

STATE OF MICHIGAN
DEPARTMENT OF HUMAN SERVICES

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BUREAU OF CHILDREN
AND ADULT LICENSING

In the matter of	Docket No.	2011-1402
Cheryl Michalski, Petitioner,	Agency No.	DF 280069116
v Bureau of Children and Adult Licensing, Respondent.	Agency:	Department of Human Services
	Case Type:	Sanction/Revocation

Issued and entered
this 24 day of April, 2012
by
Maura D. Corrigan, Director
Department of Human Services



FINAL DECISION AND ORDER

The Petitioner, Cheryl Michalski, requested an administrative hearing in this matter after the Respondent, the Bureau of Children and Adult Licensing, issued its August 10, 2011 Notice of Intent to Revoke (Notice) the Petitioner's certificate of registration (not license as stated in the Proposal for Decision) to operate a family child care home under the Child Care Organizations Act (Act), 1973 PA 116, as amended, MCL 722.111 *et seq.* Administrative Law Judge Renee A. Ozburn (ALJ) held a properly-noticed hearing on December 21, 2011. Darrin Fowler, Assistant Attorney General, appeared on the Respondent's behalf. Attorney Paul Jarboe represented the Petitioner. On February 14, 2012, the ALJ issued and entered a Proposal for Decision (PFD) concluding that the Respondent had established that the Petitioner substantially, but not willfully, violated the administrative rules cited in the Notice. The Respondent's

Exceptions were filed on February 27, 2012. The Petitioner's Response to Exceptions was filed March 12, 2012.

The Respondent sought to revoke the Petitioner's certificate of registration based on allegations in the Notice that the Petitioner violated the Act and administrative rules promulgated under the Act. In Count I, the Respondent alleged that the Petitioner violated 2005 AACS, R 400.1911(1):

(1) The caregiver shall assure appropriate care and supervision of children at all times.

The ALJ found that the Petitioner's decision to leave children unattended in her car was a result of her belief that they were safe because of the rural location. The ALJ found that the Petitioner violated R 400.1911(1) because she did not assure appropriate care and supervision of children at all times when she left them unattended in her vehicle. The ALJ concluded that the violation was substantial because of the potential danger to the children, but found that the evidence did not establish a knowing rule violation and therefore determined that it was not willful.

In Count II, the Respondent alleged that the Petitioner violated 2005 AACS, R 400.1911(5):

(5) Caregiving staff shall never leave a child unattended or with any minor in a vehicle.

The ALJ found that the Petitioner violated the rule by leaving children unattended in her car. The ALJ found that the Petitioner had substantially violated the rule because it does not allow for extenuating circumstances. The ALJ found, however, that the violation was not willful because the Petitioner did not have actual knowledge that she was violating a licensing rule.

In Count III, the Respondent alleged that the Petitioner violated 2005 AACs, R 400.1902(2):

(2) An applicant or the caregiver shall be of responsible character and able to meet the needs of children and provide for their care, supervision and protection.

The ALJ found that the Petitioner agreed with the licensing consultants that she would comply with licensing rule in the future. The ALJ found that the evidence presented did not reflect a general deficiency in her ability to act with responsible character and did not establish a general lack of suitability and ability to meet the needs of children. As a result, the ALJ concluded that the Petitioner did not violate Rule 400.1902(2).

On February 14, 2012, the ALJ issued a Proposal for Decision finding that the Petitioner substantially, but not willfully, violated Rule 400.1911(1) and (5); and found no violation of Rule 400.1902(2). On February 27, 2012, the Respondent filed Exceptions to the PFD. On March 12, 2012, the Petitioner filed her Response.

The Respondent challenges the ALJ's conclusion that the violations of Rule 400.1911(1) and (5) are not willful and cites Rule 400.16001(e):

(e) "Willful" noncompliance" means, after receiving a copy of the act or act 218, the rules promulgated under the act or act 218 and, for a license, a copy of the terms of a license or certificate of registration, an applicant or the licensee knew or had reason to know that his or her conduct was a violation of the act or act 218, rules promulgated under the act or act 218, or the terms of a license or a certificate of registration.

As the Respondent points out, Exhibit G, entered into the record is the Petitioner's renewal application. In the application, the Petitioner certified that she had reviewed the Child Care Organizations Act and the licensing rules and that she would comply with the

Act and Rule. While the Petitioner's counsel agrees with the ALJ and asserts that merely reviewing the rules does not rise to the level of establishing a "willful" violation, I disagree. The Petitioner certified that she had reviewed the rules and would follow them. She did not follow the rules because she personally did not think there was any danger to the children. The evidence presented at the hearing established that the violation of both rules was not only substantial, but also willful.

The Respondent further challenges the ALJ's refusal to admit two prior special investigation reports (which established that the Petitioner had previously been cited for failing to provide appropriate care and supervision) as inadmissible hearsay. While these documents are not necessary to prove the "willful" aspect of the Petitioner's violations, the ALJ erred in refusing to allow these documents into the record. It has been held repeatedly (*Maria Walton v BCAL*, Docket No. 2009-1096; *Fairfax Health Care v BCAL*, Docket No. 2009-1504) that prior investigation reports are admissible evidence.

The Respondent challenges the ALJ's refusal to allow into evidence an essay written by the daughter of one of the witnesses for the purpose of impeachment. The ALJ's Findings of Fact establish that the witness, Ms. Roth, was not present for, and had no personal knowledge of, the incidents relating to children being left in the car. Her sole purpose was to testify that she did not have any concerns about the Petitioner's care or supervision of her children. Because Ms. Roth had no personal knowledge of the incidents giving rise to the Notice, and because violations of the cited rules were established, it was not a prejudicial error to exclude the essay.

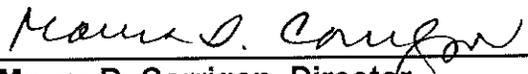
In addition, based on the same evidence that establishes violations of Rule 400.1911(1) and (5), I also conclude that the Petitioner willfully and substantially violated Rule 400.1902(2), as alleged in Count III of the Notice. The Petitioner's decision to leave children unattended in a vehicle establishes that she is not of responsible character and is not able to provide for the care, supervision, and protection of children.

Accordingly, I conclude that the Respondent has established willful and substantial violations of Rule 400.1911(1) and (5), and Rule 400.1902(2).

ORDER

NOW THEREFORE, IT IS ORDERED that:

1. To the extent not inconsistent with this Final Decision and Order, the ALJ's Proposal for Decision (PFD) is adopted, incorporated by reference, and made a part of this Final Decision and Order (see attached PFD).
2. The actions of the Bureau of Children and Adult Licensing in this matter are AFFIRMED.
3. The Petitioner's Certificate of Registration to operate a family child care home is REVOKED.
4. The Petitioner must immediately cease operation as a Child Care Home, or be in violation of MCL 722.115(1) and MCL 722.125(1), which make the operation of an unlicensed or unregistered child care organization a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$1,000, or both.



Maura D. Corrigan, Director
Department of Human Services

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 26th day of April, 2012.

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STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

In the matter of	Docket No.	2011-1402
Cheryl Michalski, Petitioner	Agency No.	DF 280069116
v Bureau of Children and Adult Licensing, Respondent	Agency:	Department of Human Services
_____ /	Case Type:	Sanction Revocation

Issued and entered
this 14th day of February, 2012
by Renee A. Ozburn
Administrative Law Judge

PROPOSAL FOR DECISION

On August 10, 2011, the Bureau of Children and Adult Licensing (BCAL/Respondent) issued a Notice of Intent to Revoke License in which BCAL seeks to revoke the license of Cheryl Michalski (Petitioner), to operate a family child care home. The Notice of Intent to Revoke alleges that Petitioner violated provisions of the Child Care Organization Act, 1973 PA 116, as amended, MCL 722.111 *et seq.* (Act) and rules promulgated under the Act. By correspondence dated August 31, 2011, Petitioner requested a hearing.

A hearing was held on December 21, 2011. Attorney Paul Jarboe appeared on behalf of Petitioner. Assistant Attorney General Darrin Fowler appeared on behalf of Respondent BCAL. Erin Cox, Marie Walker and Adam Robarge appeared as witnesses on behalf of Respondent. Karen Roth appeared as a witness on behalf of Petitioner.

ISSUES AND APPLICABLE LAW

The general issue presented is whether Petitioner committed willful and substantial violations of the Act, or rules promulgated under the Act, with respect to the operation of a family child care home.

The specific issue is whether, and to what extent, Petitioner violated 2005 AACS R 400.1902(2) and R400.1911(1) & (5) which provide:

R 400.1902 Caregiver and child care home family.

- (2) An applicant or the caregiver shall be of responsible character and shall be suitable and able to meet the needs of children and provide for their care, supervision, and protection.

R 400.1911 Supervision.

- (1) The caregiver shall assure appropriate care and supervision of children at all times.

- (5) Caregiving staff shall never leave a child unattended or with a minor in a vehicle.

EXHIBITS

Petitioner's Exhibit 1 MCL 750.135a

Respondent's Exhibits:

Exhibit A	Special Investigative Report
Exhibit B	Photograph taken 4/5/2011
Exhibit G	Respondent's 2010 License Renewal Application

FINDINGS OF FACT

Based on the entire record in this matter, including the testimony of witnesses and exhibits, the following findings of fact are established:

1. In 2010, Petitioner renewed her license to operate a family child care home at 1017 Reads Run in Traverse City, Michigan (Exhibit G). At all

times relevant to this matter, the licensed capacity of the home has been 6 children.

2. In January 2009, Veterinary Technician Erin Cox observed Petitioner leave small children unattended in a vehicle while she was in a closed door exam room having a dog put down at the Long Lake Animal Hospital where Ms. Cox is employed. Petitioner did not check on the children during the euthanasia procedure, which usually takes one hour. Ms. Cox could see the children from the lobby of the building and another employee did go out to check on the children during this 2009 clinic visit. This alleged incident was not reported to authorities in 2009 or 2010.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Petitioner's next argument [REDACTED]

4. The Long Lake Animal Hospital is located in a rural area. There are no buildings adjacent to the clinic or the parking lot. The driveway to the clinic is about 75 feet from the road and there are woods about 40 feet from the parking lot. The clinic was renovated between April 2011 and December 2011. In April 2011 there was a large atrium with windows facing the parking lot. If a client was in a front exam room with the doors open they would be able to see the parking lot.
5. On April 18, 2011, Ms. Cox checked Petitioner in and got her set up in one of the front exam rooms. Ms. Cox did not stay in the room with

Petitioner, and at times during the appointment, Ms. Cox was in the back of the building. Although Ms. Cox kept an eye on the children through the front windows, she did not go out to the car because there was no indication the children were in danger.

6. Marie Walker is a BCAL Child Care Licensing Consultant. On April 25, 2011, Ms. Walker and Licensing Consultant Adam Robarge went to the clinic and waited in Ms. Walker's vehicle in the parking lot. Mr. Robarge used his cell phone to record that Petitioner pulled into the clinic parking lot at 2:52 p.m. At 2:54 Petitioner entered the clinic. Ms. Walker observed children left in the car. From the vantage point of her car, Ms. Walker could not see Petitioner after she entered the clinic. Ms. Walker observed that the windows of Petitioner's car were rolled down slightly. There were 3 or 4 other cars in the parking lot when Petitioner arrived.
7. After Petitioner entered the building, Ms. Walker sat in her car until she heard a baby's cry coming from the car, Ms. Walker waited for one minute before exiting her car to check on the child. She observed 2 toddlers and an infant. One of the toddlers was not buckled in. Exhibit B is a photograph of Petitioner's car in the clinic parking lot taken by Ms. Walker on April 25, 2011.
8. As Ms. Walker stood outside Petitioner's car, Petitioner exited the clinic, with her dog on a leash, and approached her car asking what Ms. Walker was doing by the car. Ms. Walker identified herself as a BCAL employee and stated to Petitioner: "You can not leave kids unattended". Petitioner

responded that she did not know it was against the law, and she thought it would be "OK" as long as she could see the car from the windows of the clinic. Petitioner also asserted that the infant was sick and she did not want to remove him/her from the car. Petitioner then started back to the clinic with the dog. Ms. Walker repeated "you can not leave the kids". Petitioner then got the children out of the car and went back into the clinic with the children and the dog. Petitioner also made statements promising that she would not leave children in the car alone in the future.

9. Before Petitioner arrived at the clinic on April 25, 2011, Consultant Adam Robarge entered the clinic to get a sense of the layout of the building and observe how the parking lot looks from inside the building. He returned to Ms. Walker's car and observed Petitioner when she pulled into the parking lot. Mr. Robarge followed Petitioner and her dog into the clinic at 2:54 and recorded that she went into an exam room at 2:56. There was not a clear view of the parking lot from the exam room. Mr. Robarge observed that the door to the exam room remained closed while Petitioner was in the room. Petitioner exited the exam room with her dog at 2:59, looked out the lobby window towards her car and at 3:01 headed out the door to confront Ms. Walker. According to Mr. Robarge's notations, 7 minutes elapsed from the time Petitioner exited her car to the time she returned.

10. Standing outside the car with Ms. Walker and Petitioner, Mr. Robarge informed Petitioner that MCL 750.135a (Exhibit 1) made it illegal to leave

unattended children in a car. Mr. Robarge asked Petitioner to promise that she would not leave children alone in a car in the future.

11. Karen Roth is a Registered Nurse. Her two daughters, aged 9 and 11 have attended child care at Petitioner's home for approximately 6 years. Ms. Roth is aware that Petitioner occasionally takes her daughters places in her car. Ms. Roth has never had any concerns about Petitioner's care or supervision of her children. Petitioner initiated a conversation informing Ms. Roth of the incident involving the BCAL consultants at the veterinary clinic on April 25, 2011, shortly after it occurred. Ms. Roth knows the location of the clinic and would not have been concerned if her daughters had been left in the car alone for a few minutes, even if they were the same age as the children involved in the incident. Petitioner also acknowledged to Ms. Roth that there had been an earlier incident of leaving children in the car while she was in the clinic with a pet.

CONCLUSIONS OF LAW

The principles that govern judicial proceedings also apply to administrative hearings, 8 Callaghan's Michigan Pleadings and Practice, §60.48 at 239 (2d ed. 1994). The burden of proof is on the Respondent to prove, by a preponderance of the evidence, that grounds exist for the revocation of Petitioner's license to operate a group child care home.

As the trier of fact, the Administrative Law Judge must determine the weight, effect and value of evidence presented, including the testimony of witnesses and admitted documentary exhibits. The Administrative Law Judge must also determine the credibility of

witnesses, taking into consideration any bias, prejudice or motive that may influence a witness.

The rules governing unattended children are less lenient for child care licensees than for parents or other adults under criminal statutes as evidenced by the following provisions:

Michigan's Penal Code Section 135a(1) states:

"A person who is responsible for the care or welfare of a child shall not leave that child unattended in a vehicle for a period of time that poses an unreasonable risk of harm or injury to the child or under circumstances that pose an unreasonable risk of harm or injury to the child."

Rule 400.1911(5) of the Child Care Organization Act states:

(5) Caregiving staff shall never leave a child unattended or with any minor in a vehicle.

The evidence did not establish what, if any, steps BCAL took to train Petitioner or notify her of R 400.1911(5) prior to confronting her on April 25, 2011. Further, although the Petitioner may have left children unattended in her car at a rural veterinary clinic on more than one occasion between January 2009 and April 2011, the evidence only established a timeframe for April 25, 2011, when Petitioner left 2 toddlers and an infant unattended in her car for 7 minutes.

COUNT I

Count I alleges violation of R 400.1911(1). The evidence indicates that Petitioner's decision to leave children unattended in a car in the parking lot of a rural veterinary clinic was based on her perspective that it was reasonable and safe for the children because of the rural nature of the location. As testimony of a parent with children in Petitioner's care indicates, not all parents would find Petitioner's conduct dangerous or

harmful in an isolated rural area, as opposed to a highly trafficked urban setting. However, as evidenced by the concern of the rural clinic employee [REDACTED] Petitioner's interpretation of appropriate and safe child care is not universally accepted. While the judgment call of an adult to leave a child in a car unattended is not always a crime (e.g. MCL 750.135a), parents who leave their children with licensed caregivers rely on the imprimatur of a state license for assurance that the highest standards of safety and supervision will apply.

Under licensing standards, Petitioner violated R 400.1911(1), because she did not assure appropriate care and supervision of children *at all times* when she left children unattended in a vehicle. The potential for danger to child care children, even if reduced, makes the violation substantial. However, the evidence did not establish a knowing rule violation. Therefore the violation is not willful.

COUNT II

Count II of the Notice of Intent to Revoke alleges violation of R 400.1911(5). The Findings of Fact establish a violation of this rule because Petitioner left children unattended in a car and the rule says this should "never" happen. The rule does not allow for extenuating circumstances. The potential for harm or risk to children is always present when children are left unattended in a vehicle. Therefore, under the licensing standards, the violation was substantial. However, because Petitioner did not have actual knowledge that she was violating a licensing rule, the evidence did not establish a knowing or willful violation of R 400.1911(5).

COUNT III

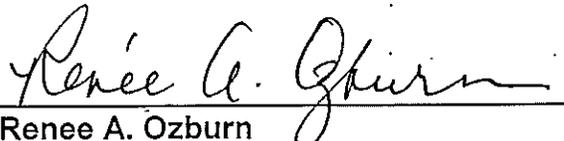
On April 25, 2011, when the consultants made it clear to Petitioner that her personal judgment about the safety of children in her car was overridden by rules prohibiting that conduct, she agreed to comply in the future. The evidence did not establish that Petitioner's judgment regarding leaving children in a vehicle at the rural veterinary clinic reflected a general deficiency in her ability to act with responsible character. Further, the evidence did not establish a general failure to be suitable and able to meet the needs of children and provide for their care, supervision and protection. Therefore, Petitioner has not violated R 400.1902(2).

PROPOSED DECISION

This Administrative Law Judge finds substantial, but not willful, violations of Counts I & II of the August 10, 2011, Notice of Intent to Revoke License.

EXCEPTIONS

If a party chooses to file Exceptions to this Proposal for Decision, the Exceptions must be filed within fourteen (14) days after the date the Proposal for Decision is issued and entered. If an opposing party chooses to file a Response to the Exceptions, it must be filed within fourteen (14) days after Exceptions are filed. All Exceptions and Responses to Exceptions must be filed with the Michigan Administrative Hearing System, Department of Licensing and Regulatory Affairs, P.O. Box 30695, Lansing, Michigan 48909-8195, and served on all parties to the proceeding.



Renee A. Ozburn
Administrative Law Judge

PROOF OF SERVICE

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed by the file on the 14th day of February, 2012.



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