THE COMMONWEALTH OF MASSACHUSETTS

**Suffolk, ss.** **Division of Administrative Law Appeals**

**Department of Early Education and Care,**

Petitioner

 v. Docket No. OC-17-086

**Bellamira Santana Reyes,**

Respondent

**Appearance for Petitioner:**

Denise J. Karlin, Esq.

Department of Early Education and Care

51 Sleeper Street, 4th FL

Boston, MA 02210

**Appearance for Respondent:**

David K. Reppucci, Esq

96 Arbor Road

Lowell, MA 01852-3137

**Administrative Magistrate:**

Edward B. McGrath, Esq.

Chief Administrative Magistrate

**CASE SUMMARY**

 Where the Respondent’s background includes a supported finding of neglect, pursuant to G.L. c. 119 § 51B, EEC acted within its discretionary authority in determining that the Respondent is not suitable to hold a family child care license. As there is no issue of material fact, I recommend that the Petitioner’s Motion for Summary Decision be allowed and the EEC’s decision to deny the Respondent’s application for discretionary approval be affirmed.

**DECISION ON MOTION FOR SUMMARY DECISON**

*Introduction*

On January 11, 2017, the Petitioner, the Department of Early Education and Care (“EEC”), pursuant to 102 CMR §1.05(1)(a) and 606 CMR §14.13, issued a decision denying the request of the Respondent, Bellamira Santana Reyes, for discretionary approval as a licensed family day care provider. The Petitioner issued its decision pursuant to the background check regulations promulgated under 606 CMR §14.14. The Respondent filed a timely appeal on January 31, 2017. The Petitioner filed the Notice of Claim with the Division of Administrative Law Appeals on February 24, 2017.

A pre-hearing conference was held on May 2, 2017. During the pre-hearing conference, the Respondent raised the issue of a supported finding of neglect issued by the Department of Children and Families (“DCF”) concerning the Respondent. I issued a scheduling order requiring the Petitioner to file a Motion for Summary Decision concerning the supported finding of neglect on or before June 2, 2017. I ordered the Respondent to file her opposition to that motion on or before July 3, 2017. I scheduled the evidentiary hearing of the matter for September 7, 2017.[[1]](#footnote-1)

 The Petitioner filed its Motion for Summary Decision on June 1, 2017. (Attachment A). The Respondent filed her opposition on June 29, 2017. (Attachment “B”). I marked the following documents as exhibits:

1. Letter from EEC Background Record Check Unit dated 11/14/2016;
2. Child Abuse/Neglect Investigation;
3. Discretionary Review Application with Addendum;
4. Final Agency Decision – Background Check Results dated January 11, 2017 and Discretionary Review;
5. Notice of Claim;
6. Letter from EEC regarding Notice of Claim;
7. Respondent’s affidavit.

*Findings of Fact*

Based upon the exhibits referred to above and the reasonable inferences from them, I hereby render the following Findings of Fact:

1. The Respondent, Bellamira Santana Reyes, applied for a family child care license and, therefore, EEC conducted a background check. The Respondent’s background check included a DCF history. (Ex. 1)
2. The background check returned information that the Respondent had been the subject of a supported allegation of neglect of a child contained in a G.L. c. 119 § 51B report and this information resulted in denial of the Respondent’s application for a family child care license. (Ex. 1)
3. On September 4, 2008, DCF concluded that allegations of neglect made against the Respondent were supported. The 2008 incident involved the alleged neglect of a seven month old child and the Respondent’s three year old son. DCF supported the neglect, because the Respondent left the seven month old alone in a bath tub and her son alone in a play pen, while she walked to a bus stop to meet another child who was being dropped off. (Ex. 2)
4. The Petitioner filed a Discretionary Review Application on December 6, 2016. (Ex. 3)
5. The EEC Background Review Team assigned to consider the application reviewed the time since the act of neglect, and the age of the Respondent at the time of the act of neglect. The Review Team also considered the seriousness and specific circumstances of the neglect, and the relationship of the specific nature of the neglect to the nature of the work to be performed by the Respondent. The Review Team also considered the number of neglectful acts and any relevant information, including the information submitted by the Respondent. (Ex. 4)
6. The Reviewers noted that the Respondent provided conflicting stories to investigators. They noted that the Respondent claimed her brother, an unapproved care giver, was watching the children and “thought it was fine that at least somebody was watching the children.” (Ex. 4)
7. After reviewing the 51B Report and the information contained in the Respondent’s Application for Discretionary Approval, the Review Team concluded that there was reason to believe that the Respondent was not suitable as a day care provider given the potential risk of harm to children. EEC determined that the Respondent was ineligible to receive a family child care license and her request for discretionary approval was denied. She was so notified in a letter dated January 11, 2017. (Ex. 4.)
8. The Respondent filed a timely appeal on January 26, 2017. (Exhibit 5.)

*Ruling*

Summary Decision in administrative proceedings is the functional equivalent of summary judgment in civil proceedings. See *Jack King and National Refrigeration, Inc. v. Office of the Attorney General, Fair Labor Division,* LB-12-367 and LB-12-407 (Division of Administrative Law Appeals January 29, 2014) citing *Caitlin v. Board of Registration of Architects,* 414 Mass. 1, 7 (1992) (citing Mass. R. Civ. P. 56 for summary decision in administrative cases), *Calnan v. Cambridge Retirement Board,* CR-08-589 (Division of Administrative Law Appeals February 17, 2012) and *Steriti v. Revere Retirement Board,* CR-07-683 (Division of Administrative Law Appeals December 10, 2009). Summary decision is appropriate when there are no genuine issues of material fact and the case may be decided as a matter of law. *King, supra,* citing *Caitlin, supra* at p. 7, 801 CMR 1.01(7)(h) and Mass. R. Civ. P. 56. A fact is “material” only if it might affect the outcome of the case. *King, supra,* citing *Lockridge v. The Univ. of Maine System,* 597 F 3d 464, 469 n. 3 (1st Cir. 2010) citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986). An issue of material fact is “genuine” only if a fact-finder could reasonably resolve the dispute in favor of either party. *Id.* (citing *Santoni v. Potter,* 369 F.3d 594, 598 (1st Cir. 2004).

 The moving party must demonstrate the absence of any genuine issues of material fact. 801 CMR 1.01(7)(h), *see also* Mass. R. Civ. P. 56, *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 808 (1991) (Evidence “may be in the form of affidavits, depositions, interrogatories, admission and sworn pleadings”). *King, supra,* citing *Beatty v. NP Corp,* 31 Mass. App. Ct. 606, 607 (1991). Inferences from these materials must be drawn in the light most favorable to the opposing party. *Beatty, supra* at p. 607. However, a magistrate does not make credibility determinations at the summary decision stage. *Id.* Therefore, if the moving party’s evidence establishes a material fact, the opposing party must in turn “set forth specific facts showing that there is a genuine issue for trial.” Mass. R, Civ. P. 56(e) (“mere allegations or denials” are not sufficient). Absent such “countervailing materials” from the opposing party, summary decision may properly be granted on the basis of the moving party’s undisputed evidence. *King, supra,* citing *Kourouvacilis v. Gen. Motors Corp.,* 410 Mass. 706, 715 (1991).

 In the case before me, EEC has established that there is no genuine dispute as to the following material fact: there were allegations of neglect made against the Respondent that were supported in a 51B Report.

 606 CMR §14.12 (2)(b) provides that:

DCF Background Record Check Discretionary Disqualification. A candidate shall be ineligible for employment, internship or a volunteer position in an EEC licensed, approved and/or funded program that has the potential for unsupervised contact with persons receiving services if he or she has been named as the person responsible for abuse or neglect of a child in a supported 51B Report unless the hiring authority has granted discretionary approval pursuant to the provisions of 606 CMR 14.13(3).

606 CMR §§14.13(3) and (4) mandate the procedures to be followed by EEC when considering a discretionary approval. Section 14.13(3) requires:

Discretionary Disqualification Based on DCF Background Record Check. The background of every candidate for whom the DCF Background Record Check investigation reveals a "discretionary disqualification" shall receive additional review by the hiring authority to determine if the candidate poses an unacceptable risk of harm to children within the position sought. The hiring authority shall inform the candidate of the findings of the DCF Background Record Check and offer an opportunity for the candidate to submit other relevant information. In reviewing the candidate's appropriateness for employment or other service given the concern for the safety of children, due weight shall be given to the following factors:

(a) time since the act(s) of abuse or neglect occurred;

(b) age of the candidate at the time the act(s) of abuse or neglect occurred;

(c) seriousness and specific circumstances of the abuse or neglect;

(d) relationship of the specific nature of the abuse or neglect to the nature of the work to be performed; (e) the number of abusive or neglectful acts;

(f) any relevant evidence of changed circumstances, or rehabilitation or lack thereof; and

(g) any other relevant information, including information submitted by the candidate.

Section 14.13(4) mandates the following:

In reviewing the DCF Background Record Check records of a candidate, the hiring authority must review the relevant DCF 51B Report(s) and may also request that the candidate submit additional information, including but not limited to a letter from any knowledgeable source such as the police, courts, prosecuting attorneys, or DCF personnel. Following the review, the hiring authority shall determine whether:

(a) to continue with the hiring process based upon EEC's approval of a SORI check and direct the candidate to submit to a fingerprint scan;

(b) to not hire the candidate; or

(c) to hire the candidate in a different position that does not require unsupervised contact with children. *The hiring authority shall require clear and convincing evidence demonstrating the candidate's appropriateness* for employment given the concern for children's safety. The hiring authority shall document, in writing, the reasons for his or her approval of the candidate for the position.

(Emphasis added)

In the instant case, pursuant to 606 CMR §14.14(3)(a)-(g), the EEC reviewers looked at the time since the act of neglect, and the age of the Respondent at the time of the act of neglect, as well as the seriousness and specific circumstances of the neglect, and the relationship of the specific nature of the neglect to the nature of the work to be performed. The reviewers also considered the number of neglectful acts and any relevant information, including that submitted by the Respondent. The Reviewers noted that the Respondent provided conflicting stories to investigators. They also noted that the Respondent claimed her brother, an unapproved care giver, was watching the children and “thought it was fine that at least somebody was watching the children.”

 The Background Record Check Discretionary Review Decision concluded that, after applying the factors contained in 606 CMR §14.14, the Respondent was “not suitable” for licensing as a family day care provider given the potential risk of harm to children by virtue of her failure to accept the seriousness of leaving the children unattended by an approved care giver.

The Petitioner’s authority is clearly delineated by law. The Petitioner has been statutorily required to conduct background record checks on applicants who seek employment with EEC licensed, approved, or federally funded programs. *See* G.L. c. 15D, §§3, 7 and 8. In accordance with its statutory authority, the Petitioner has promulgated its background check regulations under 606 CMR §14.00 requiring the background check including the DCF check that was performed in this case. *See* 606 CMR §14.09. The statutory authority delegates to the Petitioner the authority to determine who is suitable for employment or licensure in EEC licensed programs. *See* 606 CMR§14.02. The hiring authority has the discretion to decide whether the applicant is appropriate for employment in light of the concern for the safety of children. *See* 606 CMR§§14.14(2) & 14.14 (4). As such, the Petitioner has a strong legal basis for exercising the authority delegated by law.

The Division of Administrative Law Appeals is not to re-evaluate the Petitioner’s discretionary decision, but rather it should evaluate whether or not the Petitioner’s decision is based upon sufficient facts, is not arbitrary or capricious, or is otherwise unsupported by law. *Cf. Adele Lindsay v. Department of Soc. Serv*., 439 Mass. 789, 797-798 (2003) (discussing standard on administrative appeal from DSS finding of neglect). In this case, the Respondent does not dispute the existence of the 51B Report. While, the Respondent stated, in paragraph 10 of her affidavit (Ex. 7) that: “I dispute the facts and conclusions disqualifying me a day care provider for children,” she acknowledged that:

[I]t was wrong to leave the children and I would never do that again in the future…. I truly feel that a lot was made out of a very simple incident. I know it was wrong to leave the children unattended – but it was not so horrible an act that I shouldn’t be given a second chance to do what I do so well.

She stated that, at the time of the investigation, she was not represented and had a more limited understanding of English than she has today. The Respondent also stated that the investigator told her not to fight the allegations and to voluntarily surrender her license to “significantly improve” her chances of being reinstated. The investigator also promised, according to the Respondent, to assist her in getting her license back. (Par. 14 Ex. 7).

The Respondent also said that, if there was a hearing in this matter, she would call two character witnesses to testify that she is an excellent child care giver. (Par. 16 Ex. 7). But none of these facts, even if true, change the facts that the Respondent left the children alone and DCF issued a supported finding of neglect pursuant to G.L. c. 119 § 51B. In the present matter, the Petitioner’s Background Check Discretionary Review Decision is a thoughtful and lengthy analysis of the Respondent’s DCF history, taking into account documents she provided and describing the facts and law used when rendering its decision.

*Conclusion*

Accordingly, I recommend that the Petitioner’s Motion for Summary Decision be **ALLOWED** and the Petitioner’s decision to deny the application for discretionary approval be **AFFIRMED**.

Division of Administrative Law Appeals,

Edward B. McGrath

Chief Administrative Magistrate

DATED: August 1, 2017

1. The evidentiary hearing is canceled. [↑](#footnote-ref-1)