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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

v.

Case No.: SC13-1668
L. T. Case No.: 2D12-1191

DAVIS FAMILY DAY CARE HOME,

Respondent.
_____/

ANSWER BRIEF ON MERITS BY RESPONDENT DAVIS FAMILY DAY CARE HOME

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PRELIMINARY STATEMENT -

The Respondent, Davis Family Daycare Home, was the appellant below, and shall be referred to as "Davis". The Petitioner, the Department of Children and Families, was the appellee below, and will be referred to as "DCF". Record references follow the appellate record index: references to docket entries are (R). References to exhibits from the evidentiary hearing are denoted as such. References to Florida Statutes are to the 2011 statutes, unless otherwise indicated.

JURISDICTION

This Court has accepted this case for discretionary review pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi), based upon the certification of conflicts in the lower tribunal's decision in *Davis Family Day Care Home v. Dept. of Children and Families*, 117 So. 3d 464 (Fla. 2nd DCA 2013), and *Comprehensive Medical Access, Inc. v. Office of Insurance Regulation*, 983 So. 2d 45 (Fla. 1st DCA 2008).

STATEMENT OF THE CASE AND FACTS

This appeal and the administrative case below center upon three distinct administrative complaints or actions by the subject agency, against Davis. DCF issued a proposed fine on October 29th, 2010, to Davis. (R. 1-3). This proposed fine is the first of the administrative complaints, and was for an alleged single violation

on August 3rd, 2010, of the regulations governing the operation of a family day care home and imposed an administrative fine of $500.00. (R. 1-3). Davis filed a response to this proposed fine notification, which was accepted by DCF as a petition for a formal administrative hearing. On February 21st, 2011, this petition for formal administrative hearing was forwarded to the Division of Administrative Hearings, and assigned Case No. 11-0916.

Davis filed this first petition for formal administrative hearing because she had never been subject to discipline before by DCF, since her initial licensure, and had never been disciplined previously for any infraction. Davis believed the first-time fine of $500.00 was excessive. (R. 19, 37-38). The notice/complaint of DCF's proposed fine omitted any instructions and/or procedure to follow regarding payment arrangements, payment installments, or other issues relative to hardship with regard to payment of fines. (R. 42-43).

On March 23rd, 2011, the DCF issued a "Proposed Denial Application to Operate a Family Day Care Home", which was the second administrative complaint against Davis. (R. 86-91). This second complaint alleged five violations of the regulations governing the operation of a family day care home and denied the facility's renewal application. (R. 86-91).

On April 11th, 2011, DCF issued a "Proposed Denial Application to Operate a Large Family Day Care Home" to Davis. (R. 4-8). This third administrative complaint also alleged the same five allegations as set forth in the second administrative complaint issued on March 23rd, 2011. (R. 86-91).

On April 19th, 2011, Davis filed a "Petition for Administrative Hearing" disputing all the allegations in both the second and third administrative complaints lodged by DCF. (R. 6-13). On May 4th, 2011, DCF forwarded Davis' Petition to the Division of Administrative Hearings, and assigned Case No. 11-2242. (R. 6-13).

On May 11th, 2012, Davis filed a "Motion for Consolidation of Related Cases", involving all three administrative complaints against her. (R. 16). By order dated May 18th, 2011, the Division consolidated both Division cases involving Davis. (R. 16-17). A video teleconference hearing was held on July 28th, 2011. (R. 17).

At the beginning of the hearing, DCF announced that with respect to its second and third administrative complaints against Davis, it would not be presenting any evidence on either of two alleged abuse investigations that occurred in 2007 and 2008, as it had outlined in the second and third administrative complaints. (R. 4-8, R. 17-29, and R. 86-91). Thus, the entire focus of the July 28th, 2011 administrative hearing centered exclusively upon one complaint allegation of staff-to-child ratio, or

exceeding the maximum capacity for a family child care home, as alleged in DCF's - first complaint, and one isolated allegation of abuse on a child in care, as alleged in the subsequent two complaints. (R. 48-49).

Twelve witnesses testified at the hearing – seven on behalf of DCF, and five on behalf of Davis. (R. 17). Both parties timely filed proposed recommended orders, each of which was considered in the administrative law judge's preparation of the Recommended Order. (R. 18). No exceptions to the Recommended Order were filed. (R. 49).

The ALJ rendered the Recommended Order herein on October 25th, 2011.[1] The ALJ recommended that with respect to the first complaint, regarding the staff-to-child ratio, that a final agency order be entered finding that Davis was in fact over-ratio on August 3rd, 2010, and imposing an administrative fine of $500.00, with no less than ten months to pay the fine. (R. 44). The ALJ further recommended that Davis be ordered to attend remedial classes on the financial operations and management of a child care facility. (R. 44).

[1] The date of filing in the Agency's Index of Record on Appeal, Volume I, with regard to the date of filing of the ALJ's Recommended Order is incorrect. The Index indicates a date of filing of January 25th, 2011. Appellant herein had not even requested any administrative hearing as of January 15th, 2011. There could not have been a recommended order as of that date regarding the complaints in this appeal. The October 25th, 2011 Recommended Order rendered by ALJ Lynn Quimby-Pennock, bears a "received" stamp, by the "Office of the Secretary", dated October 27th, 2011. (R. 46-47). The Index should likely have recorded this as the "date filed" on the Agency's Index.

With regard to the March 23rd, 2011 administrative complaint, the second complaint, the ALJ recommended that a final order be entered by DCF which renewed the family day care home license on probation status for six months with periodic inspections to ensure the continued safe operation of the facility. (R. 44). With respect to the third complaint, the April 11th, 2011 administrative complaint, the ALJ recommended that a final order be entered by DCF, finding that the large family child care home application be issued a provisional license for a minimum of six months, with periodic inspections to ensure the continued safe operation of the facility, with the ability for an additional six month provisional period. (R. 44-45).

DCF entered its final order on February 8th, 2012.[2] DCF approved the Recommended Order with modifications. DCF rejected the ALJ's conclusion in Recommended Order paragraph 44, as to the appropriate standard of proof which should be utilized with regard to DCF's denial of the large family day care home license. (R. 49). DCF's assertion is that the correct standard is the "competent, substantial evidence" standard. (R. 49). DCF contends that it presented competent substantial evidence.

Given the ALJ's assignment of the evidentiary burden on the initial application for the large family home day care license, DCF rejected the ALJ's

[2] The Agency's Index entry for the Agency's Final Order is also incorrect. The Index provides a "date filed" date of March 17th,, 2011. The actual administrative hearing in this case was not held until July 28th, 2011. The Final Order by the Agency was rendered on February 8th, 2012. (R. 54-55).

recommendation to grant Davis the large family day care license. (R. 51). Despite this particular rejection, DCF did accept all of the ALJ's findings of fact. (R. 51). DCF also rejected the second sentence of the Recommended Order, paragraph 53, wherein the ALJ concluded that DCF had not met its burden of proof with respect to the denial notification letters. (R. 42, 52).

Had DCF adhered to the ALJ's recommendation on the issuance of a provisional license to Davis, Davis would not have been denied the Large Family Day Care Home license for which she applied. Davis initiated a timely appeal to the Second District. (R. 56-57).

In *Davis Family Day Care Home v. Dept. of Children and Families*, 117 So. 3d 464 (Fla. 2nd DCA 2013), the Second District reversed DCF's final order, and instructed DCF to issue a final order granting Davis a provisional large family child care home license consistent with the ALJ's recommendation. The Second District certified conflict in two cases, to the extent that DCF disagreed with its opinion in the case. On October 24th, 2013, this Court accepted jurisdiction and granted review without oral argument.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal was correct in reversing DCF's order below in this case, to the extent that it denied Davis' large family child care home

license. It likewise rendered its ruling appropriately, clarifying that DCF misused a standard of review as a burden of proof in its Final Order below. The Second District's interpretation of *Osborne Stern* is accurate, and properly interpreted. *CMA* and *Osborne Stern* are more than capable of harmonious resolution with each other in reasoning, certification of conflict notwithstanding. DCF's assertions of error in the Second District's decision in *Davis* are without merit. The Supreme Court should defer to the opinion in *Davis*, and affirm its holding.

STATEMENT OF THE STANDARD OF REVIEW

The standard of review in this appeal is de novo. *Sullivan v. Department of Environmental Protection*, 890 S. 2d 417 (Fla. 1st D^{CA} 2004).

ARGUMENT

I. - The Florida Supreme Court's decision in *Osborne Stern* does not stand for the proposition that the so-called "competent substantial evidence" standard is applicable as an evidentiary standard in a hearing conducted in accordance with section 120.57 of the Florida Statutes.

A. At the outset in *Department of Banking & Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996), (hereinafter "*Osborne Stern"*) this high Court confirms that it is "well-established that a factual finding by an administrative

agency will not be disturbed on appeal if (obviously on appellate review) it is supported by substantial evidence." *Id., quoting* Nelson v. State ex rel. Quigg, 156 Fla. 189, 191, 23 So. 2d 136 (l945), *cert. denied,* 327 U. S. 790, 66 S. Ct. 809, 90 L. Ed. 1016 (l946). Our highest Court goes on to state that parties are held to varying standards of proof *at the fact-finding stage* in administrative proceedings depending on the nature of the proceedings and the matter at stake. *Osborne Stern, citing Bowling v. Department of Insurance*,

In highlighting these significant precepts in *Osborne Stern*, our highest Court makes the distinction between appellate standards of review, on the one hand, and varying standards of proof, *at the fact-finding stage,* in the lower trial courts, on the other.

B. The Second District is not the only appellate court in Florida to recognize DCF's oft-repeated pattern of misusing a standard of review as a burden of proof. As the First District reasoned in *Pic 'N Save Cent. Fla., Inc. v. Department of Business Regulation*, 601 So. 2d 245, 249 (Fla. 1st DCA 1992), DCF again "failed to perceive the difference between the *burden of proof* on a party and the legal requirement that findings of fact shall be sustained (on appeal) if supported by *competent, substantial evidence."* *Id*. *Osborne Stern* provides litigants an analysis of evidentiary burdens, *not* standards of appellate review. Its reasoning correctly clarifies that while the

burden of producing evidence at the trial level may in fact shift between parties, the burden of persuasion remains upon the applicant to prove her entitlement to the license sought. *Department of Banking & Finance v. Osborne Stern & Co*., 670 So. 2d 932 (Fla. 1996). In the instant case, Davis maintained the burden of persuasion, and on the evidence presented below, she met that burden. The utilization of either of the evidentiary standards at issue simply does not negate the fact that she met the ultimate burden of persuasion.

C. The ALJ properly applied the "clear and convincing" standard of proof at the hearing below. In rendering its opinion in this case below, the Second District appropriately referenced the 1997 amendments to Chapter 120 of the Florida Statutes, specifically Fla. Stat. section 120.57(1)(h), (now currently section 120.57(1)(j)). Section 120.57(1)(j) clearly states that "findings of fact shall be based upon a preponderance of the evidence, **except** in penal or licensure disciplinary proceedings, or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized. *Fla. Stat. Section 120.57(1)(j).* On clear, relevant case law, sanctions should be proven by clear and convincing evidence. *Department of Banking and Finance v. Osborne Stern & Co*., 670 So. 2d 932 (Fla. 1996), *reaffirming Ferris v. Turlington*, 510 So. 2d 292

(Fla. 1987), *adopting the Second District in* Reid v. Florida Real Estate Commission, 188 So. 2d 846, 851 (Fla. 2nd DCA 1966).

D. In the case at bar, the tribunal at every level is faced with a proposed license revocation and a proposed license denial, bootstrapped to the same identical alleged violations, premised on the same disciplinary statute. DCF proposed to deny the licensee, Davis, the large family child care home license based on alleged violations of the Florida Administrative Code and under the authority of section 402.310 of the Florida Statutes, entitled "Disciplinary actions; hearings upon denial, suspension, or revocation of license or registration; administrative fines." DCF proposed to revoke the annual regular license Davis held, for the exact same alleged violations, under the authority of the exact same statutes. The statutes DCF cited in the proposed denial establish that DCF considered its denial of the Davis application as a sanction, or disciplinary action. DCF's actions in pursuing this appeal are clearly actions tantamount to attempts to recede from its original position in the proposed denial which initiated the lower administrative hearing in the first place. Inasmuch as DCF presented the exact, same evidence below in support of both its proposed reasons to revoke the regular license Davis held, and deny approval of the larger "step up" license, how can it credibly argue that an alternative evidentiary standard should be applied? A disciplinary

sanction, is a sanction, and a clear and convincing evidentiary standard of proof is appropriate. There is absolutely nothing in relation to these evidentiary standards which precluded or prohibited DCF from denying the larger license for other reasons than those associated with the proposed revocation of the regular annual license Davis held. Agency licensing discretion is simply not affected, either enlarged or diminished, by a legal tribunal's utilization of evidentiary standards. Attacking the Second District, and hence other Districts which have reprimanded DCF for its "fundamental misapprehension of the entirely distinct functions of evidentiary standards of proof and appellate standards of review", is just plain error. *M. H. v. Department of Children and Family Services*, 977 So. 2d 755, 759 (Fla. 2nd DCA 2008).

E. DCF's first assertion of error in its initial brief that the Second District in *Davis,* interprets *Osborne Stern* as requiring an agency to prove the reasons it provides for denying an initial license application by a preponderance of the evidence, is wholly inaccurate. Like its fundamental misapprehension of evidentiary standards and appellate review standards altogether, DCF is confused. At no place does the Second District conclude, under the pertinent facts of *Davis*, as found by the ALJ below, that the lower standard of proof was the appropriate one for the case at bar. DCF lifts a mere portion, a

sentence, of the *Davis* opinion, in an effort toward hoodwinking this Court - into believing that the Second District misinterpreted *Osborne Stern*. As reasoned above herein, it did not.

Contrary to DCF's faulty assertion in its initial brief, the Second District in *Davis* very clearly stated that "we do agree the ALJ appropriately applied a more onerous standard than the preponderance of the evidence in this disciplinary proceeding." (See *Davis* opinion, page 9).

II. - *Comprehensive Medical Access, Inc. v. Office of Insurance Regulation*, 983 So. 2d 45 (Fla. 1st DCA 2008), (hereinafter "*CMA"*), does not hold that competent, substantial evidence is a burden of proof to be applied in administrative proceedings under Chapter 120. *Davis Family Day Care Home v. Department of Children and Families*, 2013 WL 3724769 (Fla. 2nd DCA July 17th, 2013).

A. In its opinion rendered in this case below, the Second District does not hold, or reason that *CMA* holds that competent, substantial evidence is a burden of proof to be applied in administrative proceedings under Chapter 120 of the Florida Statutes. The Second District merely stated that to the extent that DCF believes that *CMA* stands for such a holding, it (the Second District), disagrees. *CMA* is also in harmony with *Osborne Stern*, as is the Second District's reasoning in the case at bar.

B. DCF's interpretation of *CMA* leaves no other plausible conclusion other - than that DCF wants to be both litigant and appellate reviewer in its administrative licensure and disciplinary proceedings. DCF is placing itself in the shoes of the appellate courts in the rendition of its final orders in hearings held pursuant to Chapter 120, and it consistently misinterprets the roles at each litigation level.

In *CMA*, the appellate court therein, *not* the subject agency, had to consider whether the proposed licensee presented competent, substantial evidence of entitlement to licensure. At the trial level, it is the fact-finder's job to assess what it hears and reads based upon the choice of two proof models, preponderance of the evidence on the one hand, and clear and convincing on the other. At the appellate court level, it is the reviewer's job to assess the fact-finder – i.e., did the fact-finder render a decision based upon competent, substantial evidence? On the evidence presented below in *CMA*, the First District correctly determined that the fact-finder, the ALJ, had not. On appeal, competent substantial evidence is such evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

In *CMA*, the Office of Insurance Regulation premised its sole reason - for denial of the appellant's initial licensure on the mere existence of a federal civil complaint alleging fraud in relation to the practice of medicine. While this federal civil complaint was admitted into evidence at the administrative hearing, there was no testimony or other evidence admitted regarding the truth or falsity of the allegations contained therein. Because of the mere existence of the federal civil complaint, the Office of Insurance Regulation presented evidence that it had a basis for suspecting that the applicant was untrustworthy. There was no evidence of record at all that the applicant had actually committed the alleged acts. Because the ALJ found that the applicant was otherwise fit for licensure, the First District reversed the agency's decision to deny the license, and remanded with directions to approve said application.

In the case at bar below, the mere existence of prior unproven allegations of child abuse prompted DCF to propose denial of a renewal of licensure, as well as initial denial of a larger license. *However, there was no competent substantial evidence that the licensee was the perpetrator of any child abuse.* There was no evidence of record that the applicant had actually committed the acts alleged. As did the First District in *CMA*, the Second District herein below reversed the agency's decision to deny the license, and

remanded with directions to approve said application. *CMA* is in harmony - with *Osborne Stern*, in that it too plainly quotes Judge Booth's reasoning that "while the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion upon the applicant to prove her entitlement to the license always remains with said applicant." *CMA*, 983 So. 2d at 46.

C. It is clear that *CMA* applies the correct standard of review on appeal in its reasoning, in its review of the fact-finder's weighing of the evidence, and *CMA* does not re-weigh the evidence. This Court should likewise not re-weigh the evidence. It is even clearer that the Second District does not hold or state in *Davis* that *CMA* holds that competent, substantial evidence is a burden of proof to be applied in administrative proceedings under Chapter 120. The Second District therein merely reasons that to the extent that DCF believes that *CMA* stands for such a holding, it disagrees. *CMA*, when properly interpreted and utilized for appellate review of Chapter 120 proceedings, presents no clear good reason for discretionary review by our highest Court. It is clearly in harmony with *Osborne Stern*, as is the Second District's reasoning in *Davis* below.

IV. DCF's assertions of error as to the Second District's reasoning in *Davis*, are - simply erroneous.

A. If DCF's second assertion of error in its initial brief is believed, specifically, that *Davis* errs by "analyzing DCF's license denial as a sanction", then all logic and common sense is totally dismissed in this case. How is it that the ALJ below would be expected to observe and consider both a proposed revocation and a proposed denial, hinging on identical alleged disciplinary violations, and as to the proposed revocation, consider the charges a "sanction", but as to the proposed denial, consider the same identical charges on the basis or theory of "relative deference"? How does an appellate reviewer fairly assess the concept of "relative deference"? How does an appellate reviewer assess at all, the concept of "relative deference", from the competent, substantial evidence perspective? Even assuming that this concept of "relative deference" would or could be considered an evidentiary standard, what evidence comprises the applicant's burdens on such a theory? Arguably, "relative deference" means DCF gets to create its own standard, and deny a license because it wants to – end of story. Such unfettered action is precisely why the current evidentiary standards, going back approaching a century, exist.

B. DCF's third assertion is merely a recitation of what it argued in its Final Order below, and in its Answer Brief to the Second District – DCF still believes that competent, substantial evidence is a trial-level evidentiary standard. It simply is not. It is an appellate standard of review.

C. With regard to the fourth and final assertion, DCF again misquotes the prior record regarding its position below. DCF recedes altogether from its own Final Order on this point, where it outright stated that issuing a provisional license to Davis would be a violation of Fla. Stat. Section 402.309. Davis complained on appeal to the Second District that DCF's assertion was an erroneous interpretation of the law. The Second District agreed, specifically finding that the language of the statute is plain, and that the ALJ's findings of fact, on which the ALJ's conclusions of law and recommendations are based, were supported by competent, substantial evidence.

CONCLUSION

This Court should affirm the decision of the Second District Court of Appeal in *Davis*.

CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

Undersigned counsel certifies that this brief was prepared with the use of Times New Roman, 14 point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Respondent's Answer Brief has been sent via electronic transmission to Gregory D. Venz, Esq., Assistant General Counsel, Department of Children and Families, at Gregory_venz@dcf.state.fl.us, this 24th day of February, 2014.

s/Charlann Jackson Sanders