

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)	
FAMILY SERVICES,)	
)	
Petitioner,)	
)	
vs.)	Case No. 01-1535
)	
WEKIVA CHILD CARE,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Carolyn S. Holifield, conducted a formal hearing in the above-styled case on July 17, 2001, by videoconference. The parties, counsel, witnesses and court reporter participated from the Zora Neale Hurston Building, Orlando, Florida; the Administrative Law Judge presided from Tallahassee, Florida.

APPEARANCES

For Petitioner: Craig A. McCarthy, Esquire
Department of Children and Family Services
400 West Robinson Street, Suite S-1106
Orlando, Florida 32801

For Respondent: Mark Riley, pro se
Wekiva Child Care
2333 East Semoran Boulevard
Apopka, Florida 32703

STATEMENT OF THE ISSUES

The issues are whether Respondent violated Rule 65C-22.001(5)(a), Florida Administrative Code, as alleged in the Administrative Complaint and, if so, should it be assessed a \$500.00 administrative fine for the violation.

PRELIMINARY STATEMENT

On or about July 26, 2000, Petitioner, the Department of Children and Family Services, filed an Administrative Complaint against Respondent, Wekiva Child Care. The Administrative Complaint alleged that Respondent failed to provide adequate supervision for a child in its care, in violation of Rule 65C-22.001(5)(a), Florida Administrative Code. For this alleged violation, the Department sought to impose an administrative fine of \$500.00.

According to the Administrative Complaint, the charge that Respondent failed to provide adequate supervision is based on the following factual allegations: (1) on April 20, 1999, while on a field trip to Chuck E. Cheese, an amusement center and restaurant, staff of Wekiva Child Care left a three-year-old female child in its care without direct supervision for at least two minutes, without staff realizing she was not with the group; (2) the child left the group without staff's knowledge and went back inside the restaurant; and (3) the child was missed by staff as they boarded the van and a final count of the children

was made. Respondent disputed the allegations and requested a hearing under Section 120.569, Florida Statutes, to contest the proposed action.

The matter was referred to the Division of Administrative Hearings on April 25, 2001, with a request that an administrative law judge be assigned to conduct a hearing and prepare a recommended order. By Notice of Hearing dated May 4, 2001, a final hearing was scheduled for June 28, 2001. Prior to the date set for the final hearing, on June 18, 2001, the parties filed an Agreed Motion to Continue Proceedings (Motion). By Order issued June 22, 2001, the Motion was granted and the hearing was rescheduled for July 17, 2001.

At the final hearing, Petitioner presented the testimony of Anna Johnson, a former employee of Respondent, and Carmen Burruezo, a child care licensing counselor with the Department of Children and Family Services. Petitioner offered and had its Composite Exhibit A received into evidence. Mark Riley, owner of Wekiva Child Care, testified on behalf of Respondent. No exhibits were offered into evidence by Respondent. At the request of Petitioner, the undersigned took official recognition of Chapter 402, Florida Statutes, and Rule Chapter 65C-22, Florida Administrative Code.

A copy of the Transcript was filed on August 6, 2001. Petitioner's Proposed Recommended Order was filed on August 16, 2001. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner, the Department of Children and Family Services, is the state agency responsible for the licensure and regulation of child care facilities operating in the State of Florida.

2. Respondent, Wekiva Child Care (Wekiva Center), is a licensed child care facility, Florida license number 497-8, located at 2333 East Semoran Boulevard in Apopka, Florida. The facility has been licensed since May 1997.

3. On April 20, 1999, the staff of Wekiva Center took 34 children on a field trip to Chuck E. Cheese, an amusement center and restaurant. The children were transported from the Center to Chuck E. Cheese in two vans.

4. Each of the vans had a maximum seating capacity of 15. This included 1 seat for the driver and 14 seats for passengers.

5. Mark Riley, the owner of the Wekiva Center, and his two-year-old daughter also went to Chuck E. Cheese for the April 20, 1999, field trip. However, Mr. Riley and his daughter did not ride in either of the Center's vans to Chuck E. Cheese. Instead, Mr. Riley, accompanied by his daughter, drove his

personal vehicle to Chuck E. Cheese and met the Wekiva Center staff and children there.

6. Typically, Mr. Riley does not work at the Wekiva Center. However, in order to comply with the staff/child ratio requirements governing field trips, Mr. Riley went to Chuck E. Cheese to assist with the supervision of the children.

7. The Wekiva Center staff and children from the Center were at Chuck E. Cheese approximately three hours. When the field trip concluded, all the staff and children from the Wekiva Center exited Chuck E. Cheese and lined up in front of the building. Then, one staff person and 14 children boarded each of the vans for the return trip to the Wekiva Center.

8. The one-way return trip from Chuck E. Cheese to the Wekiva Center took approximately five or six minutes.

9. Due to the 14-seat maximum passenger capacity of the Center's vans, six children and one teacher had to remain at Chuck E. Cheese. These children and the teacher with them went from the front to the side of the Chuck E. Cheese building and waited for one of the vans to return and pick them up and drive them back to the Center.

10. After the two vans returned to the Center and the 28 children got off, one of the vans went back to Chuck E. Cheese to retrieve the six children and one teacher who were outside the restaurant waiting for the van to return.

11. At some point between when the six children and one teacher went from the front to the side of the Chuck E. Cheese building, one of the children, a three-year-old girl, left the group and went back inside Chuck E. Cheese to go to the restroom.

12. Mr. Riley and his daughter had remained in the Chuck E. Cheese facility while the children and staff from the Center exited and lined up to go outside the building.

13. Soon after the children and staff had boarded the two vans and the vans departed for the Center, Mr. Riley saw the three-year-old girl from the Center inside Chuck E. Cheese. Mr. Riley then went outside and looked in the front of the building for children and teachers from the Wekiva Center. When Mr. Riley did not see anyone from the Wekiva Center, he mistakenly assumed that they had all left Chuck E. Cheese and returned to the Center.

14. From the front of the Chuck E. Cheese building, Mr. Riley could not see the side of the facility. Therefore, he did not know that a few children and one teacher from the Wekiva Center had not left Chuck E. Cheese but were on the side of the building waiting for one of the vans to return to pick them up and take them back to the Center.

15. When Mr. Riley did not see any staff or children from the Wekiva Center in front of Chuck E. Cheese, he mistakenly

believed that, except for the three-year-old girl who had gone back into the restaurant, everyone from Wekiva Center had left Chuck E. Cheese and returned to the Center.

16. Mr. Riley had driven his personal vehicle to Chuck E. Cheese and could have driven the three-year-old child back to the Center. However, because of his concerns about possible liability issues associated with his transporting the child, Mr. Riley decided it was better to have the child transported back to the school in one of the Center vans by Center staff.

17. Based on Mr. Riley's mistaken belief that the three-year-old girl had been inadvertently left at Chuck E. Cheese, he asked the manager of Chuck E. Cheese to call Wekiva Center and tell someone at the Center that a child had been left at the restaurant and that a van from the Center should return to Chuck E. Cheese to retrieve her.

18. As requested, the manager of Chuck E. Cheese called the Center and relayed Mr. Riley's message, that a van be sent back to Chuck E. Cheese to pick up the three-year-old girl from the Center who had left the group and had gone back into the restaurant.

19. At the time Mr. Riley asked the manager at Chuck E. Cheese to call the Wekiva Center, one of the Center vans was either in route to or about to leave the Center for the return trip to Chuck E. Cheese to pick up the children and teacher who

were still waiting on the side of the Chuck E. Cheese building. Mr. Riley was still unaware that there were five children and a teacher from the Center waiting on the side of the building for the van to return for them.

20. Apparently, when the van returned for the remaining Wekiva Center teacher and children, and prior to the van's departing for the return trip to the Center, someone determined that the three-year-old girl was not with the group. Soon thereafter, the girl was located inside the Chuck E. Cheese restaurant. She then boarded the van and returned to the Center on the van with the other five children and one teacher who had been waiting for the van's return trip to Chuck E. Cheese.

21. It is unclear how much time elapsed between the time the three-year-old girl left the group that was outside Chuck E. Cheese and the time she was observed in the restaurant by Mr. Riley. Nevertheless, for this period of time, the girl was not supervised as evidenced by the fact that the Center staff person supervising the children outside the restaurant did not know that the girl had left the group and re-entered the restaurant. Moreover, although Mr. Riley had remained in Chuck E. Cheese, he assumed responsibility for the girl only after he realized that she was in the restaurant without other supervision. Mr. Riley did not see the girl leave the group and, by his own admission, when he saw the girl, he believed

that everyone else from the Center had left Chuck E. Cheese. If Mr. Riley had seen the three-year-old girl leave the supervised group of children and re-enter the restaurant, he would have known that all the children and staff from the Center had not left the restaurant.

22. For the period of time that elapsed between the time the three-year-old girl left the supervised group of children who were outside the Chuck E. Cheese building and the time that Mr. Riley discovered her inside the restaurant, the girl was not supervised.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceedings pursuant to Sections 120.569 and 120.57, Florida Statutes.

24. As the party seeking to impose an administrative fine, Petitioner bears the burden of proving the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern, 670 So. 2d 932 (Fla. 1996).

25. Section 402.310(1), Florida Statutes, governs the proceeding and authorizes the Department to impose an administrative fine for any violation of any provisions of Sections 402.301 through 402.319, Florida Statutes, or rules

adopted thereunder. That provision also sets forth the factors that the Department should consider in determining the appropriate disciplinary action to be taken for a violation.

26. Section 402.310, Florida Statutes, provides in part the following:

(1)(a) 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.

(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 ss. 402.301-402.319 have been violated.

2. Actions taken by the licensee to correct the violation or to remedy complaints.

3. Any previous violations of the licensee.

27. The Administrative Complaint alleges that Respondent violated Rule 65C-22.001(5)(a), Florida Administrative Code, by failing to supervise a child on a field trip. That rule provides in relevant part the following:

(5) Supervision.

(a) Direct supervision means watching and directing children's activities within the same room or designated outdoor play area and responding to each child's need. Child care personnel at a facility must be assigned to provide supervision to a specific group of children and be present with that group of children at all times.

28. By clear and convincing evidence, Petitioner has established that Respondent violated Rule 65C-22.001(5)(a), Florida Administrative Code, by failing to provide direct supervision to a three-year-old child while on a field trip. This violation could have resulted in serious harm to the child. Therefore, the administrative fine suggested in the Administrative Complaint of \$500.00, per violation, per day, is found to be appropriate for the violation.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Department of Children and Family Services enter a final order finding that Respondent violated Rule 65C-22.001(5)(a), Florida Administrative Code, and that it imposes an administrative fine of \$500.00.

DONE AND ENTERED this 12th day of September, 2001, in
Tallahassee, Leon County, Florida.

CAROLYN S. HOLIFIELD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of September, 2001.

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 must be filed with the agency that will issue the Final Order in this case.