

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

Yenny Aguirre,
Petitioner

v.

Docket No. OC-24-0598

Department of Early Education and Care,
Respondent

Appearance for Petitioner:

Nicole Munroe, Esq.
Assistant General Counsel
Department of Early Education and Care
50 Milk Street, 14th Floor
Boston, MA 02109

Appearance for Respondent:

AnaMaria Gioia, Esq.
Gioia Law, Inc.
132 Lincoln Street, Suite 5R
Boston, MA 02111

Administrative Magistrate:

James P. Rooney

Summary of Recommended Decision

The husband of a woman who ran a family daycare was denied approval as a household member when his wife applied to renew her license. The denial was based on his arrest for domestic assault in 2022 after an argument the husband had with his wife when he was drunk and the Department of Early Education and Care's lack of assuredness that a similar incident will not happen in the future. The husband's involvement with the Department of Children and Families for one year thereafter, in which he participated in home visits by DCF and weekly family therapy sessions, and DCF's conclusion after that year that the children of the household were safe coupled

with the lack of any similar domestic violence incidents since 2022 is clear and convincing evidence that the husband should be approved as a household member.

RECOMMENDED DECISION

Yenny Aguirre appeals from the Department of Early Education and Care's (EEC) revocation of her day care license because it has found her husband to be an unsuitable household member. I held a hearing February 10, 2025. I admitted 15 exhibits into evidence. I granted EEC's motion to impound EEC's discretionary review report, the Revere Police Department's arrest report, and the Department of Children and Families' (DCF) close out letter. EEC presented testimony from Maria Morales, a Background Check Specialist II. Ms. Aguirre testified on her behalf and presented testimony from DCF social worker Jacob McNally. The parties made oral closing arguments, thus closing the record.

Findings of Fact

Based on the testimony and exhibits admitted at the hearing and reasonable inferences from them, I make the following findings of fact:

1. Yenny Aguirre first obtained a family day care license in 2014. She operated her day care from 7:00 a.m. to 4:00 p.m. Prior to 2024, she had been allowed to renew her license without any problem. (Aguirre testimony.)
2. Ms. Aguirre married Augusto Builes Lopera six years ago. They now have three children. Mr. Lopera works outside the home six days per week. His work hours are 4:30 a.m. to 7:00 p.m. (Aguirre testimony.)
3. In 2014, Mr. Lopera was arrested on a misdemeanor drunk driving charge. The charge was dismissed for failure to prosecute. (Ex. 4.) In 2021, EEC reviewed Mr. Lopera's suitability

to be a household member. He explained that he went to a bar after work and had a few beers while watching a soccer game. He said when he resumed driving, a car in front of him stopped abruptly when a light turned red, and he bumped into the rear of the car. The EEC reviewer thought the incident was minor, that Mr. Lopera was apologetic about it, and had not been in trouble since then. EEC therefore approved him as a household member. (Ex. 8.)

4. On Saturday, May 7, 2022, Ms. Aguirre and Mr. Lopera argued. He took her cell phone, and she tried to grab it back. She and her four-year-old daughter locked themselves in the bathroom. Her nine-year-old son called the police. (Aguirre testimony.)

5. When the police arrived, they found Mr. Lopera in the kitchen sweeping up broken glass and Ms. Aguirre coming out of the bathroom. Ms. Aguirre told an officer that she and Mr. Lopera had an argument during which he “snatched her [cell] phone from her, pushed her, and struck her with a closed fist in the upper chest/shoulder area.” In a statement later that day, Ms. Aguirre told the police that Mr. Lopera had three margaritas when the family had lunch at a Mexican restaurant. When they returned to their apartment, Mr. Lopera questioned her about flowers given to her. She told him one of the parents at the day care gave them to her; he thought they were from another man and demanded to see her phone, which she refused to do, leading to a heated argument and to him smashing her phone. Mr. Lopera’s son told police that his father drinks weekly and that he is prone to anger when he is intoxicated. (Exs. 1 and 2.)

6. Mr. Lopera was charged with assault on a family member, witness intimidation, and malicious destruction of property. All charges were dropped because of failure to prosecute.

(Ex. 3.)

7. The police officers, as mandated reporters, informed the Department of Children and Families about the arrest of Mr. Lopera over his violent actions toward his wife in the presence of his two children at the time. Ms. Aguirre told the DCF that Mr. Lopera had pushed her and she locked herself in the bathroom to prevent the situation from escalating. She said Mr. Lopera becomes abusive only if he gets drunk on hard liquor; he does not become drunk when he drinks beer. She said that for some time he had been taking over-the-counter medication to decrease alcohol cravings but had stopped one year ago. Because of Mr. Lopera's abusive behavior, his arrest, and his evident alcohol use, DCF found the allegations of child neglect to be supported. (Ex. 15 – DCF's 51B report.)

8. In her meeting with DCF, Ms. Aguirre expressed an interest in family therapy and home visits from DCF. (Aguirre testimony.)

9. DCF agreed to provide assessments and family supports. Jacob McNally, a social worker, was assigned to the family. In the first three months he made two visits per month to the family. He spoke to both parents and the two children together and separately. He asked how the family relationships were going and discussed planning how to keep the children safe. He asked the children whether they had seen any arguments or alcohol use. For the remainder of the year, he made home visits once per month. (McNally and Aguirre testimony.)

10. The family also received therapy at their home one hour per week. Two bilingual therapists met with the adults and the two children. They discussed Mr. Lopera's arrest and alcohol use. They offered insights into the problem that led to the need for family therapy; their goal was to improve this family's relationship. The family never canceled this therapy, which continued for a year. The adults signed releases allowing the therapists to report what happened in therapy with Mr. McNally. (McNally and Aguirre testimony.)

11. Mr. McNally made recommendations to Mr. Lopera about steps to address his drinking. He could recommend a program like AA but could not force anyone to attend a program. Mr. Lopera was willing to attend a program but given his work hours and his need for a program in Spanish, he did not find a program to attend. He received some information about online sessions, but Ms. Aguirre reported that he did not attend any. (Aguirre and McNally testimony.)

12. The evidence diverges as to whether Mr. Lopera still drinks. Ms. Aguirre testified that she asked him after his 2022 arrest to stop drinking and that he has done so. Mr. McNally observed him when he went to the family home; he did not testify to ever seeing signs that Mr. Lopera had been drinking. He also spoke to other family members throughout the year and to the family therapists who worked with the family. Mr. Lopera told him Mr. McNally that he had stopped drinking. The son, however, who told Mr. McNally he knew when his father was drinking, told Mr. McNally that Mr. Lopera drank infrequently and had long periods of sobriety. When Mr. Lopera spoke to Maria Morales, EEC's background check specialist, he did not tell her

that he had completely stopped drinking, but it is not exactly clear what question she asked him. (McNally, Aguirre, and Morales testimony.)

13. Mr. McNally closed the case after one year because, based on his monthly meetings with the family and his conversations with the family therapists, EEC had no remaining concerns about Mr. Lopera's drinking, the safety of the children, or another episode of domestic violence. (McNally testimony.) On May 25, 2023, he sent a letter to Mr. Loprea stating that DCF "recently completed a family assessment and has determined that further services are not required at this time." (Ex. 9.)

14. In 2024, when Ms. Aguirre sought to renew her license, Mr. Lopera consented to have EEC check his CORI record, which revealed the 2022 charges against him. (Morales testimony; Ex. 1.)

15. Ms. Morales has been a background check specialist at EEC for two years. She performs approximately 230 background checks per year. (Morales testimony)

16. Given the nature of the charge, Ms. Morales performed a "discretionary review" to determine if Mr. Lopera had presented clear and convincing evidence that he was suitable to be a household member. She considered the factors listed in EEC's regulations, statements by Mr. Lopera, and reference letters on his behalf. She did not visit the home or speak to anyone in the family other than Mr. Lopera. She was ultimately looking to see if he was safe around

children and whether he was present at the house during day care hours.¹ (Morales testimony.)

17. Mr. Lopera sent two statements to EEC. In the first, he admitted that he:

overreacted and my son got scared and my wife decided to have him call the police because they were scared to see me this way. I admit to doing wrong and made an error because my children saw me this way, which the police came and . . . arrested [me] where I was released the same night once the effects of alcohol had passed. I would like to add that after that a scene like that has never happened again because I am not an alcoholic. And at no moment did I want to affect anyone and I would not do it again.

(Ex. 5.)

18. In his second statement, Mr. Lopera added that stated that he and his family “received family therapy for one year and this helped me and my family a lot,” in particular that he needs to “think well before acting.” Regarding help with his drinking, he stated:

I would also like to add that I was able [to] enter and application with Casa Esperanza and I could view some information and 3 videos about alcoholics anonymous. Which I wanted to do voluntarily. They are not meetings/classes for rehabilitation because they did not send me to take them.² I simpl[y] was interested about more information and mentioned this to my social worker who found me the website.

(Ex. 6.)

1 In her report, Ms. Morales noted that on one occasion in 2023, Ms. Aguirre left a child enrolled in her day care alone with Mr. Lopera for 20 minutes. Mr. Lopera is not an approved childcare provider. No further details were provided and there was no testimony about this incident at the hearing. (Ex. 1.)

2 Mr. Lopera’s wrote his statements in Spanish. Ms. Morales translated them and the statements made in the two letters supporting him. (Morales testimony.) I assume Mr. Lopera means by this sentence that DCF did not require him to enroll in an alcohol cessation program, which is consistent with Mr. McNally’s testimony.

19. Mr. Lopera submitted two letters in support. Camilo Galeano, who has known him for many years, stated that Mr. Lopera is “very caring with his children, and I have never seen him in any violent events towards someone. He is very attentive to his family.” Juan Rosenbar declared that “[s]ince I’ve known him I’ve never seen him act badly towards his children or towards his wife. On the contrary, he loves them so much and is very attentive to them. He is a good father.” (Ex. 7.)

20. Ms. Morales considered that the incident happened two years prior to her review, which meant it was fairly recent, that Mr. Lopera was an adult at the time, and that it was serious because of the incident’s violent nature, his drunkenness, the presence of children, and that it happened in the home where day care was provided. Although Mr. Lopera had not been convicted following his arrests in 2014 for drunk driving or 2022 for assault, which favored Mr. Lopera, Ms. Morales worried that these arrests might reflect a pattern because both involved drinking. She thought that it weighed in Mr. Lopera’s favor that he had undergone therapy, although she was not provided with information about what went on during that therapy. She was also concerned that Mr. Lopera had not received treatment specific to his use of alcohol. (Morales testimony.)

21. Ms. Morales initially intended to determine that Mr. Lopera was suitable to be a household member, but after consulting with her supervisor, she determined he was unsuitable because of the seriousness of the incident in 2022 and because she lacked evidence of rehabilitation from a drinking problem. (Morales testimony; Ex. 1.)

22. In her report, Ms. Morales stated:

Mr. Builes [Lopera] admits to his mistake and understands what he did was wrong. He states that Family Therapy has helped him and his family and cause him to stop and think before acting. His references describe him as a caring and hardworking family man. Mr. Builes has done research into the alcohol prevention program at Casa Esperanza. He was encouraged by DCF to participate in Substance Abuse Interventions, yet he has not done so since the incident. Although this is Mr. Builes' only know violent incident on his criminal record, within the DCF report his child expressed he's been violent in the past and he feels unsafe when his father is drunk and that he drinks weekly. His wife also expressed in the 51B report Mr. Builes needs help. Mr. Builes' role as a household member gives him the potential to be to be home during daycare hours even though his work schedule requires him to be out of the home during daycare hours. Mr. Builes' previous incident of OUI can present a pattern of issues with alcohol in which he has not shown evidence of intervention.

(Ex. 1.) She concluded that Mr. Builes failed to submit clear and convincing evidence demonstrating his suitability to be a household member. *Id.*

23. On March 21, 2024, EEC sent separate letters to Ms. Aguirre and Mr. Lopera informing them that Mr. Builes had not been approved to be a household member. (Exs. 11 and 12.)

On April 12, 2024, Ms. Aguirre gave birth to the couple's third child who needed to be hospitalized for a few days. (Aguirre testimony.) Each of them filed an appeal on June 20, 2024, in which they stated that the letters of disapproval had not reached them until June 1, 2024. (Exs. 13 and 14.)

Discussion

The Department of Early Education performs background record checks on all applicants for a daycare license and, if the applicant is seeking to operate a daycare in their home, then on all household members as well. One of the databases the Department checks is the Massachusetts Criminal Offender Record Information database. Some prior conduct is automatically disqualifying. *See* 606 CMR 14.10(1). Other prior conduct will trigger a

discretionary review process, including instances in which the individual has “criminal charges appearing on EEC's Table of Disqualifying Offenses S Discretionary Disqualifications.” 606 CMR 14.10(6)(b). A charge of assault of a family member is on this list.

An EEC background check specialist when conducting such a review must consider a series of factors. They are:

1. Time since the incident(s);
2. Age of the candidate at the time of the incident(s);
3. Seriousness and specific circumstances surrounding the incident(s);
4. Relationship of the incident(s) to the ability of the candidate to care for children;
5. Number of criminal offenses or findings of abuse/neglect;
6. Dispositions of criminal offenses and findings of abuse/neglect;
7. Relevant evidence of rehabilitation or lack thereof; and
8. Other relevant information, including information submitted by the candidate.

606 CMR 14.12(f). In conducting this review, the background check specialist must determine whether the candidate has presented “clear and convincing evidence demonstrating the candidate's suitability for licensure, employment or affiliation in light of the concern for children's safety.” 606 CMR 14.2(e).

The question before DALA then is whether Ms. Aguirre has now presented clear and convincing evidence that Mr. Lopera is suitable to be a household member.³ Ms. Morales

³ EEC contends that its unsuitability finding should be reviewed only to determine if it was arbitrary or capricious or lacked substantial evidence to support it. These are review standards that apply to court review of executive agency action and are based on the level of deference the judicial branch must give to decisions made by the executive branch.

DALA is part of the executive branch. And in the case of EEC, its review is part of the process of the agency rendering a final decision. By that I mean that DALA renders a recommended decision to the EEC Commissioner who must then make the final decision as to whether the clear and convincing standard has been met. That is because once an agency has promulgated a regulation, it is bound to adhere to it. *Royce v. Commissioner of Correction*,

concluded that Mr. Lopera had not made such a showing because of serious concerns regarding drunkenness and violence raised at the time of his arrest, a possible longer term alcohol problem given his earlier arrest for drunk driving, and the lack of clear evidence that he had taken steps to resolve whatever drinking problem he had.

Ms. Morales's determination was based largely on a document review of Mr. Lopera's CORI report, the police report of his 2022 arrest, the DCF 51B report, the EEC report discussing his earlier drunk driving arrest, Mr. Lopera's two written statements, and his two reference letters supplemented by a conversation with Mr. Lopera. There is no evidence that she spoke to anyone else in the family, and she testified that she did not visit the house.

While I understand that what happened in 2022 raised serious concerns about Mr. Lopera being a member of the household where his wife ran a daycare and that the evidence of what he has done to address his alcohol issues is not crystal clear, I am persuaded by the testimony of Mr. McNally, the DCF social worker, because of his intense involvement with the family over a one year period and his conclusion after this involvement that Mr. Lopera was safe around children.

During that year, Mr. McNally spoke to both Mr. Lopera, Ms. Aguirre, and their two children on multiple occasions, at least once per month. He met with them as a group and individually and asked about the family situation, whether there had been arguments between

390 Mass. 425, 427 (1983). Furthermore, DALA is not simply reviewing the material the background check specialist had. It holds a hearing on the matter at which new evidence can be introduced. Here, for example, that would be the testimony of the DCF social worker assigned to Mr. Lopera's case.

the parents, and whether Mr. Lopera was drinking. It is clear from what Ms. Aguirre told DCF and her son told the police on the day of Mr. Lopera's arrest that they were frank about what they thought about Mr. Lopera's drinking and its impact on the family. Mr. McNally continued to ask Ms. Aguirre and her son specifically about Mr. Lopera's drinking. Had he heard negative reports from either of them about Mr. Lopera's behavior and his drinking, I would have expected that to impact Mr. McNally's decision-making about the family. Mr. McNally also made close observations of Mr. Lopera to see if his presentation suggested he was drinking. By the end of the year, based on what he had heard and seen, he had concluded that there were no safety concerns for the family involving domestic violence or Mr. Lopera's drinking.

Mr. Lopera was cooperative with DCF throughout that year. Ms. Aguirre told DCF as soon as the agency became involved that she would like family therapy. Mr. Lopera agreed to it and participated in the family therapy once per week with two therapists for an entire year. In his second statement to Ms. Morales, he told her he had learned from this therapy the damage he had done to his family and that he needed to think before acting. Mr. McNally had been allowed by the family the opportunity to talk to the therapists about how the family therapy was progressing. If the therapists had reported to him that Mr. Lopera was not learning how to curb his behavior to prevent a threat to his children, I assume that would have changed Mr. McNally's ultimate conclusion.

Although questions remain about whether Mr. Lopera is still drinking, what is more important is that there is no evidence that Mr. Lopera has become drunk and belligerent again after his arrest in 2022, and there is evidence that Mr. Lopera understands how his earlier

behavior hurt his family and that he has learned strategies to prevent it. He has not participated in an alcohol cessation program, but he did try to find one and did not find one in Spanish that he could attend given his long, six-days-per-week work schedule. Although he says he is not an alcoholic, his efforts to look for some help make clear that he is aware that his drinking has created problems with his family. Mr. McNally in his visits to the house asked him and the rest of his family about his drinking. This would have been a focus of the family therapy as well considering that Ms. Aguirre was well aware that Mr. Lopera became angry when drunk. Thus, Mr. Lopera would have had a year in which the focus was on his drinking and strategies to avoid problems associated with that drinking. While Ms. Aguirre believes her husband has stopped drinking, and Mr. Lopera told Mr. McNally that he had stopped, his statement to Ms. Morales suggests that he does drink sometimes, which is consistent with what his son told Mr. McNally, namely that his father does drink occasionally but has long periods of sobriety. Whatever the truth of the matter, there is no evidence of any violent arguments fueled by Mr. Lopera's drinking since the argument in 2022 that led to Mr. Lopera's arrest. It appears that at least he is drinking less and that he has learned strategies to prevent his behavior from getting out of hand, such as thinking before he acts. While Ms. Morales' report accurately recites what Ms. Aguirre and her son stated about the problems Mr. Lopera's drinking had caused, the evidence supports that he is drinking less frequently and that it has not led to any drunken, angry outbursts like the one in 2022.

EEC's concern is with the welfare of the children in Ms. Aguirre's daycare. Mr. Lopera's work schedule should consistently take him away from the home during daycare hours. DCF's

concern was with the children of the household, who are there all the time. The intense work DCF did with the family over a one year period and Mr. Lopera's participation in home visits and family therapy throughout that year, coupled with DCF's ultimate conclusion that the family and the children in it do not need further DCF intervention, along with the lack of any incidents of drunken rage by Mr. Lopera since 2022, presents clear and convincing evidence that Mr. Lopera is suitable to be in a household in which his wife operates a daycare.

I therefore recommend that Mr. Lopera be approved by the Department of Early Education and care as a household member.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney

James P. Rooney
First Administrative Magistrate
DIVISION OF ADMINISTRATIVE LAW APPEALS
4 Summer St., 4th Floor
Malden, MA 02148
Tel: (781) 397-4700
www.mass.gov/dala

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