STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

Alma's Day Care Center

PROPOSED DECISION

ML-10-0087

Pursuant to petition filed February 10, 2010, under Wis. Stat. § 227.44, to review a decision by the Department of Children and Families, a briefing schedule was established by agreement of the parties, in lieu of a hearing, to present their respective cases.

The issue for determination is whether the Department correctly revoked petitioner's child care license because she has prior prohibited convictions resulting in an automatic bar under Wis. Stat. § 48.685.

There appeared at that time and place, the following persons:

PARTIES IN INTEREST:

Petitioner:

Alma's Day Care Center, by

Attorney Jill M. Kastner
Legal Action of Wisconsin
230 West Wells Street, Room 800
Milwaukee, WI 53203

Respondent:
Department of Children and Families, by

Attorney Nicole Bjork
Department of Children and Families
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, WI 53703

Administrative Law Judge:
Marina Croft
Division of Hearings and Appeals

FINDINGS OF FACT

1. On May 16, 1991, petitioner was convicted of a felony, Failure to Report Receipt of Income, in violation of Wis. Stat. § 49.12(1) and (6) and of Wis. Stat. § 943.20(3)(c).
2. On February 2, 2010, the Department of Children and Families (DCF) issued a Notice of Revocation to petitioner informing that her license was revoked because she had been convicted of a crime that barred her from holding a childcare license under a statute that took effect on February 1, 2010.
3. On February 10, 2010, petitioner filed an appeal with the Division of Hearings and Appeals.

DISCUSSION

As a result of the 2009 Wisconsin Act 76, changes have been made to the caregiver background law for all licensed child care and day camp facilities, effective February 1, 2010. The 2009 revisions to Wis. Stat. § 48.685 update the list of convictions and offenses that bar a person from holding a license to operate a child care facility. The statute mandates that DCF may not license or continue the license of a person to operate a daycare center if that person has been convicted of a serious crime or has committed an offense involving fraudulent activity as a recipient of public assistance. Wis. Stat. §§ 48.65(4m)(a)1[1] and 48.685(5)(br)5[2]. This law applies to all licensees – current and new.

In this case, DCF revoked petitioner's child care license because she had been convicted of a felony, Failure to Report Receipt of Income to obtain public assistance benefits, in violation of Wis. Stat. § 49.12(1) and (6) and of Wis. Stat. § 943.20(3)(c), which is a crime that barred her from holding a childcare license pursuant to the newly enacted statute. DCF indicated that a conviction under Wis. Stat. § 49.12(1), requires intent to willfully make false representations to obtain government assistance, and that Wis. Stat. § 49.12(6), states that a public assistance recipient's failure to notify the agency of the receipt of income or assets within 10 days shall be considered fraud. DCF also alleged that the factual circumstances related to petitioner's 1991's arrest and conviction are irrelevant in this matter because her conviction and the statutes specifically address fraud and intent, and whether petitioner's actions were violations of public assistance has already been decided in the criminal proceedings.

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[1] Wis. Stat. § 48.685 (4m)(a) Notwithstanding s. 111.335, and except as provided in par. (ad) and sub. (5), the department may not license, or continue or renew the license of, a person to operate an entity, the department in a county having a population of 500,000 or more, a county department, or an agency contracted with under s. 48.651 (2) may not certify a child care provider under s. 48.651, a county department or a child welfare agency may not license, or renew the license of, a foster home or treatment foster home under s. 48.62, and a school board may not contract with a person under s. 120.13 (14), if the department, county department, contracted agency, child welfare agency, or school board knows or should have known any of the following:

1. That the person has been convicted of a serious crime or, if the person is an applicant for issuance or continuation of a license to operate a child care center or for initial certification under s. 48.651 or for renewal of that certification or if the person is proposing to contract with a school board under s. 120.13 (14) or to renew a contract under that subsection, that the person has been convicted of a serious crime or adjudicated delinquent on or after his or her 12th birthday for committing a serious crime or that the person is the subject of a pending criminal charge or delinquency petition alleging that the person has committed a serious crime on or after his or her 12th birthday. (Annotations omitted).

[2] Wis. Stat. § 48.685 (5)(br) For purposes of licensing a person to operate a day [child] care center under s. 48.65, certifying a day [child] care provider under s. 48.651, or contracting with a person under s. 120.13 (14) to operate a day [child] care center or of permitting a person to be a nonclient resident or caregiver specified in sub. (1) (ag) 1. a. of a day [child] care center or day [child] care provider, no person who has been convicted or adjudicated delinquent on or after his or her 12th birthday for committing any of the following offenses or who is the subject of a pending criminal charge or delinquency petition alleging that the person has committed any of the following offenses on or after his or her 12th birthday may be permitted to demonstrate that he or she has been rehabilitated: …

5. An offense involving fraudulent activity as a participant in the Wisconsin Works program under ss. 49.141 to 49.161, including as a recipient of a child care subsidy under s. 49.155, or as a recipient of aid to families with dependent children under s. 49.19, medical assistance under subch. IV of ch. 49, food stamps benefits under the food stamp program under 7 USC 2011 to 2036, supplemental security income payments under s. 49.77, payments for the support of children of supplemental security income recipients under s. 49.775, or health care benefits under the Badger Care health care program under s. 49.665. (Annotations omitted).

In response, petitioner's representative alleged that petitioner was never convicted of an offense enumerated in the new caregiver law, and that the new law does not automatically bar every individual who was convicted of a crime or public assistance violation. Petitioner's representative explained that petitioner has never engaged in fraudulent activity as a participant in a public assistance program as was set forth in the new statute because the criminal complaint does not accuse petitioner of knowingly making a false statement or accused of knowing she was supposed to report the temporary income. Petitioner's representative also explained that petitioner did not make any false statements because her statements were true at the time they were made – petitioner failed to report the income because she was not employed at the time she applied or verified her employment situation, her employment dates always occurred in between reviews.

However, I agree with DCF in that the factual circumstances surrounding petitioner's conviction are irrelevant to these proceedings because petitioner already had a prior opportunity to present her case, on its merits, during the criminal proceedings. Her conviction is a fact that I cannot change. The criminal complaint also clearly states that petitioner engaged in fraudulent activity to obtain public assistance benefits[3] which, in turn, makes her ineligible to hold a child care license pursuant to the newly enacted law. The law does not leave any room for discretion and no administrative rules or policy have been enacted whereby discretion is granted.

Further, assuming petitioner is making an equitable argument, I add that the Division's administrative law judges are without the authority to provide remedies in "equity." Rather, I am limited to interpret the law as written. Therefore, I must conclude that the Department correctly revoked petitioner's child care license because she has prior prohibited convictions resulting in an automatic bar under Wis. Stat. § 48.685.

CONCLUSIONS OF LAW

The Department correctly revoked petitioner's child care license because she has prior prohibited convictions resulting in an automatic bar under Wis. Stat. § 48.685.

NOW, THEREFORE, it is **ORDERED**

That the petition for review herein be and the same is hereby dismissed.

NOTICE TO RECIPIENTS OF THIS DECISION:

This is a Proposed Decision of the Division of Hearings and Appeals. IT IS NOT A FINAL DECISION AND SHOULD NOT BE IMPLEMENTED AS SUCH.

If you wish to comment or object to this Proposed Decision, you may do so in writing. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your comments and objections to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy to the other parties named in the original decision as "PARTIES IN INTEREST."

All comments and objections must be received no later than 15 days after the date of this decision. Following completion of the 15-day comment period, the entire hearing record together with the Proposed

[3] The complaint states, in pertinent part, that petitioner "being a person originally eligible to receive public assistance… did receive income… and **did intentionally fail to notify** said agency granting such assistance of the receipt of that income within 10 days after receipt, and thereafter continued to receive public assistance, **resulting in a fraudulent overgrant** of $2514 between January 1, 1987 and February 1, 1990, contrary to Wisconsin Statutes section(s) 49.12(6)&(1) and (943.20(3)(a)." Emphasis added. See criminal complaint attached to the DCF's brief as Exhibit B.

Decision and the parties' objections and argument will be referred to the Secretary of the Department of Children and Families for final decision-making.

The process relating to Proposed Decision is described in Wis. Stat. § 227.46(2).

Given under my hand at the City of Madison, Wisconsin, this _____ day of _____, 2010.

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Marina Croft
Administrative Law Judge
Division of Hearings and Appeals