

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

September 21, 2017

Suffolk, ss.

Docket No. OC-15-556

DEPARTMENT OF EARLY EDUCATION AND CARE, Petitioner

v.

JOANNE BARBAS, Respondent

RECOMMENDED DECISION

Appearance for Petitioner:

Thomas B. Myers, Esq.
Assistant General Counsel
Dep't of Early Education and Care
51 Sleeper St., 4th floor
Boston, MA 02210

Appearance for Respondent:

Joanne Barbas, *pro se*
55 Ralph St.
Watertown, MA 02472-3037

cc: Respondent's previous address of record

Joanne Barbas, *pro se*
95 Silver Hill Lane
Waltham, MA 02451-2236

Administrative Magistrate:

Mark L. Silverstein, Esq.

Summary of Decision

A licensed family child care provider appealed a September 2015 determination of the Department of Early Education and Care (EEC) revoking the license under which she had operated a single family child care program in her residence since early 2009. This action followed repeated violations observed by Department inspectors, including exceeding the licensed child care children capacity, failure to comply with a 2015 EEC sanction order that froze her enrollment and reduced her capacity from 6 to 4 child care children, not complying with required child to staff ratios, and utilizing unapproved caregivers. DALA scheduled a hearing on the two issues identified previously for adjudication: whether the violations on which EEC based its license revocation decision occurred, and whether, based upon the violations that occurred, EEC was justified in revoking the family child care license or whether this sanction was excessive. In July 2017, DALA issued an order rescheduling the hearing at the family child care provider's request. The order emphasized that appearance at the hearing was mandatory and that each party was required to serve and file its hearing exhibits and prehearing memorandum regarding the issues to be decided here prior to the hearing. The family child care provider did not file hearing exhibits or a prehearing memorandum, and also failed to appear for the scheduled hearing on September 21, 2017. DALA therefore issues a decision recommending that the appeal be dismissed for lack of prosecution, and that the 2015 license revocation order be finalized as a result. Although the adjudicatory record has closed, it remains for EEC to decide whether and, if so, when, it will finalize the license revocation and begin closure of the family child care program in question.

*Background**1. EEC's September 2015 License Revocation Decision, and the Grounds on Which License Revocation was Based*

Respondent Joanne Barbas, who had, since February 4, 2009 operated a single family child care program in her Waltham, Massachusetts residence pursuant to Department of Early Education and Care (EEC) family child care license # 9022101 (expiring date Feb. 9, 2018), appeals an order issued by EEC on September 10, 2015 that revoked her license because on five occasions she exceeded her licensed capacity of 6 child care children and required child-to-staff ratio, utilized unapproved assistants, failed to comply with a previous EEC sanction order (issued on July 28,

2015) that froze her enrollment and reduced her capacity from 6 to 4 children, and, by these repeated violations, showed that she was not capable of providing an environment that ensured the safety and well-being of children. *See* M.G.L. c. 15D, § 10 and 102 C.M.R. § 1.07(4)(a)(1).

EEC's order alleged that the following violations occurred and were the basis for its determination that Ms. Barbas had violated her license and the applicable regulations on multiple occasions and repeated those violations even after being directed to correct them, exhibited poor judgment, ignored EEC's regulations and prior orders, made a conscious decision to disregard them, and jeopardized the safety of children in her care, making it necessary and appropriate for EEC to revoke her family childcare license:

*A. Exceeding licensed child care children capacity
(Five Alleged Instances of this Violation)*

On January 8, 2013, EEC reviewed Ms. Barbas's attendance records and found that she exceeded her licensed capacity of 6 child care children regularly in December 2012. (EEC determination to revoke license, Sept. 10, 2015, at 2, second full para.)

On April 25, 2014, EEC staff visited Mrs. Barbas's family child care program in Waltham and observed her caring for eight child care children (two more than her licensed capacity). Five of these children were under the age of two years. (*Id.*, second and third full paras.)

On May 8, 2014, EEC staff observed Ms. Barbas caring for 11 child care children on May 8, 2014, which violated her licensed capacity of 6 child care children. (*Id.*, second full para.). EEC issued a notice of noncompliance to Ms. Barbas regarding the child care children capacity violations

in April and May 2014, and Ms. Barbas signed a corrective action plan on May 8, 2014 acknowledging that her licensed capacity was 6 child care children and stating that she would not exceed this limit. (*Id.*, second full para.)

On June 4, 2015, EEC staff conducted an unannounced visit to Ms. Barbas's residence and observed her caring for 7 child care children, which exceeded her licensed capacity of six child care children. (*Id.* at 1, second full para., and at 2, second full para.) In view of this and the previous violations it had observed, EEC issued a noncompliance statement to Ms. Barbas on June 4, 2015. (*Id.* at 1, second full para.), and Ms. Barbas responded that she needed a license allowing her to care for 10 child care children (*id.* at 2, second full para.). She repeated this request during an enforcement meeting that EEC held on June 25, 2015, but the agency told her that her licensed capacity would remain at 6 child care children until the EEC legal unit could review the matter. (*Id.* at 3, third para.) As a result of that review, EEC issued a sanctions order to Ms. Barbas on July 28, 2015 that froze her child care children enrollment and reduced her family child care program's capacity from 6 to 4 child care children. (*Id.* at 1, second full para., and at 3, third para.) The sanctions order stated, among other things, that Ms. Barbas had a right to request its reconsideration, but that she was required to comply with the order until EEC decided a reconsideration request. (*Id.* at 1, third para.) On August 14, 2015, Ms. Barbas filed a request for reconsideration with the agency asking that it rescind its reduction of her child care children capacity. The agency did not rescind this child care capacity reduction. (*Id.* at 2, top portion of para. continuing over from 1.)

On August 18, 2015, EEC staff conducted an unannounced visit to Ms. Barbas's residence on August 18, 2015 to determine whether she was complying with the July 28, 2015 sanctions order,

and observed nine child care children, five more than the reduced capacity that the sanctions order allowed. Four of these children were under the age of two years. (*Id.* at 2, first full para.)

*B. Operation in Excess of Child to Staff Ratios
(Four Alleged Instances of this Violation)*

EEC regulations limit the number of child care children cared for by a qualified EEC educator to three children under three years old, one of whom must be at least of toddler age and walking independently. Although the presence of sufficient licensed educators or assistants does not change the licensed capacity of a single family child care program, *see* 606 C.M.R. § 7.10(4)(d)-(h), the regulations require that all children over a capacity of six must be at least of school age. *See* 606 C.M.R. § 7.10(4)(d) and (e) (referenced by the appealed EEC Determination at 3, para. 5.)

On August 16, 2013, EEC staff observed that Ms. Barbas was alone with three children under the age of 15 months (Order Revoking License, dated Sept. 10, 2015, at 2, third full para.), in excess of three children under three years old, one of whom needed to be an independently-walking toddler, who she could care for herself, per the regulations.

On October 1, 2013, EEC staff observed that Ms. Barbas was caring for 5 children under the age of two years without an approved assistant (*id.*) in excess of three children under three years old who she could care for herself under the regulations.

On April 25, 2015, EEC staff observed that Ms. Barbas was alone with five children under the age of two years (*id.*), in excess of three children under three years old who she could care for herself under the regulations.

On May 8, 2015, EEC observed that Ms. Barbas was alone with five children under the age of 15 months (*id.*), in excess of three children under three years old who she could care for herself under the regulations, one of whom needed to be an independently-walking toddler.

*C. Utilizing Unapproved Assistants
(Four Alleged Instances of this Violation)*

During visits to Ms. Barbas's family child care program on October 1, 2013 and April 25, 2014, EEC staff observed that Ms. Barbas was utilizing unapproved assistants. (Order Revoking License, dated Sept. 10, 2015, at 2, fourth para.)

During a visit on May 8, 2014 visit, EEC staff observed that Ms. Barbas was utilizing two unapproved caregivers to help her care for 11 child care children, five of whom were under the age of two years. (*Id.* at 2, fourth para., and at 3, second para.) In the corrective action plan that she signed on May 8, 2014, Ms. Barbas stated that she would not use an unlicensed person to care for child care children in her program, and that she would only utilize an assistant who had a license "in hand to give [her]." (Order Revoking License, dated Sept. 10, 2015, at 2, fourth para.)

During the unannounced August 18, 2015 visit, when EEC staff observed that Ms. Barbas was caring for 9 child care children, four of whom were under the age of two years, staff also observed that Ms. Barbas was being assisted by Brendalisse Medina, who had applied to the agency for a certified assistant certificate but had not yet completed the application process or a background record check, and was not then a licensed assistant. (*Id.* at 2, first para.)

D. Other Violations

EEC's decision to revoke Ms. Barbas's family child care license was also based upon the following additional violations:

(1) During their visits to Ms. Barbas's family child care program on January 8, 2013, April 25, 2014, and May 6, 2014, EEC staff also observed child care sleeping arrangement violations, including inappropriate napping of infants and placement to sleep incorrectly. EEC ordered that Ms. Barbas complete safe sleep training on June 19, 2014. (Order Revoking License, dated Sept. 10, 2015, at 3, first and second paras., and at 4, first full para., *citing* 606 C.M.R. § 7.11(13)(e)2 and EEC's "Safe Sleep Policy.")

(2) Ms. Barbas failed to complete the corrective actions required by EEC's July 28, 2015 sanctions order, including freezing her enrollment at the reduced capacity of 4 child care children, attending 20 hours of mandated training, and submitting to EEC a list of all parents with children enrolled in her program, a list and schedule of all children in care in her program, and parent acknowledgment statements from each parent who had a child enrolled in her program. (Order Revoking License at 1, second para., and at 5, first full para.)

(3) During the August 18, 2015 unannounced visit to Ms. Barbas's family child care program, EEC staff did not observe a copy of the July 28, 2015 sanctions order posted in the licensed child care space of Ms. Barbas's residence, as the sanctions order required. (*Id.* at 2, first full para.)

(4) In view of the totality of Ms. Barbas's repeatedly exceeding her licensed child care children capacity (on five observed occasions), her repeated violations of child to staff ratios (on four

observed occasions), her repeated utilization of unlicensed assistants (on four observed occasions), and her placement of the children in her care at risk as a result, EEC determined that Ms. Barbas exercised poor judgment as a licensed child care provider, which was a separate violation of the agency's regulations. *See* 606 C.M.R. § 7.09(8). (Order Revoking License at 5, third para.)

1. Ms. Barbas's Appeal to DALA, and Proceedings Through and Including the Hearing Date

Ms. Barbas's counsel at the time filed an appeal challenging EEC's Decision on her behalf with EEC on October 1, 2015. As the appeal was filed within 21 days after she received EEC's order, it was timely. EEC allowed Ms. Barbas to continue operating her family child care program in Waltham under her license while her appeal remained pending.

Ms. Barbas admitted, in her appeal, that she had exceeded her licensed child care capacity and child to staff ratios, but denied that she had placed the health and safety of any child care children at risk. She also admitted having used unapproved caregivers, but denied having been cited for this violation on "several occasions." She also denied failure to comply with EEC's sanctions order; while she admitted that her compliance with it was not timely, Ms. Barbas asserted that she was "now in compliance" with the order. Ms. Barbas admitted, without qualification, that she had exercised poor judgment when she repeatedly violated EEC regulations.

EEC transferred the appeal to the Division of Administrative Law Appeals (DALA) for adjudication and the issuance of a recommended decision, *see* 102 C.M.R. § 1.08(2), on October 8, 2015. DALA issued a notice scheduling the prehearing conference for December 9, 2015. On November 12, 2015, the parties moved jointly to continue the prehearing conference because Ms.

Barbas's counsel would not be in the Commonwealth between December 5 and 13, 2016, and between December 23, 2015 and January 5, 2016. On November 19, 2015, I issued an order rescheduling the prehearing conference to January 11, 2016 at DALA.

Both parties appeared for the prehearing conference by their respective counsel on that date.

I scheduled a hearing for March 31, 2016, and identified, as the issues to be adjudicated:

- (1) Whether the violations on which EEC based its license revocation order occurred; and
- (2) Whether, based upon the violations that occurred, EEC was justified in revoking Ms. Barbas's family child care license, or whether this sanction was excessive. *See* M.G.L. c. 15D, § 10, 102 C.M.R. § 1.07(4)(a)1, and 102 C.M.R. § 1.07(3).

I also set a deadline for filing prehearing memoranda (by March 18, 2016) and hearing exhibits (ten calendar days before the hearing). *See Order Following Prehearing Conference* (Jan. 12, 2016).

The parties were discussing settlement on January 11, 2016, when I held the prehearing conference. Ms. Barbas's attorney withdrew subsequently, with notice to DALA and EEC, on February 19, 2016. Now self-represented, Ms. Barbas continued discussing a possible resolution of this matter by agreement after the conference. On March 29, 2016, the parties moved jointly to continue the hearing because Ms. Barbas had supplied EEC with "documentation" they needed more time to discuss, and had "requested to settle the matter." I rescheduled the hearing for May 24, 2016, a date on which both parties appeared to be available. On May 23, 2016, however, the parties moved for a further hearing continuance because they were "close to reaching" an agreement and needed time to draft it. Based upon this motion, I issued an Order, on May 23, 2016, continuing the hearing without rescheduling it, and instead set a deadline by which the parties were to file a status report if they had not already filed a settlement agreement and/or a withdrawal of the appeal.

The parties' settlement efforts continued through the summer of 2016. On June 6, 2016, the parties reported jointly that they were continuing to draft an agreement; on July 25, 2016 and August 10, 2016, they reported jointly that Ms. Barbas needed more time to review a proposed agreement draft. I issued several orders through September 8, 2016 that extended the time to file a settlement agreement and/or a signed withdrawal of the appeal or to file a further status report.

A status report was due on September 30, 2016. The report was not filed, but neither did the parties report that efforts to resolve the matter had proven unsuccessful and that a hearing needed to be rescheduled. That proved to be the case, ultimately; on May 18, 2017, EEC counsel requested that I schedule a hearing, and I scheduled it for July 28, 2017. The order rescheduling the hearing, issued on June 13, 2016, stated that attendance at the hearing was mandatory, listed the issues to be adjudicated and the parties' expected witnesses (as they had been stated and listed in the earlier prehearing conference report), and imposed new deadlines for filing prehearing memoranda (July 20, 2017) and hearing exhibits (July 20, 2017).

On June 15, 2017, EEC counsel moved to reschedule the July 28, 2017 hearing to an earlier date (July 24, 25, 26 or 27, 2017) due to a scheduling conflict. Ms. Barbas filed a handwritten response to the motion stating that was "unable to attend" the hearing on any of those dates or on July 28, 2017, and that she was "not available until after August 22, 2017." She also stated in her response that she "will also be trying to resolve this matter with EEC " so that a hearing would not be necessary.

On July 7, 2017, I issued an Order rescheduling the hearing for 1:30 p.m. on September 21, 2017 at DALA. As had my June 13, 2016 Order, the July 7, 2017 Order Rescheduling Hearing

stated that attendance at the hearing was mandatory, listed the issues to be adjudicated and the parties' expected witnesses (as they had been stated and listed in the earlier prehearing conference report), and imposed new deadlines for filing prehearing memoranda and hearing exhibits (one week before the hearing, on September 14, 2017). The Order was sent by regular mail to Ms. Barbas at two addresses shown in the record: 55 Ralph St., Watertown, MA 02472-3037, and 95 Silver Hill Lane, Waltham, MA 02451-2236, where she operated her family child care program. Neither mailing was returned to DALA by the United States Postal Service, and its receipt by Ms. Barbas is therefore presumed.

EEC filed a prehearing memorandum and proposed hearing exhibits on September 18, 2017. Ms. Barbas had not filed a prehearing memorandum or proposed hearing exhibits by the hearing date.

I held the hearing at DALA, as scheduled, at 1:30 p.m. on September 21, 2017. EEC counsel and the agency's scheduled hearing witnesses appeared. Ms. Barbas did not appear, and no one appeared on her behalf. After waiting 30 minutes and determining that neither EEC counsel nor the DALA Docket Clerk had received a telephone call or filings from Ms. Barbas, I ended the hearing.

Discussion

I am dispensing with issuing an order to show cause to Ms. Barbas before I issue a decision recommending the dismissal of her appeal and the finalization of EEC's determination to revoke her family child care license. I do so for the following reasons: The hearing had been rescheduled to a date convenient for Ms. Barbas; notice of the rescheduled hearing (the July 7, 2017 Order) had been

sent to her at the two addresses the record showed for her; Ms. Barbas filed no objection to the September 21, 2017 hearing date; she had not filed a prehearing memorandum or proposed hearing exhibits by the hearing date; she had not filed a motion requesting that the hearing be continued; she had not contacted EEC counsel about the hearing or settlement since I issued the July 7, 2017 order rescheduling it; and her failure to appear at the hearing confirmed her intention to abandon her appeal. In addition, Ms. Barbas has stated her preference for resolving this matter without a hearing since shortly after the January 11, 2016 prehearing conference, although for reasons that the record does not make clear, the parties were unable to reach an agreement despite apparently coming close to doing so. Nonetheless, her failure to file a prehearing memorandum or proposed hearing exhibits, and her failure to appear for the scheduled hearing, are consistent with her long-expressed preference that the appeal not proceed to a hearing. I also take into account that Ms. Barbas has continued to operate her family child care program since EEC issued its determination to revoke her family child care license over two years ago—sufficient time during which she could have resolved this matter by agreement or via a hearing, which has been rescheduled several times since I scheduled it initially at the prehearing conference.

In the circumstances, an order to show cause would likely do little more than delay this matter's resolution further. Before I closed today's hearing, EEC counsel expressed his agency's preference that the status of Ms. Barbas's license be resolved without any further delay, for the reasons stated in its license revocation determination. In the circumstances, which include a strong child care safety element underlying EEC's September 2015 license revocation determination, I give considerable weight to the agency's preference.

Disposition

Accordingly, I now issue this decision recommending that Ms. Barbas's appeal of EEC's September 10, 2015 determination to revoke her family child care license (# 9022101) be dismissed for lack of prosecution, pursuant to 801 C.M.R. § 1.01(7)(g)2, and that the license revocation decision be finalized as a result. This recommended decision reserves fully to EEC the discretionary decision of whether, and, if so, when, it will finalize the revocation of Ms. Barbas's family child care license and begin the closure of her family child care program, which would include identifying alternative day care options for the four child care children who remain in Ms. Barbas's program.

SO ORDERED.

This is a recommended decision of the Division of Administrative Law Appeals. The parties are hereby notified that, pursuant to 801 C.M.R. § 1.01(11)(c)1, each of them has 30 days to file with the Department of Early Education and Care any written objections to this recommended decision, which may be accompanied by a supporting brief. A final agency decision in this matter will be issued by the Commissioner of the Department of Early Education and Care.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Mark L. Silverstein
Administrative Magistrate

Dated: September 21, 2017