

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

DEPARTMENT OF EARLY
EDUCATION AND CARE,
Petitioner

v.

JENNIFER WALLER ,
Respondent

:
:
:
:
:
:
:
:
:
:
:

Docket No. OC-23-0266

October 18, 2024

Appearances:

For Petitioner: Ryan Foreman, *Esq.*

For Respondent: Jennifer Waller, *pro se*

Administrative Magistrate:

Eric Tennen

SUMMARY OF RECOMMENDED DECISION

Twenty years ago, the Respondent’s husband was criminally charged with sexually related offenses. The case was ultimately dismissed. Because her husband is a “household member,” when the Respondent applied for a family day care license in 2022, his past allegations subjected him to a discretionary review. As part of that process, the Respondent was allowed to present evidence to explain the charges. Nevertheless, the Department of Early Education and Care denied her application. Because the Respondent did not prove to the Department by clear and convincing evidence that she was suitable for a license, I recommend the decision be affirmed.

INTRODUCTION

Pursuant to 102 Code Mass. Regs. § 1.08(2)(a) and 606 Code Mass. Regs. § 14.14(2), the Respondent timely appeals a decision by the Department of Early Education and Care (“DEEC” or “the Department”) denying her application for a family childcare license. On January 5, 2024, I conducted a virtual hearing on the WebEx platform, with the consent of both parties. The Respondent testified and called two additional witnesses: Joleen Langelier and Jessica Whittall.

The Department presented one witness, Unique Dodd, the background check reviewer who conducted the Respondent's discretionary review for DEEC. I entered 19 exhibits into evidence without objection. The Parties submitted closing briefs on March 22, 2024, at which point I closed the administrative record.

FINDINGS OF FACT

1. The Respondent applied for a family childcare license in 2022. (Ex. 13.)
2. When someone applies for a license, they are automatically subjected to a background check which looks at, among other things, criminal history. The background check applies to the applicant and any household members living with them. (Dodd testimony.)
3. Some prior conduct is automatically or presumptively disqualifying. 606 Code of Mass. Regs. § 14.10(1) & (2). Other prior conduct may trigger a discretionary review process. *Id.* at § 14.10(6). (Dodd testimony.)
4. As part of the Respondent's background review, DEEC found information that triggered its discretionary review process: her husband, a household member, had several criminal charges stemming from incidents in 1997 and 2004. (Stipulated facts.)
5. The 1997 incident and related charges did not play a role in DEEC's decision. (Dodd testimony; Ex. 13.)
6. The 2004 incident and charges did. They were based on allegations that the Respondent's husband sexually assaulted an acquaintance. He was charged with one count of assault to rape and one count of indecent assault and battery (over 14). (Stipulated facts; Ex. 4.)
7. The police reports detail the allegations from the complainant's point of view. She explained that she was with some friends that night and they were drinking. The group

- included the Respondent's husband.¹ She passed out on the couch and woke up the next day around noon. She believed she may have been sexually assaulted because her bra and underwear were on backwards and her tampon had been removed. (Ex. 3.)
8. She then called the Respondent's husband who came over to talk about it. According to her, he admitted he was in the bedroom with her, pulled out her tampon, and attempted to have sex with her. He said he did not, though, because she was sleeping or passed out. (Ex. 3.)
 9. A friend who was there that night corroborated some of the complainant's statements. She noted that the complainant had three drinks. She also saw the Respondent's husband leaving at 5:00 a.m., but the complainant seemed okay. However, when the complainant woke up and noticed how disheveled she was, she was hysterical and crying. (Ex. 3.)
 10. One other friend said that he and the Respondent's husband carried the complainant to her bed that night. As they were walking out, the complainant called the Respondent's husband into the bedroom. The complainant's friend did not feel comfortable with that, so he checked on them from time to time; but every time he checked, the complainant was sleeping with the Respondent's husband lying beside her. (Ex. 3.)
 11. The District Attorney's office ultimately dropped the charges because the complainant stopped cooperating. (Stipulated facts; Ex. 4; Respondent testimony.)
 12. During the discretionary review process, the Respondent was given a chance to explain her husband's charges. That is part of the standardized procedure. Whenever someone's

¹ At the time, the Respondent and her husband were only dating and not married.

application triggers this process, they are given an application requesting certain materials and allowing them to explain their past conduct in what is called a “candidate statement.” (Dodd testimony; Ex. 13.)

13. The Respondent and her husband wrote various narratives explaining the incident. (Exs. 2, 7-9.) The Respondent also testified about the incident at the hearing. (Respondent testimony.)
14. In his candidate statement, the Respondent’s husband admitted that he and his friends, including the complainant, were drinking all night. He also admitted he did have oral sex with the complainant. However, he then says he told the Respondent about the incident the next day and the complainant apologized (apparently for interfering with their relationship). He claims that the complainant ultimately went to the police because their friends pressured her to. He believes his friends did not like the Respondent and were looking for a reason to break them up. (Ex. 2.)
15. The Respondent’s written statement likewise denied her husband committed a criminal act and put forth the same theory for why the complainant would make a false allegation. (Ex. 7.)²
16. Once the application was complete, the DEEC reviewer—here Ms. Dodd—conducted the review by considering a series of factors listed in 606 Code Mass. Regs. § 14.12(f):

1. Time since the incident(s);

² Additionally, while the Respondent’s husband did not testify at the hearing, she did. She testified consistent with her and her husband’s written statements. She continued to deny that her husband committed a criminal act and added more detail about why she believed the complainant would make a false allegation. The testimony about the complainant’s motives was based largely on uncorroborated, totem-pole hearsay. While such evidence is admissible, I place no weight on it because I do not find it reliable. In any event, this testimony did not add much to her written statement, which the Department had when it conducted its discretionary review.

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.

(Dodd testimony.)

17. At the hearing, Ms. Dodd further explained how she weighed the factors. In short, every factor but one weighed in the Respondent's favor. However, the one factor weighing against him was the seriousness of the specific circumstances, which heavily outweighed the other, favorable factors. (Dodd testimony.)
18. She did not recommend DEEC grant the Respondent her license:

Although [the Respondent's husband] was not convicted of this serious crime the lengthy details in the police report are concerning. It appears a sexual encounter did occur between himself and the victim. Given the details of the police report and [his] own statements it does not appear the victim was awake to consent to the sexual encounter. It would be a great risk to children placing them in a home for childcare with a person that may have committed a sexual assault crime. As a result, EEC has deemed the candidate NOT APPROVED given the potential risk of harm to children.

(Ex. 13.)

19. Two other people reviewed Ms. Dodd's report. Together, all three need to vote to approve an application before it can go through. But here, both reviewers agreed with Ms. Dodd that the Department should not grant the Respondent her license. (Dodd testimony.)
20. At the DALA hearing, Ms. Dodd further elaborated on her reasoning as it relates to children. Ms. Dodd explained that while the conduct was against an adult, the complainant was a vulnerable person (because she was intoxicated). The Department's

concern is that children are also considered vulnerable people. (Dodd testimony.)

21. The Respondent then timely appealed. While the appeal was pending, the Department agreed to conduct a further review and gave the Respondent a chance to submit additional documents, which she did. (Exs. 15-19.)
22. However, after reviewing these letters, DEEC did not change its position. (Dodd testimony.)

DISCUSSION

When an applicant to be a childcare provider or a household member has a potentially disqualifying background, *see* 606 Code Mass. Regs. § 14.10(6), DEEC may conduct a discretionary review to determine whether to grant or deny a childcare license. That discretion is not unfettered. DEEC's regulations define what factors a reviewer must consider. *Id.* at § 14.12(f). These regulations also state that "the candidate [for a childcare license must present] clear and convincing evidence demonstrating the candidate's suitability for licensure, employment or affiliation in light of the concern for children's safety." An agency is bound to adhere to its regulations. *Royce v. Commissioner of Correction*, 390 Mass. 425, 427 (1983). This means that EEC may not issue a license to a candidate with a potential disqualifying background if the candidate failed to present clear and convincing evidence of suitability. By the same token, if the candidate presented clear and convincing evidence of suitability, EEC must grant the license.

There are myriad cases where DEEC denied an applicant a license during the discretionary review process relying on a substantiated allegation of abuse or a criminal conviction. *See, e.g., EEC v. Aguilar*, OC-23-0251, at *9 (Dec. 21, 2021), citing cases. But there are also many cases in which the Department's denial is based on mere unsubstantiated

allegations or charges that did not result in convictions. *See, e.g., EEC v. Nguyen*, OC-18-0430 (DALA Mar. 12, 2020); *EEC v. Nasra*, OC-18-376 (DALA Oct. 25, 2018); *EEC v. Goss-Johnson*, OC-16-407 (DALA Jun. 26, 2017). The Department may certainly rely on uncharged conduct, but its review must evince a careful evaluation of the facts. It is one thing for an agency to rely on the facts of an incident when the accused was, for example, convicted of the crime. It is another thing to accept as true alleged facts after the legal process has provided no verdict and, in this instance, the prosecution has abandoned its allegations. That requires a more searching inquiry.

The Department's review here met this standard. It evaluated numerous documents including multiple statements by the Respondent and her husband. It even reopened the process after the Respondent appealed to DALA to allow her to submit more documents, which she did. The Department weighed both sides and explained its reasoning in a transparent process. Its ultimate decision was well within the range of reasonable responses given the seriousness of the allegations and the Department's responsibility and mandate in issuing childcare licenses. It was the Respondent's burden to show by clear and convincing evidence that the serious, but unresolved, charges against her husband does not reflect, years later, on his ability to be a household member at her proposed childcare facility.³

That said, I should consider new evidence that emerges at a hearing, especially if it sheds

³ I sympathize with the Respondent because, as she argues, "there is no way for [her] husband to defend himself and provide clear and convincing evidence to prove his innocence in this twenty-year-old dismissed case." There is merit to that argument and the Respondent probably provided as much evidence to DEEC as will ever be available to her—outside of sworn testimony by her husband. I doubt, for example, that she could produce statements from the complainant or other percipient witnesses because, even if she could find them, they are unlikely to be cooperative. Of course, if she could produce those statements, it may be worth reapplying for her license. Absent that, the Department's decision was reasonable, even if it appears unfair to the Respondent which, on some level, it is.

light on a particular factor or provides context not apparent from the record before it. *See Jarominski v. DEEC*, FCC-22-038 (May 24, 2024), final agency decision reviewing *DEEC v. Jarominski*, OC-22-0329 (Dec. 21, 2023). At the hearing, the Respondent was given the opportunity to provide any information she wished, including any new information not previously provided to the Department. But the information she provided was largely the same information the Department already had when it conducted its review. Her husband did not testify so I was unable to assess his credibility. Nor was there much evidence regarding her husband's behavior now, 20 years after he was charged, to show that he posed no threat to children. Thus, there are no new facts for me to evaluate nor to present to the Department as it conducts its final review.

This case thus stands apart from another case I decide today, *DEEC v. Gupta*, OC-23-0396. There, the Respondent presented new, credible evidence at the hearing that called into question the Department's evaluation. The new evidence included sworn testimony by the person alleged to have committed a crime who had not previously explained his version of events. It also included a recantation by the complainant, also under oath. Similar evidence is missing in this case.

CONCLUSION AND RECOMMENDED ORDER

I recommend the decision be **affirmed**.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Eric Tennen

Eric Tennen
Administrative Magistrate