Regulation, No. NC01-461, 2002 WL 977812 (R.I. Super. Apr. 22, 2002). In Jake & Ella's, the Superior Court vacated the revocation of a liquor license because "the sanction imposed [was] excessive and disproportionate as a matter of law." Id. at *5. There, the Court held that "implementation of that sanction [revocation] under the facts of this case was clearly an abuse of discretion, ignoring concepts of proportionality that hearing officers should be expected to apply." Id. at *6.

On the other hand, the Court is mindful of Rocha v. State Pub. Utils. Comm'n, 694 A.2d 722 (R.I. 1997), heavily cited to in Jake & Ella's, which stated that "[t]he Superior Court is limited in its review of an agency decision to examining the record to determine whether it contains some or any legal evidence therein to support the finding made by the division." Rocha, 694 A.2d at 727. This Court cannot "merely disagree[] with the sanction decided upon by the division and reverse[] the division's decision." Id. at 726; see also Culhane v. Denisewich, 689 A.2d 1062, 1065 (R.I. 1997) (observing "it is not the prerogative of this court to substitute its judgment for that of the hearing committee" with regard to disciplinary sanctions for law enforcement officers). "[T]he question of the appropriate remedy is 'peculiarly a matter for administrative competence.'" Rizek v. SEC, 215 F.3d 157, 160 (1st Cir. 2000) (quoting Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973) (citation omitted)); see also Sultan

Chemists, Inc. v. EPA, 281 F.3d 73, 83 (3d Cir. 2002) ("[H]eightened deference is due to the agency's penalty assessment.").

Nevertheless, based solely on the three violations before the Court, the Court could find the revocation to be "so arbitrary and extreme that it constitutes a clear abuse of discretion" in the vein of Jake & Ella's, 2002 WL 977812 at *5. This Court lacks a sufficiently-developed record to make such a conclusion. Of the three violations, two were technical and only one potentially could have threatened the safety and welfare of the children in John Hope's care. It is undisputed that Ms. Valerio had a background check. The violation was merely that it was not in the proper file. The failure to notify about the site coordinator was for a period of two days, and the position was filled a few days after that. As to Ms. Roberts, the record is devoid of the disqualifying reason that made her ineligible for hire. Consequently, the real threat to the children from hiring her is unknown.

If the Department's revocation was based on the cumulative effect of the violations which led to the several probationary periods, the nature of John Hope's previous violations is unclear from the record. While the record hints at technical violations, see R. Ex. 9, there may be more substantive violations that were not mentioned. Whether the decision of the Department to revoke the license was arbitrary, capricious, or an abuse of discretion depends on whether John Hope has committed intermittent technical violations of DCYF regulations or has shown a pattern of inability to comply with substantive Department policies. The record here lacks the information needed for the Court to make such a determination.

IV

Conclusion

After review of the entire record, this Court finds that the Hearing Officer's determination that John Hope committed the violations charged was supported by substantial evidence in the record. However, the Court has insufficient information to determine that the revocation of John Hope's license was not arbitrary, capricious, or an abuse of discretion. Thus, pursuant to § 42-35-15(g), the Court remands the matter to DCYF for further proceedings; namely, to reopen the record to establish the disqualifying information concerning Ms. Roberts and to contextualize the Center's previous violations and findings.[8] A more thorough record will allow this Court to determine whether revocation was or was not an arbitrary or capricious sanction. This Court shall retain jurisdiction over the matter. Counsel shall prepare an appropriate order for entry.

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[8] While the Court is aware that DCYF policy is not to inform requesters of information about the reasons for disqualification, see Hr'g Tr. 97:10-20, when the Department seeks to revoke a license based on hiring a disqualified person, this information becomes relevant to the inquiry. If there are concerns about the public disclosure of this information, it is well within the authority of the arbitrator to fashion an appropriate procedure to maintain the requisite confidentiality.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**John Hope Settlement House, Inc., d/b/a John Hope Day Care Center v. Rhode Island Department of Children, Youth & Families, et al.**
CASE NO:	**PC-2017-0843**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 9, 2017**
JUSTICE/MAGISTRATE:	**Licht, J.**

ATTORNEYS:

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