

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TIA HOWARD, CARMEN SMITH,            )  
and DIANA JONES,                        )  
  )  
          Petitioners,                    )  
  )  
vs.                                        )     Case No. 01-3858  
  )  
DEPARTMENT OF CHILDREN                )  
AND FAMILY SERVICES,                    )  
  )  
          Respondent.                    )  
\_\_\_\_\_)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 4, 2002, in Ocala, Florida before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioners: Edward L. Scott, Esquire  
Edward L. Scott, P.A.  
409 Southeast Fort King Street  
Ocala, Florida 34471

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

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Petitioners committed the offenses described in the Administrative

Complaints and if so, whether the Department of Children and Family Services should impose proposed fines.

PRELIMINARY STATEMENT

By letters dated July 2, 2001, the Department of Children and Family Services (Department) issued Administrative Complaints to Impose Fines to each of the three Petitioners, Carmen Smith, Tia Howard, and Diana Jones. The Administrative Complaint letters charged Petitioners with the illegal operation of a day care facility, caring for infants without authorization or required equipment, serving meals from a facility unlicensed and equipped to do so, and transporting children in vehicles owned by an unlicensed facility in an unsafe manner. The Administrative Complaints sought to impose fines of \$26,000.00 on each Petitioner with an additional fine of \$2,000.00 per day per Petitioner for each successive day the Petitioners operated the day care facility.

Petitioners disputed the allegations of the administrative complaints and jointly requested an administrative hearing. The Department consolidated the three cases and forwarded them to the Division of Administrative Hearings on or about October 3, 2001. A formal hearing was scheduled for January 3 and 4, 2002. Prior to the hearing, the parties indicated that only one day would be needed to conduct the hearing.

At hearing, Petitioners presented the testimony of the three Petitioners, Carmen Smith, Tia Howard, and Diana Jones, and one witness, Reverend James Sykes. Petitioners' Exhibits 1 through 3 were admitted into evidence. Respondent presented the testimony of four witnesses, Luzonia Waters, Nancy Denmark, Harmon S. "Stan" Blanchard, and Darnell Stewart. Respondent's Exhibits 1 through 10 were admitted into evidence. Official recognition was taken of Chapter 65C-22, Florida Administrative Code.

The hearing was not transcribed. The parties requested 10 days in which to file proposed recommended orders. However, on January 14, 2002, the parties filed a Stipulated Motion for Extension of Time to File Proposed Recommended Orders. This motion was granted. The parties timely filed proposed recommended orders on January 22, 2002, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Carmen Smith owned and operated Happy Days Day Care Center (Happy Days) located in Ocala, Florida. On June 17, 2001, the license to operate Happy Days expired and was not renewed.<sup>1/</sup>

2. Tia Howard is Carmen Smith's daughter. Ms. Howard was not employed by Happy Days but volunteered there. She also was never an employee of St. Paul's A.M.E. Church Preschool. Around

the time that Happy Days' license was to expire, Ms. Howard contacted the Department inquiring as to transferring the license of Happy Days to Ocala Northwest Learning Center. Ms. Howard was informed there was no valid license to transfer.<sup>2/</sup> Ms. Howard helped move equipment from Happy Days to St. Paul's on June 17, 2001. Ms. Howard was in Savannah, Georgia, for school and National Guard duty from June 18, 2001 until July 2, 2001.

3. On a date near in time to the expiration of Happy Days' license, Ms. Smith and Ms. Howard wrote an undated letter to parents of children who attended Happy Days. The letter read as follows:

HAPPY DAYS CHILD CARE CENTER  
2345 N.W. 10th Street  
Ocala Florida  
Phone: 732-3848 or 732-8292

Happy Days Child Care Center is suggesting that all students (with the exception of Protective Service Students) transfer to St. Pauls Academy effective June 18, 2001. Parents must notify Childhood Development of their transfer before Monday June 18th. Parents on Protective Service Program we are recommending Oakcrest Early Education Center where transportation will be provided for those who need it. This is only a temporary placement of approximately 14 days or until Happy Days can complete the transaction of a name change, from Happy Days to Ocala N.W. Learning Center

4. Childhood Development Services (CDS) contracts with the Department to administer the enrollment in and payment for subsidized daycare in the Ocala area. When the Department notified Ms. Smith that the license would not be renewed, CDS sent a letter dated April 11, 2001, to all parents with children enrolled in Happy Days advising them that they would have to make other arrangements for daycare because Happy Days would no longer be licensed or eligible to provide subsidized childcare.

5. St. Paul's A.M.E. Church Preschool (St. Paul's) held child care facility license number 130852 effective October 20, 2000 through October 21, 2001. Reverend James Sykes is the Pastor of St. Paul's A.M.E. Church, where the preschool was located. Ms. Smith and her daughter, Ms. Howard, were and are members of St. Paul's A.M.E. Church.

6. Sometime before June 17, 2001, Ms. Smith approached Reverend Sykes about St. Paul's taking the children who attended Happy Days. St. Paul's child care facility was vacant at the time despite the license to operate remaining current at all times material hereto. There was also a modular unit on St. Paul's property that had been leased to CDS but had been vacated by June 18, 2001.

7. Reverend Sykes agreed to provide child care to the children whose parents wanted to transfer their children from Happy Days to his child care facility. Many of the children who

attended Happy Days moved to St. Paul's which reopened on June 18, 2001. The Board of Trustees of his church was aware of this arrangement and either approved it or agreed to it. Reverend Sykes rented vans and other equipment for St. Paul's daycare center from Ms. Smith for a nominal sum. The vans and equipment had been used at Happy Days. Reverend Sykes explained that his motivation in providing child care to the children was to help out Ms. Smith because she was a member of his church, and to help out the parents by offering continuity of childcare for the children.

8. The Happy Days name and telephone number remained on the vans for a week to ten days until the vans were spray painted to cover the Happy Days name. The record is unclear as to whether the telephone number and/or license number of Happy Days remained on the vans after the name was covered by spray paint.

9. Except for the payment of nominal rent for the vans and the equipment, there is no evidence that Reverend Sykes or St. Paul's paid any money to Ms. Smith or her daughter, Ms. Howard. Neither Ms. Smith or Ms. Howard were employees of St. Paul's.

10. Mr. Stan Blanchard is employed by the Marion County Health Department. One of his responsibilities is to conduct inspections of daycare centers. He received information that

Happy Days or Ocala Northwest moved operations to St. Paul's and was operating illegally there. He went to St. Paul's on June 18, 2001, and found persons he described as staff from Happy Days and Ocala Northwest. He was familiar with Ms. Smith and Ms. Howard because of contact he had with them over time at Happy Days. He saw Ms. Smith bringing food into the building. He found children in the modular building that had been occupied by CDS. Additionally, he found what he determined to be violations of standards for child care facilities.

11. At the time of his inspection of St. Paul's, Mr. Blanchard was not certain that St. Paul's had a valid license to operate a daycare facility, and did not know whether Ms. Smith was an employee of St. Paul's. He wrote two reports while at St. Paul's that day. One report identifies the facility as "St. Paul's AME Christian Daycare". At the top of the report, Mr. Blanchard wrote, "DCF to determine the legality of this arrangement." His report noted three violations: that St. Paul's allowed Ocala Northwest to use their facility; that infants were not allowed due to lack of hand-washing facilities and, therefore, the infants must be sent home; and that food comes in from Ocala Learning Center which "has lost its license" and that food must come from St. Paul's kitchen. Ms. Smith arrived during his inspection and signed this report, according to Mr. Blanchard, because she was bringing food into the

facility at the time of his inspection. Mr. Blanchard presumed the food came from Ocala Northwest.

12. The second report of Mr. Blanchard's identifies the facility as "Ocala NW Learning Center". At the top of the report, Mr. Blanchard wrote, "Immediate Closure Required." The report stated that Ocala Northwest was illegally occupying the former CDS St. Paul's Headstart Center, which had been housed in the modular unit on St. Paul's property, and cannot reopen until licensed by the Department. The report noted that the children had been moved from the former CDS center to the St. Paul's daycare next door "which may still have an active license." This report was signed by Diana Jones.

13. Diana Jones was an employee of Happy Days for 10 years. When Happy Days ceased operations, she was offered employment by Reverend Sykes and became employed as his assistant director of the facility. She was not an owner of either Happy Days or St. Paul's but was employed by each. She gave Mr. Blanchard's report which she had signed to Reverend Sykes. She continued to work at St. Paul's until it ceased operations on July 2, 2001.

14. Upon receiving a complaint that Happy Days was operating illegally at St. Paul's, Mary Carpenter, a Department counselor, went to St. Paul's to investigate. Her report indicates that she went to St. Paul's on June 18, 2001, and that



no one would answer the locked door. Ms. Carpenter did not testify and it is unclear from her report and from the record why she received no answer at the door of St. Paul's when Mr. Blanchard was able to go inside on the same day and write two reports while there. A second report of Ms. Carpenter's was written on June 29, 2001, and referenced the same problems brought up by Mr. Blanchard regarding infants being at the facility and food preparation.

#### CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Section 120.57(1), Florida Statutes.

16. The Department of Children and Family Services is the agency charged with the responsibility of licensing child care facilities in the state of Florida. Chapter 402, Florida Statutes.

17. The Department seeks to impose administrative fines on each of the Petitioners. Accordingly, as the party asserting the affirmative of an issue before this administrative tribunal, the Department has the burden of proof. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). The Department must establish facts which support its position of imposing administrative fines by clear and

convincing evidence. Department of Banking and Finance v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996).

18. The Administrative Complaint charges Petitioners with violating Section 402.312, Florida Statutes, which reads in pertinent part as follows:

402.312 License required; injunctive relief.--

(1) The operation of a child care facility without a license is prohibited. If the department or the local licensing agency discovers that a child care facility is being operated without a license, the department or local licensing agency is authorized to seek an injunction in the circuit court where the facility is located to enjoin continued operation of such facility. When the court is closed for the transaction of judicial business, the department or local licensing agency is authorized to seek an emergency injunction to enjoin continued operation of such unlicensed facility, which injunction shall be continued, modified, or revoked on the next day of judicial business.

(2) Other grounds for seeking an injunction to close a facility are that:

(a) There is any violation of the standards applied under ss. 402.301-402.319 which threatens harm to any child in the child care facility.

(b) A licensee has repeatedly violated the standards provided for under ss. 402.301-402.319.

(c) A child care facility continues to have children in attendance after the closing date established by the department or the local licensing agency.

(3) The department may impose an administrative fine on any child care facility operating without a license,

consistent with the provisions of s.  
402.310.

19. The Administrative Complaints also charge Petitioners with violating the standards imposed on child care facilities pursuant to Section 402.305, Florida Statutes, and Chapter 65C-22, Florida Administrative Code,<sup>3/</sup> by caring for infants without a license or appropriate facilities to do so; providing meals from an unlicensed facility and contrary to the license of St. Paul's; and transporting children in vehicles owned by an unlicensed facility and in an unsafe manner.

20. The Administrative Complaints seek to impose an administrative fine on each Petitioner pursuant to Section 402.310, Florida Statutes,<sup>4/</sup> which reads in pertinent part as follows:

402.310 Disciplinary actions; hearings upon denial, suspension, or revocation of license; administrative fines.--

(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.

21. The Department interprets the language of Section 402.310, Florida Statutes, as not being limited to the actual holder of the license, but to include anyone who participates in the violation in a significant way. Accordingly, the Department seeks to impose the maximum fine of \$500.00 per day on each Petitioner.

22. However, this interpretation is inconsistent with the language of Section 402.310, Florida Statutes, which expressly refers to denial, suspension or revocation of a license, repeatedly refers to "the licensee" and does not appear to contemplate applicability to persons other than a licensee. On the other hand, Section 402.312(3), Florida Statutes, which is also cited in the Administrative Complaints, expressly allows the Department to impose a fine on any child care facility operating without a license.

23. The parameters of St. Paul's license were not clearly established in the record. While there is reference in Ms. Carpenter's and Mr. Blanchard's reports and Mr. Blanchard's

testimony to infants not being allowed to be there due to lack of hand-washing facilities and reference to food coming from outside the facility, the Administrative Complaints in this proceeding were not brought against St. Paul's, which held a valid license at all times material to this case.

24. As to Petitioner Carmen Smith, the evidence in the record shows that she was not an employee of St. Paul's and, with the exception of receiving nominal rent money for equipment, was not paid by St. Paul's. While she was the director of Happy Days, it ceased to operate on June 17, 2001.

25. As to Petitioner Tia Howard, the extent of her involvement appears to be helping move furniture and equipment from Happy Days to St. Paul's. Otherwise, she was in Savannah, Georgia, and therefore, was not a participant in any fashion in the operation of St. Paul's.

26. As to Petitioner Diana Jones, the evidence shows that she was employed by St. Paul's and signed for the report requiring that the children be moved from the modular building to the church building, which was done. However, Reverend Sykes established that he was the Director of St. Paul's, and that it was his decision to move the children to the modular building before moving them to the church building. While Ms. Jones may fit within the definition of "operator" in Section 402.302(11), Florida Statutes, in that she was the assistant director, the

allegations in the Administrative Complaint regarding infants being in the facility and improper provision of food to the children are within the context of an "illegal daycare" being operated at St. Paul's. Any deficiency that may exist in St. Paul's compliance with relevant statutes and rules would need to be brought within the context of an administrative complaint addressed to the license holder, St. Paul's A.M.E. Church Preschool. Such an Administrative Complaint was issued to Reverend Sykes on the same day as the Administrative Complaints in this proceeding. However, Reverend Sykes is not a party to this proceeding and this Recommended Order makes no findings related to the Administrative Complaint brought against Reverend Sykes.

27. As to the allegation that children were being transported in vehicles owned by an unlicensed facility and in an unsafe manner, the evidence presented shows that the vans were leased at a nominal rate for use by St. Paul's and the name of Happy Days was spray painted in a week to 10 days to cover the Happy Days name. Moreover, there is no evidence in the record regarding the allegation in the Administrative Complaints that the children were transported in an unsafe manner when the vans were being used to transport children to St. Paul's.<sup>5/</sup>

28. The Department argues that the Petitioners acted in collusion to continue the operation of Happy Days after Happy

Days' license expired. However, the letter written by Petitioners Smith and Howard suggested two child care facilities to the parents, not just St. Paul's. Regardless of the intentions of Petitioners regarding former clients of Happy Days, they did not operate an illegal daycare facility in that St. Paul's was licensed to operate at all times material to this proceeding.

RECOMMENDATION

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

RECOMMENDED:

That the Department of Children and Family Services enter a final order dismissing the Administrative Complaints against Petitioners Carmen Smith, Diana Jones, and Tia Howard.

DONE AND ENTERED this 15th day of February, 2002, in Tallahassee, Leon County, Florida.

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BARBARA J. STAROS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 15th day of February, 2002.

ENDNOTES

1/ The expiration and nonrenewal of the license was the result of prior litigation between Happy Days and the Department.

2/ The record is unclear as to whether Ms. Howard formally applied for a license or simply inquired about transferring a license. There is no evidence in the record that Ocala Northwest ever existed beyond Ms. Howard's inquiry of the Department regarding possible licensure.

3/ No specific provision of Chapter 65C-22, Florida Administrative Code, is cited in the Administrative Complaints.

4/ The Administrative Complaint actually cites Section 302.10, Florida Statutes, which is apparently a typographical error.

5/ That issue was raised in a Complaint for and Notice of License-Renewal against Happy Days in DOAH Case No. 01-1811. In that case, Happy Days filed a Voluntary Dismissal of its request for administrative hearing and the case was closed without hearing. The allegations in that case resulted from a licensure inspection of Happy Days that occurred in February of 2001, which is prior in time to the facts that are involved in this proceeding. Those specific allegations cannot be promoted in this case.

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.