



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

FOS/144226

PRELIMINARY RECITALS

Pursuant to a petition filed September 27, 2012, under Wis. Stat. § 48.64(4), and Wis. Admin. Code § DCF 56.10(1), to review a decision by Family Works, Inc. in regard to Foster Care, a hearing was held on November 05, 2012, at Viroqua, Wisconsin.

The issue for determination is whether Family Works, Inc. properly denied petitioner's application for a foster home license.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Children and Families
201 East Washington Avenue
Madison, Wisconsin 53703

By: Nicole Ruder, Licensing Specialist
Family Works, Inc.

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Vernon County.
2. Petitioner is married and lives with her husband, [REDACTED] [REDACTED] in the same household.
3. Petitioner has been providing foster care in Wisconsin for approximately 30 years.

4. Petitioner applied with Family Works, Inc. for a foster home license, after having been affiliated with another private child placing agency for an indeterminate period of time.
5. On or about September 24, 2012, Family Works, Inc. denied petitioner's application for a foster home license.
6. In 1965, petitioner's husband was convicted in the State of Wisconsin for violating Wis. Stat. §§ 940.23 – Reckless Injury and 943.10(a) – Burglary, and served time at a correctional facility in Green Bay for that conviction.

DISCUSSION

Foster homes are licensed under the rules promulgated by the Department of Health Services (DHS). See, §§ 48.75(1) and 48.67, Wis. Stats. The applicant must meet all requirements contained in DHS foster care rules unless an exception has been granted. See, §§ 48.67 and 48.68, Wis. Stats., Wis. Adm. Code, § DCF 56.05.

In addition to foster home licensing rules, under the terms of the Wisconsin Caregiver Law, the effect of a prior criminal conviction upon foster parent licensure varies, depending on the particular crime involved. See, § 48.685, Wis. Stats. In general, some criminal convictions act as a permanent bar to licensure, some are a bar except that the person may show that he or she has been “rehabilitated” and some are a bar only for 5 years from the date of the conviction. See, Wis. Stat. § 48.685(1)(c), (5)(a), and (5)(bm), and 42 USC 671(20). See also, Wis. Adm. Code, Ch. DHS 12, Appendix B. The crime of Reckless Injury § 940.23 acts as a permanent bar.¹ Wis. Adm. Code, Ch. DHS 12, Appendix B. The rehabilitation process under § DHS 12.12, Wis. Adm. Code, is therefore not available to such a person.

The foster care licensing worker testified very favorably regarding petitioner and her husband, asserting that they are outstanding foster parents. In fact, the letter of denial states:

Family Works was intending to license you, as you have been fostering successfully in Wisconsin for the last 30 years and came well recommended to our agency. You meet every other requirement in DCF 56 for foster parents. It is only because you applied with our agency that you were first required to get fingerprint records from the FBI, as you were continuously licensed by another private child placing agency when the Adam Walsh law requiring fingerprinting of potential foster parents went into effect in 2008. Neither of you were ever deceitful about [REDACTED]'s past and state d that you had no idea that record would affect your ability to foster, as it had been disclosed when you were first licensed as foster parents many years prior, and because [REDACTED] believed that he was considered a juvenile at that time and that those convictions would not impact him as an adult. ... I believe that your history as successful foster parents who have helped many children over the years should negate a 47 year old conviction from when [REDACTED] was 19 years old and possibly still considered a juvenile e...

Exhibit 2, page 2.

It was apparent to this ALJ that the Cunninghams are genuinely good people, and that Family Works, Inc. would like to license them to provide foster care. The petitioner's husband was a young man, possibly a juvenile, when he committed the crime. He served jail time and parole and has never been in trouble

¹ A note card referencing Mr. [REDACTED]'s conviction refers to the title of the Wis. Stat. § 940.23 crime as “Injury by Conduct Regardless of Life.” Exhibit 2, p.1. Wis. Stat. § 940.23 is presently titled “Reckless Injury.” Respondent testified that, while the title has changed, it is the same crime today as it was in 1965. Nothing in the record disputes this contention.

since. He and his wife were originally approved for foster care decades ago with full disclosure of Mr. [REDACTED]'s criminal record. However, there is no exception provided in the law for such mitigating circumstances.

The purpose of the law regulating foster home licenses is to protect and promote the health, safety and welfare of children placed in foster homes. Wis. Stat. § 48.67; Wis. Admin. Code § DCF 56.01(1). The protection of children is a paramount goal, the health and safety of children are the paramount concerns, and the best interest of the child is always the paramount consideration. Wis. Stat. §§ 48.01(1) & (1)(a). Given this mandate, foster care rules must be applied and interpreted strictly so as to give effect to the paramount goal of protecting children and the paramount concern of assuring children's health and safety.

A foster home license may lawfully be denied if the applicant fails to meet the minimum requirements for a license. Wis. Stat. § 48.67. In order to meet the minimum requirements for a license, it is necessary to meet all requirements contained in Wisconsin Department of Children and Families (DCF) foster care rules unless an exception has been granted. Wis. Stat. § 48.67; Wis. Admin. Code §§ DCF 56.02(2) & 56.05(1)(c)1. Furthermore, a licensee is required to be familiar with DCF foster care rules and comply with their requirements. Wis. Admin. Code § DCF 56.05(1)(c) intro. & 56.05(1)(c)1. Thus, a foster home license may be denied for any failure to meet a requirement contained in DCF foster care rules (unless an exception has been granted).

DCF foster care rules state that an applicant or licensee is unqualified to hold a licensee if the applicant, or any other nonclient resident living in the household, is prohibited from licensure by Chapter DHS 12 of the Wisconsin Administrative Code. Wis. Admin. Code § DCF 56.05(1)(f)2.b. No exceptions can be granted to this rule. Wis. Admin. Code § DCF 56.02(2)(a)1.

Whether or not this situation is unfair is not an issue that I may reach. I am without authority to base any decision on equity. It is the long-standing policy of the Division of Hearings & Appeals that the Department's Administrative Law Judges do not possess equitable powers. See, *Wisconsin Socialist Workers 1976 Campaign Committee v. McCann*, 433 F.Supp 540, 545 (E.D. Wis.1977). See also, *Village of Silver Lake, Wis. v. DOR*, 87 Wis. 2d 463 (Wis. App. 1978). This office must limit its decisions to the law as set forth in state statutes and administrative code provisions. The petitioner must seek a favorable decision based on equity in a circuit court of this State.²

While I find my conclusion disheartening and difficult, I must find that the respondent has properly followed Wisconsin law and all applicable regulations in denying to license petitioner in this instance.

CONCLUSIONS OF LAW

Family Works, Inc., as instructed by respondent, properly denied petitioner's Foster Care license application on the basis of petitioner's husband's 1965 conviction of Wis. Stat. § 940.23 (Reckless Injury), which constitutes a permanent bar to Foster Care licensure.

² Of note, researching this issue led me to a 2001 Decision issued by another Administrative Law Judge wherein a pardon by the governor's office resulted in a determination that a prior criminal conviction, which was the subject of the full and absolute gubernatorial pardon, is not an automatic bar under the Wisconsin Caregiver's Law to his licensure as a foster parent. *In the Matter of James E. Thomas, Jr.*, FOS-40/45536 (Feb. 2001).

THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be served and filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Madison,
Wisconsin, this 11th day of January, 2013

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



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The preceding decision was sent to the following parties on January 11, 2013.

Foster Care
DCF - Foster Care