

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN)
AND FAMILY SERVICES,)
)
Petitioner,)
)
vs.) Case No. 99-3451
)
HAPPY DAYS DAY CARE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Notice was provided and on February 17, 2000, a formal hearing was held in this case. Authority for conducting the hearing is set forth in Sections 120.569 and 120.57(1), Florida Statutes. The hearing location was the City Hall, 151 Southeast Osceola Avenue, Ocala, Florida. The hearing was conducted by Charles C. Adams, Administrative Law Judge.

APPEARANCES

For Petitioner: Ralph McMurphy, Esquire
Department of Children
and Family Services
1601 West Gulf Atlantic Highway
Wildwood, Florida 34785-8158

For Respondent: Edward L. Scott, Esquire
409 Southeast Fort King Street
Ocala, Florida 34471-2239

STATEMENT OF THE ISSUE

Should the Department of Children and Family Services, (the Department), impose discipline against the license of Happy Days

Day Care owned by Carmen Smith upon grounds set forth in the Administrative Complaint dated July 15, 1999?

PRELIMINARY STATEMENT

Carmen Smith contested the administrative complaint by requesting a hearing in accordance with Chapter 120, Florida Statutes. The Department referred the case to the Division of Administrative Hearings to conduct a hearing to resolve disputed facts. Section 120.57(1), Florida Statutes. Following one continuance the case was heard on the aforementioned date.

The Department presented Karen Merton, Michelle Parr, Marsha Carpenter and Maria Vazquez as its witnesses. The Department's Composite Exhibit numbered 1 and Exhibits numbered 2 through 7 were admitted as evidence. Carmen Smith testified and presented Lynn-Anne Morin and Patricia Mann as her witnesses. Carmen Smith's Exhibit's numbered 3, 4, and 7A through 7MM were admitted as evidence. Ruling was reserved on the admission of Carmen Smith's Exhibit numbered 6, pending review by the Department's counsel. Carmen Smith's Exhibit numbered 6 is admitted.

A hearing transcript was filed on March 28, 2000. When the hearing concluded the parties were informed that proposed recommended orders could be filed 20 days from the filing of the transcript, which made the due date for filing April 17, 2000. The Department moved to extend the time for filing proposed recommended orders to April 27, 2000. That motion was unopposed.

The parties were orally informed that proposed recommended orders could be filed by April 27, 2000. By their agreement to extend the deadline for filing proposed recommended orders beyond 10 days after the filing of the hearing transcript, the parties have waived the necessity to enter the recommended order within 30 days after the hearing transcript was filed. Section 28-106.216, Florida Administrative Code. Proposed recommended orders timely filed by the parties have been considered.

FINDINGS OF FACT

Licensure

1. Carmen Lamb Howard Smith owns a child care facility (facility) in Ocala, Florida. The Department licenses that facility according to Sections 402.301 through 402.319, Florida Statutes. The facility is known as Happy Days Day Care.

Food Services

2. The facility provides child care around the clock.

3. The children are normally served dinner at the facility until 8:00 p.m. each day. Until 7:30 a.m. the following morning no other food is served to the children. Notwithstanding the policy not to provide food after 8:00 p.m., a child who is brought to the facility will be fed after 8:00 p.m. when that child has not eaten and is in distress. Ordinarily a parent leaving a child with the facility after dinner time would be expected to feed the child before the child was left with the facility.

4. The food schedule at the facility has posted that there are "no exceptions" to the policy not to provide food beyond 8:00 p.m.

5. As an example of the exception concerning not providing food after 8:00 p.m., if a child has been to a doctor's appointment or come from the hospital or the like, that child would be fed after 8:00 p.m. Another example is that if the child had been receiving Gatorade before coming to the facility, and Gatorade is available, the child is provided Gatorade by the facility.

6. Children kept at the facility at night retire for bed between 8:45 p.m. and 9:00 p.m.

7. Children are provided water before retiring for the evening.

8. During July 1999 approximately 35 children were staying at the facility after 9:00 p.m. After 10:00 p.m. 22 to 26 children were cared for at the facility. After midnight approximately six children remained at the facility. The children who remained overnight were children of parents who worked between 11:00 p.m. and 7:00 a.m.

9. Infants who are cared for in the facility receive a snack between breakfast and lunch. Children of other ages receive a snack between lunch and dinner.

Hiring Practices

10. Persons who are hired by the facility to care for children are referred to as teachers.

11. At times relevant to the inquiry, before a teacher was hired, Patricia Mann as Director of Happy Days Day Care, would interview the prospective employee. Ms. Mann would send the prospective employee to be fingerprinted. The prospective employee would be sent to the local police station to get an I.D. and to have the local police department perform a check to see if that person has a criminal history. The information obtained by those persons concerning their background would be brought back to Ms. Mann to be placed in an individual file for the employee. Employee files were maintained by the facility at times relevant to the inquiry.

12. Ms. Mann also reminded prospective employees of the need to receive tuberculosis (TB) tests.

13. Ms. Smith, the facility owner, reviewed applications for employment during the time in question, paying particular attention to the experience that the applicants had in child care.

14. Marsha Carpenter works for the Department as a Family Services Counselor. Additionally, Ms. Carpenter has responsibility for licensing child care facilities. In that capacity she inspects facilities to determine compliance with licensing standards.

15. On May 27, 1999, Ms. Carpenter reviewed employee files at the facility to determine compliance with background screening and other requirements which employees must meet to work in the facility. She discovered that a number of employees did not have the background screening complete. Having identified this inadequacy, the facility was provided 14 days' notice to correct the deficiencies. Patricia Mann signed the inspection checklist that noted these deficiencies. Ms. Mann's signature was provided on the date the inspection took place.

16. More than 14 days passed before re-inspection. The re-inspection was conducted on June 24, 1999. Upon re-inspection it was determined that not all the deficiencies observed on May 27, 1999, had been corrected. Petitioner's Exhibit numbered 6 admitted into evidence lists the employees and the continuing items of non-compliance that had existed on May 27, 1999 and June 24, 1999. The missing items related to background screening, local law enforcement checks, TB test results, and employment history. Ms. Patricia Mann was made aware of these findings and provided a copy of the continuing deficiencies in relation to the areas of concern.

17. The previously mentioned employees cared for children at the facility without completing required background screening and obtaining TB tests.

18. Notwithstanding the expectation by Ms. Mann that those employees would comply with the legal conditions prerequisite to their employment, this was not done.

Boyfriend Visits

19. Some members of the night time staff at the facility allowed their boyfriends to visit while the staff was on duty to supervise children. The administration at the facility reprimanded the staff for this misconduct. Ms. Smith promptly met with the staff following discovery of the problem and conducted a staff meeting. Ms. Smith prepared a document addressed "To All Staff" reminding staff that the facility had a policy that states, "if you don't work there, you can't visit there unless you have children there. If you are not a parent, or a worker or you don't have any business there, you don't have any business being there." Beyond the meeting Ms. Smith has not been informed that the problem of night time visits by boyfriends persists.

Inappropriate Discipline

20. It had been reported that Rogenia Thomas, who cared for children from ages 6 to 13 years at the facility, slapped a child in the face and pinched another child. No other adult was present when these events were alleged to have transpired. Ms. Thomas denied the incidents in conversation with Ms. Mann. Nonetheless, Ms. Mann suspended the employee for three days as evidenced in an employee warning report dated June 8, 1999.

Petitioner's Exhibit numbered 7. That report reflects that Ms. Thomas was told that if the incident happened again she would be terminated. At the time Ms. Thomas was on probation, according to the report. Following the three-day suspension Ms. Thomas was not allowed full-time contact with children; she only had contact with children at times when other teachers took breaks. That contact was with children age six weeks through five years. Later, for reasons that are unexplained in the record, Ms. Thomas was terminated.

21. Viola Rayam was a teacher at the facility who cared for children six weeks through 13 years old. Complaints were made that Ms. Rayam had cursed a child in her charge. Ms. Rayam in conversation with Ms. Mann denied the incident. The record does not reveal that the alleged incident was observed by anyone other than the child. Ms. Rayam was suspended for a week and a half based upon the accusations. After the incident that led to the one and a half week suspension Ms. Rayam was allowed to care for children six weeks to five years old. Ms. Smith terminated Ms. Rayam from employment at the facility for an unrelated matter.

22. Although Ms. Thomas and Ms. Rayham denied the allegations concerning misconduct, the administrators in the facility imposed in-house discipline to assuage any concerns which the Department had about the alleged misconduct.

23. None of the children alleged to have been victimized by the conduct attributed to Ms. Thomas and Ms. Rayam testified at hearing.

24. It was not proven that the alleged acts of misconduct by Ms. Thomas and Ms. Rayam took place.

25. Karen Merton works for the Department as a Family Services Counselor in the adoption unit. Sometime around June 10, or 11, 1999, she visited the facility. It was a hot day. While outside Ms. Merton observed a facility staff member sending some children to what the staff member called "time-out." These children were being sent from the shade afforded by the facility building to sit in the sun for "time-out." There were three or four children involved. One was a blond-haired, fair-skinned little girl whom Ms. Merton estimated to be a first or second grader. By the time Ms. Merton departed the scene, the little girl had been standing in the sun for approximately 15 minutes. Before Ms. Merton left the facility she reminded a person located at the front of the facility that the little girl had been outside in the sun for about 15 minutes. That person walked outside observed the child and stated "Oh," remarking that this person knew the child. The person at the front of the facility where Ms. Merton had signed in then returned to her station in the facility without taking action concerning the little girl's circumstance. Ms. Merton then left the facility.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569 and 120.57(1), Florida Statutes.

27. The Department bears the burden to prove by clear and convincing evidence the allegations in the Administrative Complaint directed to Carmen Smith as owner of Happy Days Day Care.^{1/} See also Section 120.57(1)(j), Florida Statutes.

28. Paragraph 2 of the administrative complaint states the following:

Happy Days Child Care has violated sec. 402.305(8), Fla. Stat. And Rule 65C-22.005, F.A.C. by failing to provide nutritious meals and snacks of a quality and quantity to meet the nutritional needs of the children in its care. This is particularly true with regard to children at night, as no meals or even snacks are provided between about 8:00 p.m. and 7:30 a.m., regardless of when children are left after the facility's cutoff on food about 8:00 p.m.

29. Section 402.305(8), Florida Statutes:

NUTRITIONAL PRACTICES.-- Minimum standards shall include requirements for the provision of meals or snacks of a quality and quantity to assure that the nutritional needs of the child are met.

30. In pertinent part Rule 65C-22.005, Florida Administrative Code, states:

Food and nutrition
(1) Nutrition.

(a) If a facility chooses to supply food, they shall provide nutritious meals and snacks of a quantity and quality to meet the daily nutritional needs of the children.

(b) If a facility chooses not to provide meals and snacks, arrangements must be made with the custodial parent or legal guardian to provide nutritional food for the child.

(c) If a special diet is required for a child by a physician, a copy of the physician's order, a copy of the diet, and a sample meal plan for the special diet shall be maintained in the child's facility file.

(d) Meal and snack menus shall be planned, written, and posted at the beginning of each week. Menus shall be dated and posted in the food service area and in a conspicuous place accessible to parents. Any menu substitution shall be noted on the menu.

* * *

(3) Food Service.

(a) Children shall be individually fed or supervised at feeding and offered food appropriate for their ages.

* * *

31. The facts found do not establish violations of Section 402.305(8), Florida Statutes, and Rule 65C-22.005, Florida Administrative Code.

32. Paragraphs 3 and 4 of the Administrative Complaint state the following:

3. Staff at the facility have subjected children to inappropriate and non-constructive discipline in violation of sec. 402.305(12), Fla. Stat. And 65C-22.001(8), F.A.C. Inappropriate discipline has included:

- a. cursing and shouting at children;
- b. pinching children;
- c. Striking furniture and equipment with a plastic bat in an intimidating manner;
- d. making children stand in the hot sun for extended periods;
- e. making children stand with their arms outstretched or over their heads for extended periods; and
- e. punishing children for accidents in toileting.

4. Although the owner and director were aware that staff members had cursed and shouted at children and pinched children, the staff members involved were transferred from supervising the school age children who can speak up for themselves to supervising infants and toddlers who cannot speak up if abused or neglected.

33. Section 402.305(12), Florida Statutes, states:

(12) CHILD DISCIPLINE.--

(a) Minimum standards for child discipline practices shall ensure that age-appropriate, constructive disciplinary practices are used for children in care. Such standards shall include at least the following requirements:

- 1. Children shall not be subjected to discipline which is severe, humiliating, or frightening.
- 2. Discipline shall not be associated with food, rest, or toileting.
- 3. Spanking or any other form of physical punishment is prohibited.

(b) Prior to admission of a child to a child care facility, the facility shall notify the parents in writing of the disciplinary practices used by the facility.

34. Rule 65C-22.001 (8), Florida Administrative Code, states the following:

Child Discipline.

(a) Verification that the child care facility has provided, in writing, the disciplinary practices used by the facility shall be documented on the enrollment form, with signature of the custodial parent or legal guardian.

(b) Each staff member of the child care facility must comply with the facility's written disciplinary practices.

(c) A copy of the facility's current written disciplinary practices must be available to the licensing authority to review for compliance with s. 402.305(12), F.S.

35. It has not been shown that employees at the facility cursed and shouted at children or pinched children, such that Ms. Smith would be responsible as alleged in paragraph 3 at 3.a. and 3.b. The discipline imposed by the facility upon the suspicion that employees had engaged in misconduct does not prove the misconduct. No other proof was presented to show that the employees violated Section 402.305(12), Florida Statutes. Nor has proof been shown that a violation occurred in relation to Rule 65C-22.001(8), Florida Administrative Code, concerning imposition of discipline in relation to the allegations made about cursing and shouting at children and pinching children.

36. As alleged in paragraph 3.d., it was inappropriate discipline to leave the children in the hot sun for "time-out,"

especially the one child who was left there for an extensive period of time. Section 402.305(12)(a)1, Florida Statutes.

37. No other facts were proven concerning the alleged violations in paragraph 3, at 3.c. and 3.e.

38. The allegations in paragraph 4 of the administrative complaint do not form the basis for imposing discipline in association with Section 402.305(12), Florida Statutes, and Rule 65C-22.001(8), Florida Administrative Code.

39. Paragraph 5 of the Administrative Complaint states the following:

At night, staff members have allowed their boyfriends, who have not been subject to a background check, to enter and visit them while they were supposed to be supervising children.

40. Paragraph 6 of the Administrative Complaint states the following:

Staff were sleeping at nights, or otherwise unavailable or unable to provide the required supervision for children and access for parents. Parents must be allowed access in person and by telephone to a facility at all times a facility is in operation or their children are in care. Rule 65C-22.011(9), F.A.C.

41. Rule 65C-22.001(9), Florida Administrative Code, states:

(9) Access. A child care facility must provide the custodial parent or legal guardian access, in person and by telephone, to the child care facility during the facility's normal hours of operation or during the time the child is in care.

42. No proof was offered concerning staff sleeping at night. Staff members were otherwise unavailable or unable to provide required supervision for children in the facility while visiting their boyfriends. However, failure to supervise is not addressed in Rule 65C-22.001(9), Florida Administrative Code. No proof was presented on lack of access to parents.

43. Paragraph 7 of the Administrative Complaint states the following:

New staff members were allowed to continue working with children even though they had not completed the background screening requirements of Chapter 435, Fla. Stat. in a timely fashion as required by ss. 402.305(2). In addition, such required checks as employment history and local law enforcement checks were not completed. Employees were also allowed to work without completing the tuberculosis and health checks. As a result of a complaint, Marsha Carpenter of Department's staff went to the facility on May 27, 1999 and reviewed employee records.

Numerous deficiencies were found which had not been corrected on a follow up inspection on June 24, 1999.

44. In pertinent part Section 402.305(2), Florida Statutes, states:

PERSONNEL.--Minimum standards for child care personnel shall include minimum requirements as to:

(a) Good moral character based upon screening. This screening shall be conducted as provided in Chapter 435, using the level 2 standards for screening set forth in that chapter.

* * *

(e) Periodic health examinations.

45. Section 435.04(1), Florida Statutes, describes Level II screening standards where it states:

All employees in positions designated by law as positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall include, but not be limited to, employment history checks, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

46. Personnel within the facility were allowed to care for children without complying with necessary background screening. Additionally, TB test results were not obtained. These oversights were discovered on May 27, 1999. Ms. Mann was informed concerning the problem areas. When a re-inspection was conducted at the facility on June 24, 1999, problems still existed concerning background screening and TB tests.

47. For the violations in relation to paragraphs 3 and 7 within the Administrative Complaint, the license held by Ms. Smith is subject to discipline. That discipline is in accordance with opportunities set forth in Section 402.310(1)(a), Florida Statutes, which states:

The department or local licensing agency may deny, suspend, or revoke a license or impose an administrative fine not to exceed \$100 per

violation, per day, for the violation of any provision of ss. 402.301-402.319 or rules adopted thereunder. However, where the violation could or does cause death or serious harm, the department or local licensing agency may impose an administrative fine, not to exceed \$500 per violation per day.

48. Standards for the imposition of the discipline are set forth in Section 402.310(1)(b), Florida Statutes, which states:

(b) In determining the appropriate disciplinary action to be taken for a violation as 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 the 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 this part have been violated.
2. Actions taken by the licensee to correct the violation or to remedy complaints.
3. Any previous violations of the licensee.

49. No evidence was presented concerning attempts at corrections for leaving the children in the sun as a means of discipline. Corrections were not timely made concerning background screening and health examinations.

50. As identified at the hearing the facility owner had been fined \$500.00 for the event in which the child was playing unsupervised in a ditch near the facility mentioned in paragraph 1 of the Administrative Complaint. In another case discussed at hearing, a child being transported in a van, operated by a staff member at the facility was left unattended, exited the van and

was found at a restaurant. The van was undergoing shop repairs at the time. For this violation an \$1,100.00 administrative fine was imposed.

51. For the violation described in paragraph 3.d. of the Administrative Complaint, a \$500.00 administrative fine is warranted given the potential serious harm for the one little girl left in the sun for an extended period of time and in view of the past history of violations.

52. For the violations described in paragraph 7 of the Administrative Complaint, given the serious nature of those violations and the past violations, a one-month license suspension is warranted.

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered which imposes a \$500.00 administrative fine for the violations in paragraph 3.d. and imposes a one-month suspension for the violations in paragraph 7, and dismisses the remaining alleged violations in the administrative complaint.

DONE AND ENTERED this 22nd day of May, 2000, in Tallahassee,
Leon County, Florida.

CHARLES C. ADAMS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of May, 2000.

ENDNOTE

1/ Paragraph 1 to the administrative complaint accusing the owner of violating Rule 65C-22.001(4) and (5), Florida Administrative Code, for failure to supervise a child who was found in the ditch outside the facility was effectively dismissed during the hearing. The basis for dismissal was the realization that this complaint had been resolved through the imposition of a \$500 administrative fine.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.