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IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

CASE NO.: SC13-1668
L. T. CASE NO. 2D12-1191

v.

DAVIS FAMILY DAY CARE HOME,

Respondent.
_______________________________________/

INITIAL BRIEF ON MERITS BY PETITIONER DEPARTMENT OF CHILDREN AND FAMILIES

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PRELIMINARY STATEMENT

The petitioner, Department of Children and Families, was the appellee below, and shall be referred to as "Department". The respondent (appellant below) will be referred to as "respondent" or "Ms. Davis". 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

The Court has accepted this case for discretionary review under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi) based upon certified conflict between the lower tribunal's decision in *Davis Family Day Care Home v. Dep't. of Children and Families*, 117 So. 3d 464 (Fla. 2nd DCA 2013), and *Comprehensive Medical Access, Inc. v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008).

STATEMENT OF THE CASE AND FACTS

This case originated from three separate Department licensing actions which were referred to the Division of Administrative Hearings in two separate administrative proceedings, and thereafter consolidated by the Division.

Case No. 11-0916

On October 29, 2010, the Department issued an administrative complaint notifying Ms. Davis the Department intended to impose a $500 fine against her family day care home because she had operated with more children in care than allowed by law. (R. 15). The ALJ found Ms. Davis committed this infraction and recommended the Department impose the $500 fine. (R. 21-2; 32; 44). The final order approved and adopted the recommended order as to this issue in all critical respects[1]. Respondent did not appeal the final order as to any issue in Case No. 11-0916.

Case No. 11-2242

On March 23, 2011, the Department notified Ms. Davis it intended to deny her application to renew her existing family day care home license, issued under section 402.313, Florida Statutes. (Respondent's Exh. 14). On April 11, 2011, the Department notified Ms. Davis it intended to deny her initial application for a large family child care home license under section 402.3131, Florida Statutes. (Respondent's Exh. 2). Both denial notices stated identical bases for the denials:

1. Three alleged instances of respondent employing inappropriate corporal punishment on children in care. The events were alleged to have occurred in 2007, 2008, and 2010;

[1] The final order rejected the recommended order's suggestion the Department somehow erred by failing to advise appellant, in the administrative complaint, that the administrative fine could be paid in "installments".

2. Respondent's alleged misrepresentation of the number of children in her care on December 1, 2010, when the Department and local law enforcement were investigating the third alleged corporal punishment incident;
3. The overcapacity incident established as fact in Case No. 11-0916.

The Department, at the final hearing, elected not to rely on the 2007 and 2008 allegations of corporal punishment. (R. 17). The ALJ found, with regard to the 2010 corporal punishment allegation, the child in question suffered physical injury but the Department did not prove by clear and convincing evidence that respondent caused the injury. (R. 29-30). The ALJ found respondent misrepresented the number of children in her home on December 1, 2010, but further found the Department did not prove by clear and convincing evidence that respondent's misrepresentation was intentional. (R. 26-8). The ALJ found the Department proved the overcapacity violation by clear and convincing evidence. (R. 21-2, 32). The Department approved and adopted the ALJ's findings of fact. (R. 49, 51).

The ALJ concluded "[t]he standard of proof with respect to a contested denial of the family day care renewal application and the denial of the large family child care application is by clear and convincing evidence." (R. 32 (recommended order ¶ 44)). The ALJ concluded the Department did not meet this burden with regard to the denial of either application. (R. 42 (recommended order ¶ 53)).

The ALJ recommended the Department renew respondent's existing family day care home license, but place it in probation status for six months with enhanced inspections to ensure safe operation. (R. 44). The final order approved and adopted this recommendation and it was not part of the appeal below. (R. 53-4). With regard to respondent's initial application for a large family child care home license, the ALJ recommended the Department issue a six-month provisional license with enhanced periodic inspections to ensure safe operation. (R.44-5). The final order rejected this recommendation, concluding respondent was not an appropriate candidate for a provisional license. (R. 51-2). The Department also concluded the overcapacity violation, together with the competent substantial evidence relating to the 2010 corporal punishment incident and the December 1, 2010, misrepresentation of the number of children in care, were appropriate reasons for denying respondent's application for an initial license. (R. 50-52). The Department's rejection of the ALJ's recommendation for a provisional large family child care home license was the sole action under review in the lower tribunal.

In *Davis Family Day Care Home v. Dep't of Children and Families,* 117 So. 3d 464 (Fla. 2nd DCA 2013). the court below reversed the Department's final order, and instructed the Department to issue a final order granting respondent a provisional large family child care home license consistent with the ALJ's recommendation. The court concluded an agency denying an initial license application is required to prove the

factual basis for the denial by a preponderance of the evidence, but then characterized the Department's denial of respondent's initial application for a large family child care home license as a sanction, and held the Department had to prove the reasons for denying the license by clear and convincing evidence. *Id.* at 469. The court, in so holding, certified conflict with *Comprehensive Medical Access v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008), which holds an agency denying a license application must only present competent substantial evidence to support the stated reasons for denial. *Id.* at 468. The *Davis* court below also certified conflict with *Haines v. Dep't of Children and Families*, 983 So. 2d 602 (Fla. 5th DCA 2008), but the Department believes *Haines* and *Davis* are not in conflict.

On October 24, 2013, this Court accepted jurisdiction and granted review without oral argument.

STANDARD OF REVIEW

This appeal presents only questions of law. This court reviews questions of law *de novo*. *Bakerman v. The Bombay Company, Inc.*, 961 So. 2d 259, 261 (Fla. 2007).

SUMMARY OF ARGUMENT

The Second DCA opinion below, *Davis Family Day Care Home v. Dep't of Children and Families,* 117 So. 3d 464 (Fla. 2nd DCA 2013), erroneously interprets this Court's decision in *Dep't of Banking and Finance v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996). *Davis* reads *Osborne Stern* to require an agency to prove the reasons it provides for denying an initial license application by a preponderance of evidence. This Court should disapprove the Second DCA's clearly erroneous interpretation of *Osborne Stern* and should approve the First DCA's correct approach described in *Comprehensive Medical Access v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008).

Davis erred by analyzing the Department's denial of respondent's initial application for a large family child care home license as a sanction. Although the Department's April 11, 2011, denial letter incorporated language typical of an administrative sanction, it is the nature of the action, not the language describing it, which should determine the relative deference the regulatory agency's decision is accorded. Respondent submitted an initial application for a large family child care home license under section 402.3131, Florida Statutes (2011), after previously operating a regular family day care home under section 402.313, Florida Statutes. Sections 402.308 and 402.3055, Florida Statutes (2011), plainly required the Department to consider respondent's prior compliance history in evaluating her

application to operate a large family child care home. The denial was a "regulatory measure" as described in *Osborne Stern*, not a disciplinary sanction.

Davis erred by reversing the Department's denial of respondent's license application because the Department, in compliance with *Osborne Stern*, provided specific, legitimate reasons for denying the application, and produced competent substantial evidence in support of those reasons in the administrative hearing.

Davis erred by reversing the Department's rejection of the administrative law judge's (ALJ) recommendation to award respondent a provisional large family child care home license. Section 402.209, Florida Statutes (2011), authorizes, but does not require, the Department discretion to award a provisional license in circumstances where the Department finds non-compliance with minimum standards which will not endanger a child in care. The Department must be accorded even greater deference under section 402.309 than the broad discretion the Department enjoys with regard to evaluating an applicant under sections 402.308 and 402.3055, Florida Statutes. The Department was not required to award respondent a provisional license.

ARGUMENT

I. THE SECOND DCA HAS MISINTERPRETED THIS COURT'S HOLDING IN *OSBORNE STERN* AS TO A REGULATORY AGENCY'S EVIDENTIARY BURDEN IN AN ADMINISTRATIVE PROCEEDING CONCERNING THE DENIAL OF A LICENSE APPLICATION.

This court, in *Dep't of Banking and Finance v. Osborne Stern & Co.*, recognized the "fundamental principle that an applicant for licensure bears the burden of ultimate persuasion at each and every step of the licensure proceeding, regardless of which party bears the burden of presenting certain evidence." 670 So. 2d 932, 934 (Fla. 1996) *quoting Osborne Stern & Co. v. Dep't of Banking and Fin.*, 647 So. 2d 245, 250 (Fla. 1st DCA 1994)(Booth, J. concurring and dissenting). This precept is supported by the principle "an agency has particularly broad discretion in determining the fitness of applicants who seek to engage in an occupation the conduct of which is a privilege rather than a right." *Id. Osborne Stern*, similar to the instant case, reviewed a license denial where the licensing agency alleged the applicant had violated legal standards pertaining to the specific regulated activity. *Id.*

The Direct Conflict

In *Comprehensive Medical Access, Inc. v. Office of Ins. Reg.*, 983 So. 2d 45 (Fla. 1st DCA 2008), the First District addressed conflicting views on the application of *Osborne Stern* in the context of an administrative proceeding contesting the Office of Insurance Regulation's (OIR) denial of an application to

administer a health flex plan. OIR sought to deny the permit because of concern the applicant had previously engaged in fraud relative to the provision of health care, while the applicant maintained the permit was denied based solely on hearsay. *Id.* The court clearly and concisely explained the relative burdens of production and persuasion in the administrative hearing:

> The effect of the burden of persuasion has been the source of much confusion in this appeal. The Florida Supreme Court has emphasized that "while the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove her entitlement to the license" throughout the proceedings. *Dep't of Banking & Fin., Div. of Securities & Investor Protection v. Osborne Stern & Co.,* 670 So.2d 932, 934 (Fla. 1996). Despite the fact that the applicant continuously has the burden of persuasion to prove entitlement, however, the agency denying the license has the burden to produce evidence to support a denial. *Id.* While the agency is not required to prove its allegations by clear and convincing evidence, it may not deny a license application unless the decision is supported by competent substantial evidence. *Id.* at 934 n. 2. 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." *De Groot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957).

983 So. 2d at 46. *See also, Mayes v. Dep't of Children and Family Serv.*, 801 So. 2d 980, 981 (Fla. 1st DCA 2001).

Comprehensive Medical Access ultimately held OIR improperly denied the license application in that case, but only because the agency did not produce competent substantial evidence to support the agency's fraud concerns. *Id.* at 46-7.

OIR introduced a federal agency's civil complaint into evidence, but provided no further testimony or evidence concerning the allegations. *Id.* The ALJ found the complaint sufficient to "raise the issue" of the applicant's fitness for licensure, and recommended OIR deny the application, which OIR did. *Id.* The court, reversing the denial, explained the "mere existence" of the civil complaint was evidence only that OIR had a basis for suspecting the applicant was untrustworthy; it was not evidence the applicant had actually committed the acts. *Id.* at 47. The court held:

> the issue *at the hearing* was not whether OIR had a good faith basis for being suspicious, but whether there was *a competent substantial* basis for denying the application despite [the applicant's] expertise in providing medical care to the targeted population. . . . OIR failed to meet its burden to *present evidence* in support of the denial.

Id. (emphases supplied). *Comprehensive Medical Access* correctly concluded *Osborne Stern* did not require OIR, at the hearing, to *prove* the applicant had committed the specified unlawful acts; rather, OIR had to produce competent substantial evidence (i.e. something beyond the hearsay complaint) of those bad acts.

In contrast to *Comprehensive Medical Access*, the *Davis* decision in the instant case departs from *Osborne Stern's* clear holding. *Davis* concludes *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." 117 So. 2d at 468. (internal quotation omitted). Rather, *Davis* construes *Osborne Stern* to hold an agency denying a license application must prove

its stated reasons for denial by a preponderance of evidence. *Id.* at 469. In support, *Davis* erroneously points to section 120.57(1)(j), Florida Statutes, which generally provides findings of fact in a proceeding under section 120.57(1), shall be by a preponderance of evidence. 117 So. 3d at 469. Although the preponderance of evidence language in section 120.57(1)(j) post-dates *Osborne Stern*[2], it does not overrule it. The statute simply codifies the general rule that, where there is a material fact in dispute in an administrative proceeding, the party seeking to establish the fact must prove it by preponderant evidence. *See, e.g., Balino v. Dep't of Health and Rehab. Serv.*, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). This concept was well-established long before *Osborne Stern* was decided, but it applies only where a party must carry the burden of proof. *Osborne Stern*, again, explains the regulatory agency in a license application dispute must shoulder only a burden of production, not the burden of persuasion, as to the stated reason for denying the license. An ALJ need not decide whether specified reasons for denying a license have been proven, only whether the agency produced competent substantial evidence to support those reasons. The preponderance standard in section 120.57(1)(j) , Florida Statutes, is, therefore, inapposite.

---

[2] *Davis'* assertion chapter 97-176, section 8, Laws of Florida, enacted the preponderance of evidence standard is incorrect. The language referencing the preponderance of evidence standard, now in section 120.57(1)(j), was enacted by chapter 96-159, section 19, Laws of Florida. Chapter 96-159, Laws of Florida, however, became effective after *Osborne Stern* was decided.

Davis further states the Department's reliance on competent substantial evidence in the final order in this case reflects the Department's "fundamental misapprehension of the entirely distinct functions of evidentiary standards of proof and appellate standards of review." 117 So. 3d at 467-8. (internal quotation omitted). The Department respectfully submits the Second DCA has misapprehended both *Osborne Stern's* holding, as discussed above, as well as the underlying principles of agency discretion and protection of the public interest in evaluating license applicants in regulated industries.

This Court has long acknowledged "[d]iscretionary authority is necessary for agencies involved in the issuance of licenses and the determination of fitness of applicants for licenses," particularly where persons seek the privilege of engaging in regulated activity which is potentially injurious to the public welfare. *Astral Liquors, Inc. v. Dep't of Bus. Reg.*, 463 So. 2d 1130, 1132 (Fla. 1985); *see also, Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981)(it is fundamental that an applicant for a license carries burden of persuasion throughout administrative proceedings, and the burden is not subject to shifting by an ALJ). An agency's exercise of this broad discretionary authority in licensing is subject only to judicial review "to determine whether it meets the standard of reasonableness." *Astral Liquors*, 436 So. 2d at 1132. *Osborne Stern* simply recognizes this settled law that, subject to limited judicial review, it must be a regulatory agency which decides to

grant or deny a license, not an ALJ or a appellate court. 670 So. 2d at 934-5. While the *Davis* court's construction of *Osborne Stern* would theoretically lighten a regulatory agency's burden of proof in a license denial proceeding from clear and convincing evidence to preponderant evidence, this hardly constitutes the deference contemplated in *Astral Liquors*. The agency would still have the burden to prove the reasons for denial. If an agency must carry the burden to persuade a fact-finding ALJ as to the specific reasons for license denial, then a large measure of agency discretion is transferred to the ALJ. Whether the nominal evidentiary standard is clear and convincing or preponderance, the ALJ will find the facts as she believes them to be, and the agency will be able to reject them only if the findings are not supported by competent substantial evidence. *See, e.g., Stinson v. Winn*, 938 So. 2d 554, 555 (Fla. 1st DCA 2006). This approach imposes essentially the same due process requirements for a license denial as for a sanction, despite the fact the applicant as yet has no property interest in the license. *Astral Liquors* and *Osborne Stern* explain the licensing process must consider the more inchoate "public interest" in the safe practice of the occupation in question. 463 So. 2d at 1132; 670 So. 2d at 934. Assigning the burden of persuasion to the agency places the applicant's nebulous interest in obtaining a license in a superior position relative to the public's interest in ensuring safe and appropriate purveyors of particular services.

Ultimately, *Davis* fails to recognize the Department, at the evidentiary hearing, was not required to *prove* anything. This is underscored by the footnote on page 468 of the opinion:

> In addition, even if DCF had been correct in its determination that the ALJ applied the incorrect burden of proof, it cannot reweigh the evidence put forth in the ALJ's finding of fact under its own burden of proof, rather than remanding the case to the ALJ for reconsideration of the facts under the correct burden.

117 So. 3d at 468, n.1. In this case, the ALJ should have first determined whether respondent established her general fitness for licensure by a preponderance of the evidence. The ALJ then should have found whether the Department produced competent substantial evidence to support its stated reasons for denying respondent's license application. The ALJ could then make a recommendation as to whether the Department's basis for the denial was reasonable. On appeal, the Second DCA could review whether the Department produced competent substantial evidence, and whether the basis for denial was reasonable. In other words, the court below should have conducted the same judicial review the First DCA did in *Comprehensive Medical Access.*

Other Pertinent Decisions

While *Davis* and *Comprehensive Medical Access* crystallize the conflicting interpretations of *Osborne Stern*, there are several cases which have addressed the issue on varying facts. In *M. H. v. Dep't of Children and Fam. Serv.*, 977 So. 2d 755 (Fla. 2nd DCA 2008), the Second DCA reversed the Department's denial of an application to renew a foster care license. The *M. H.* court analyzed *Osborne Stern* essentially the same as does *Davis* in the instant case. In *N. W. v. Dep't of Children and Family Serv.*, 981 So. 2d 599, 601-2 (Fla. 3rd DCA 2008), the Third DCA, citing *Mayes v. Dep't of Children and Family Serv.*, interpreted *Osborne Stern* the same as does the First DCA in *Mayes* and *Comprehensive Medical Access*, but, nevertheless, reversed the denial of a foster care license on grounds the Department was bound by the ALJ's finding the Department failed to prove the applicant's lack of fitness.

In *Haines v. Dep't of Children and Families*, 983 So. 2d 602, 606 (Fla. 5th DCA 2008), the Fifth DCA, like the Second, held *Osborne Stern* requires an agency denying a license to prove the factual basis for the denial by a preponderance of evidence. *Davis* certifies conflict with *Haines* on the ground *Haines* applied the preponderance standard in a proceeding to revoke a license. 117 So. 3d at 469. The Department submits there is no conflict between *Davis* and *Haines*, because the license revoked in *Haines* was a foster care license, subject to section 409.175(2)(f), Florida Statutes (2006), which provided:

> A license under this section is issued to a family foster home or other facility and is not a professional license of any individual. Receipt of a license under this section shall not create a property right in the recipient. A license under this act is a public trust and a privilege, and is not an entitlement. This privilege must guide the finder of fact or trier of law at any administrative proceeding or court action initiated by the Department.

983 So. 2d at 604. The *Haines* court explained it was this statute which led it to conclude preponderance of evidence, rather than clear and convincing, was the Department's evidentiary burden in a foster care license revocation proceeding. This is entirely consistent with the Second DCA's approach in *Davis*, which does not involve a foster care license.

Coke v. Dep't of Children and Family Serv., 704 So. 2d 726 (Fla. 5th DCA 1998), is cited in support by *Davis*. 117 So. 3d at 467. In *Coke*, the court recounted "the Department agrees . . . it had the burden of proving [the licensee's] lack of entitlement to a renewal of her license and that the evidence needed to be clear and convincing." *Coke* however, is not on all fours with the instant case, because it addressed a denial of an application to renew a family day care home license. The court, moreover, simply relied on the Department's concession and did not analyze *Osborne Stern*. However, even if applicable, a careful reading of the brief *Coke* opinion suggests the court applied *Osborne Stern* in a manner quite similar to *Comprehensive Medical Access*, notwithstanding its statement on the burden of proof. The hearing officer (now ALJ) in *Coke* found the Department did not prove the factual

basis (injury of a child at the facility) for denying renewal of a family day care home license. *Id.* at 726. The Department rejected the finding, found instead the child had been injured in the applicant's care, and denied the license renewal. *Id.* at 726-7. *Coke* affirmed the denial based on competent substantial evidence to support the Department's finding. *Id*. at 726-7. The court even ruled the Department, in rejecting the hearing officer's finding, did not engage in "a redetermination of fact issues, but rather [made] a legal determination" within its authority. *Id. Coke* certainly does not support *Davis'* handling of the license denial in the instant case.

The Department submits this Court should approve the interpretation of *Osborne Stern* adopted by the First and Third DCA in *Comprehensive Medical Access* and *N. W.*, respectively. The Court should disapprove the conflicting interpretations advanced by the Second DCA in this case and *M. H.*, as well as by the Fifth DCA in *Haines*.

II. THE SECOND DCA ERRED BY HOLDING THE DEPARTMENT'S APRIL 11, 2011, DENIAL OF RESPONDENT'S APPLICATION FOR A LARGE FAMILY CHILD CARE HOME LICENSE WAS A SANCTION.

On April 11, 2011, the Department notified respondent it intended to deny her initial application for a large family child care home license:

> The Department proposes to deny your application to operate a large family day (sic) care home for violations of the Florida Administrative Code (F.A.C.) by authority of [s]ection 402.310 Florida Statute (F.S.). This letter is considered an administrative complaint of (sic) the purposes of [s]ection 120.60(5), F.S.
>
> You were initially licensed as a family day care home by our Department at the address above on April 5, 2007[,] and have continued to be licensed since. *On February 23, 2011[,] our office received your initial application to obtain a license to operate a large family day (sic) care home* located at the address above.
>
> . . .
>
> The Department is denying your renewal (sic) application based on numerous complaints to our office alleging physical abuse of children in your care and Class I violations of licensing standards.

(Resp. Exhibit 2).

As set forth in the Statement of Case and Facts, the Department issued an administrative complaint and two license denial notices to respondent between October 2010 and April 2011. (Resp. Exhibits 1, 2, 14). The first paragraph of each action letter contained the same boilerplate references to an administrative complaint utilized in the October 28, 2010, administrative complaint. *Id.* *Davis* points to the

foregoing language in the April 11 denial notice to characterize the denial of respondent's initial application for a large family child care home license as a sanction. 117 So. 2d at 466, 468, 469. Specifically, the court referenced the denial notice's citation to sections 120.60(5) and section 402.310, Florida Statutes. The Department concedes section 120.60(5), Florida Statutes, applies to certain types of administrative sanctions, to wit: revocation, suspension, annulment, or withdrawal of a license. The Department acknowledges the reference to section 120.60(5) in the April 11 denial notice was erroneous, because the notice did not relate to a revocation, suspension, annulment, or withdrawal of a license. The Department's careless drafting[3] of the April 11 denial notice is not laudable, but the Second DCA was wrong to hold such drafting changed the nature of the Department's action from denial of an initial license application to an administrative sanction. *See Osborne Stern*, 670 So. 2d at 934 ("The denial of registration pursuant to section 517.161(6)(a) . . . is not a sanction for the applicant's violation of the statute, but rather the application of a regulatory measure"). The denial notice, despite its flaws, accurately advised respondent of the factual basis for the denial of the application, and in no way prejudiced respondent's preparation for the evidentiary hearing. *See generally,*

[3] The April 11 notice (Resp. Exh.2, p.1) also references respondent's "renewal" application in the third paragraph, after correctly identifying respondent's "initial" application in the second paragraph. It is evident the April 11 notice was inartfully drafted using the October 2010 administrative complaint and March 23 denial notice templates.

Lusskin v. Agency for Health Care Admin., 731 So. 2d 67 (Fla. 4th DCA 1999)(administrative complaint must advise affected party of the specific factual basis for the intended action); *Cottril v. Dep't. of Ins.*, 685 So. 2d 1371 (Fla. 1st DCA 1996)(same).

Davis also erred in holding the denial of respondent's application for an initial large family day care home license was a sanction based the denial notice's reference to section 402.310, Florida Statutes. Specifically the opinion below explains:

> The denial of the initial large family day care license is a disciplinary action for violations allegedly committed under the family day care home license. The statute relied upon by DCF in its proposed denial, section 402.310 provides that DCF "may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301–402.319, or the rules adopted thereunder: ... (3) Deny, suspend, or revoke a license or registration." § 402.310(1)(a)3. It also states that "[w]hen the department has reasonable cause to believe that grounds exist for the denial ... it shall determine the matter in accordance with procedures prescribed in chapter 120." § 402.310(2). The statute is clear that (1) it is disciplinary in nature, and (2) the procedures of chapter 120 apply. *See also* Op. Att'y Gen. 03–15 (2003).

117 So. 3d at 468.

Osborne Stern, in part, looked to the regulatory scheme at issue in that case to distinguish the registration denial from a sanction. 670 So. 2d at 934. There, the critical statute was section 517.161(6), Florida Statutes (1989), which provided: "[r]egistration under s. 517.12 may be denied or any registration granted may be

suspended or restricted if an applicant or registrant is charged, in a pending enforcement action or pending criminal prosecution, with any conduct that would authorize denial or revocation under subsection (1)." The Court concluded the statute authorized the Department of Banking and Finance to deny a security broker registration based on charged violations of securities laws as a "regulatory measure" rather than a sanction.

Here, *Davis* erroneously concludes the reference to section 402.310, Florida Statutes, renders the license denial an administrative sanction. Section 402.310, Florida Statutes, does state the Department may deny a license as a "disciplinary sanction" for a violation of sections 402.301-402.319, Florida Statutes, and the rules adopted thereunder. This language, however, when read *in pari material* with the rest of the section, refers at most to a denial of a renewal license, not an initial one. For example, section 402.310(1)(d) states "[t]he disciplinary sanctions set forth in this section apply to *licensed* child care facilities, *licensed* large family child care homes, and *licensed or registered* family day care homes." (emphasis supplied). The statute says nothing about initial applicants for licensure. Section 402.310(1)(b) provides:

> In determining the appropriate disciplinary action to be taken for a violation provided in paragraph (a), the following factors shall be considered:
> 1. The severity of the violation, including the probability that death or serious harm to health or safety of any person will result or has resulted, the severity of the actual or potential harm, and the extent to which the provisions of ss. 402.301-420.319 have been violated.

> 2. *Actions taken by the licensee or registrant* to correct the violation or to remedy complaints.
> 3. *Any previous violations of the licensee or registrant*.

(emphasis supplied). Clearly, the statute contemplates a "disciplinary action," including a license denial, being taken against an existing licensee or registrant, not someone making initial application for a license.

More significant, however, is the fact the Department's authority to evaluate license applicants is not limited to section 402.310, Florida Statutes. Section 402.308, Florida Statutes, generally directs the Department to consider an applicant's ability to comply with minimum standards:

> (1) ANNUAL LICENSING.—Every child care facility in the state shall have a license which shall be renewed annually.
> . . .
> (3)(d) The department shall issue or renew a license upon receipt of the license fee and upon being satisfied that all standards required by ss. 402.301-402.319 have been met.

Section 402.3055(1)(a), Florida Statutes, specifically *requires* the Department to consider a license applicant's prior history as a regulated entity:

> The Department . . . shall require that the application for a child care license contain a question that specifically asks the applicant, owner, or operator if he or she has ever had a license denied, revoked, or suspended in any state or jurisdiction, or has been the subject of a disciplinary action or been fined while employed in a child care facility. . . . If the applicant, owner, or operator admits that he or she has been a party in such action, *the department . . . shall review the nature of the suspension, revocation, disciplinary action, or fine before granting the applicant a license to operate a*

> *child care facility. If the department . . . determines as a result of such review that it is not in the best interest of the state . . . for the applicant to be licensed, a license shall not be granted.*

(emphasis supplied).

Section 402.3055 establishes even more clearly than did the applicable statutes in *Osborne Stern* and *Comprehensive Medical Access*, that the Legislature intended to authorize the Department to deny a child care license for past violations of law or rule as a regulatory measure, rather than a sanction. Where the applicable statues in the prior cases authorize the respective agencies to deny licensure for statutory violations, section 402.3055 *requires* the Department to deny a license if the Department believes the applicant's prior violations indicate the applicant could pose a risk to children in care. This is strong confirmation the Legislature believes operating a child care facility is every bit as "potentially injurious to the public welfare" as selling liquor or securities. *See astral Liquors*, 463 So. 2d at 1132. The Department must, with regard to awarding child care licenses, have the "broad discretion" described in *Astral Liquors* and *Osborne Stern*.

The Second DCA's characterization of the license denial as a sanction, and its requirement the Department prove the reasons for denial by clear and convincing evidence essentially place the licensing decision almost entirely within the ALJ's discretion. This is antithetical to the plain language of section 402.3055, Florida

Statutes, and the well-established principles of agency licensing discretion described in this Court's decisions. This Court should reject *Davis* on this point.

III. THE DEPARTMENT'S FINAL ORDER DENYING RESPONDENT'S APPLICATION FOR A LARGE FAMILY CHILD CARE HOME LICENSE IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE PRODUCED AT THE ADMINISTRATIVE HEARING AND WAS APPROPRIATE UNDER *OSBORNE STERN*.

The ALJ's findings of fact in the recommended order in this case unequivocally establish the Department produced competent substantial evidence to support the specific and legitimate reasons the Department identified for denying respondent's initial application for a large family child care home license. The Department's final order appropriately relied on the ALJ's findings to conclude the license denial was consistent with *Osborne Stern* and *Comprehensive Medical Access*. *Davis*, therefore, erred by reversing the final order.

The Department, in its denial letter as modified at the final hearing, advanced three specific reasons for denying the license:

> 1. Respondent used inappropriate corporal punishment on children in family day care home, as reported to the Department on December 1, 2010;
>
> 2. Respondent misrepresented the number of children in her family day care home on December 1, 2010, when the

Department and local law enforcement were investigating the inappropriate corporal punishment incident;

3. Respondent operated her family day care home in excess of statutory maximum capacity in August 2010.

(Respondent's Exh. 2). The ALJ's recommended order addressed the corporal punishment issue at length (R. 23-30), and relates the Department's presentation of competent substantial evidence (R. 23-5). The ALJ found the child in question had been struck, but ultimately concluded the Department had not proven respondent was the perpetrator. (R. 29). As to respondent's misrepresentation of the number of children in care, the ALJ found respondent did misrepresent the number of children in the family day care home, but was not convinced she did so intentionally. (R. 28). The ALJ found respondent suffered a memory lapse resulting from the stress of her pregnancy and the Department's investigation of the corporal punishment. *Id.* As to the overcapacity incident, respondent conceded the violation, and the ALJ found the Department proved it by clear and convincing evidence. (R. 32). The record, therefore, clearly demonstrates the Department produced competent substantial evidence to support the first two components of the factual basis for denial, and clear and convincing evidence proving the third, yet *Davis* concludes the Department exceeded its authority by denying the license.

The Department submits any of the three foregoing reasons, singly or together, constitute an appropriate basis to deny respondent's large family child care home application, if supported by competent substantial evidence. *Osborne Stern; Astral Liquors*. Respondent, in 2011, was seeking to "step up" from a family day care home license to a large family child care home license. *See* §§ 402.313; 402.3131, Fla. Stat. It was her initial application for a large family child care home license. (R. 19). The Department, in evaluating the application, was required to assess respondent's history as a family day care home provider. §§ 402.3131(1)(a); 402.3055(1)(a), Fla. Stat. The Department, based on the concerns and competent evidence described in the recommended order, concluded it was not in the best interests of the state for respondent to receive a large family child care home license at that time.[4]

The ALJ, as discussed above, established an inappropriate burden of proof for the Department in the proceeding and, in recommended order paragraph 53, erroneously concluded the Department did not meet its burden of proof with regard to the license denial. (R. 42). The ALJ, nevertheless, must have concluded the Department established some cause for concern, because she *did not* recommend respondent be awarded a license. Rather, the ALJ recommended:

> With respect to the April 11, 2011, [denial notice] [] a final order be entered by the Department of Children and Families

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[4] The Department, upon a subsequent application, awarded respondent a large family child care home license in August 2013 after she operated her regular family day care home with a good compliance record for from 2011 – 2013.

> 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. 44-5). The ALJ, in effect, simply substituted her judgment for the Department's as to how to regulate this child care provider. This is entirely inconsistent with the Department's broad discretion conferred by section 402.3055, Florida Statutes, *Astral Liquors* and *Osborne Stern*. *Davis* erred by holding the Department was bound by the ALJ's recommendation. In essence, the Second DCA not only erroneously adopted the clear and convincing evidence standard as to the factual basis for the license denial, but also misapplied it to conclude the Department's reasons for deny the license application were insufficient. This Court should reverse *Davis* on this point, and hold the Department produced competent substantial evidence to support legitimate specific reasons for denying respondent's large family child care home license application.

IV. THE SECOND DCA ERRED BY REQUIRING THE DEPARTMENT TO ADOPT THE ALJ'S RECOMMENDATION TO AWARD RESPONDENT A PROVISIONAL LARGE FAMILY CHILD CARE HOME LICENSE.

The ALJ, after considering the evidence presented at the final hearing, recommended the Department issue respondent a provisional license under section 402.309, Florida Statutes, for a minimum of six months with periodic inspections to ensure continued safe operation. (R. 44). The Department's final order rejected this recommendation on grounds a provisional license was not appropriate to respondent's circumstances. (R. 51). *Davis* reversed the final order, concluding the plain language of the statute permitted the ALJ to make a binding recommendation to award the provisional license. 117 So. 3d at 470. *Davis* further concluded the Department could not reject the recommendation because the ALJ's findings were supported by competent substantial evidence. *Id.*

Davis again ignores the principles of agency licensing discretion discussed *supra*. With regard to the ALJ's or the court's authority to require the Department to issue respondent any license, regular or provisional, on the facts of this case, the Department relies on its argument with respect to sections 402.308 and 402.3055, Florida Statutes, in points II and III above.

For regular child care licenses, section 402.308(3)(d), Florida Statutes, provides "the department *shall* issue or renew a license upon receipt of the license fee and upon being satisfied that all standards required by ss. 402.301-402.319 have been met."

(emphasis supplied). While this language gives the Department "broad discretion" to evaluate the applicant, *see Astral Liquors*, it suggests a qualified applicant must be awarded a license. Section 402.309, Florida Statutes, however, provides in pertinent part, "the department . . . *may* issue a provisional license for child care facilities, family day care homes, or large family child care homes . . . to applicants for an initial license . . . who are unable to meet all the standards provided for in ss. 402.301-402.319." (emphasis supplied). The Legislature's use of the permissive "may" distinguishes section 402.309 from section 402.308, and suggests the decision to award a provisional license is entirely discretionary with the Department, subject only to judicial review for reasonableness.

Phillips v. Dep't of Juv. Just., 736 So. 2d 118 (Fla. 4th DCA 1999), construed agency authority under section 435.07(1), Florida Statutes (1999), which provided "[t]he appropriate licensing agency *may* grant to any employee otherwise disqualified from employment an exemption from disqualification" for certain offenses if the employee demonstrated rehabilitation by clear and convincing evidence. (emphasis supplied). The *Phillips* court concluded the statute made granting an exemption discretionary with the licensing agency and held "[i]t thus follows that even if Phillips' presentation constituted clear, convincing, and unrefuted evidence that he qualified for an exemption, the agency was not under any obligation to give him one. This court may not substitute its judgment for that of the agency on an issue of

discretion." *Heburn v. Dep't of Children and Families*, 772 So. 2d 561, 563 (Fla. 1st DCA 2000), considering the same language in section 435.07(1), Florida Statutes (1997), explained the court had little room to review an agency's denial of an exemption on undisputed facts:

> An exemption from a statute, enacted to protect the public welfare, is strictly construed against the person claiming the exemption, and the Department was not required to grant Heburn any benefits under the exemption. The discretion accorded the agency in this case is analogous to, *but perhaps even broader than*, the discretion accorded a licensing agency determining the physical fitness of applicants to engage in a business or occupation potentially injurious to the public welfare. The Department's exercise of discretion is sufficiently circumscribed by the standards set forth in section 435.07(3). That discretion can by judicially reviewed to determine whether it meets the standard of reasonableness.

(emphasis supplied)(citations omitted). *See also*, *Stewart v. Dep't of Juv. Just.*, Case No. 03-2450 (DOAH Oct. 10, 2003)(DJJ Dec. 4, 2003)(clearly rehabilitated "exemptible" employee is not entitled to exemption, merely eligible to be granted on at the agency's broad discretion).

Section 402.309, Florida Statutes, must be construed as widening the Department's already broad discretion in child care licensing. The statute authorizes, but does not require, the Department to provisionally license a child care provider to operate even where the provider does not meet all applicable standards, if the provider can otherwise ensure the children's health and safety. The statute

does not establish the right to a provisional license under any circumstances. The ALJ, based on her fact-finding, concluded the Department should award respondent a provisional license for six months, which would allow respondent to open her large family child care home with additional Department inspections. Applying the same facts, the Department concluded a provisional license was not appropriate given the requirements of section 402.309, Florida Statutes, and the safety concerns raised by respondent's violations in the family day care home. Because the Legislature has not required the Department to award a provisional license under any given circumstances, the Department was under no obligation to adopt the ALJ's recommendation.

Finally, *Davis* misapplies section 120.57(1)(l), Florida Statutes, in concluding the Department could not reject the ALJ's provisional license recommendation because the ALJ's findings of fact were supported by competent substantial evidence. While an agency may reject an ALJ's findings of fact only if they are not supported by competent substantial evidence, the agency may reject a conclusion of law or interpretation of statute over which the agency has substantive jurisdiction by stating with particularity its reasons for doing so. § 120.57(1)(l), Fla. Stat.; *see, e.g., Sledge v. Dep't of Children and Families*, 861 So. 2d 1189, 1192 (Fla. 5th DCA 2003). The Department's final order provided a reasoned explanation, founded upon interpretation of section 402.309, Florida Statues, for declining the ALJ's

recommendation for a provisional license, and the Second DCA erred by concluding the Department was bound by the recommendation.

CONCLUSION

Davis and *Comprehensive Medical Access* present divergent interpretations of this Court's decision in *Osborne Stern*. The two cases not only directly conflict as to the evidentiary standard in administrative proceedings concerning license denials, but they reflect dramatically different concepts of agency licensing discretion. This is an important issue for state government operation and public safety. This Court should take the opportunity to return to *Osborne Stern*, clarify the evidentiary standard, and re-affirm agency licensing discretion. The Department requests the Court approve *Comprehensive Medical Access* and disapprove *Davis* to the extent of the conflict in the two cases, even if it were to conclude the Department's denial of the license application in this case was inappropriate under the correct standard.

Davis erroneously concludes the denial of respondent's large family child care home license application was a sanction rather than a "regulatory measure" as contemplated in *Osborne Stern*. The license denial at issue in this appeal was legally indistinguishable from the denial in *Osborne Stern*, and *Davis* should not have re-cast it as a disciplinary sanction. This Court should affirm the Department's denial of respondent's license application as a regulatory measure under *Osborne Stern.*

This Court should affirm the Department's denial of respondent's license application because it was based upon specific and valid reasons supported by competent substantial evidence produced at the evidentiary hearing. This Court should reverse *Davis* on this point.

Finally, the Court should reverse *Davis'* order that the Department issue respondent a provisional large family child care home license. Section 402.309, Florida Statutes, does not require the Department to issue a provisional license under any given set of facts, and the Department was not bound by the ALJ's suggestion the Department issue a provisional license.

Respectfully Submitted,

____/s/__________________
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY this brief was prepared using Times-New Roman 14-point font.

____/s/__________________
Gregory D. Venz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of this brief has been provided by electronic mail to Charlann Jackson Sanders at csanders64@tampabay.rr.com this 9th day of December, 2013

___/s/___________________
Gregory D. Venz