

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SELINA BREW,)
)
 Petitioner,)
)
 vs.) Case Nos. 04-1644
) 04-3002
 DEPARTMENT OF CHILDREN AND)
 FAMILY SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

On August 25, 2004, a final administrative hearing in these cases was held in Orlando, Florida, before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Barry R. Nager, Esquire
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For Respondent: Beryl Thompson-McClary, Esquire
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STATEMENT OF THE ISSUES

Whether Petitioner's license to operate a day care center should be suspended or revoked.

Whether Petitioner's license to operate a day care center should be renewed.

PRELIMINARY STATEMENT

By certified letter dated March 23, 2004, Respondent, Department of Children and Family Services, informed Petitioner, Selina Brew,¹ that her license to operate a day care facility was being revoked. The proposed revocation was based upon the results of Respondent's inspection of Petitioner's facility on March 5, 2004, which alleged noncompliance with applicable licensing statutes and rules.

Petitioner disputed the facts underlying Respondent's decision, and on April 22, 2004, by an amended petition, she timely requested a formal administrative hearing. On May 4, 2004, Respondent referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an Administrative Law Judge to conduct the hearing requested by Petitioner.

Subsequently, on June 10, 2004, Respondent notified Petitioner that her application for renewal of her license to operate a child care center, known as Today's Kids, was being denied based on the same allegations contained in the March 23,

2004, letter. Petitioner denied the allegations, and this matter was referred to DOAH on August 24, 2004. With the agreement of the parties, these two cases were consolidated.

Following discovery, the final hearing was scheduled for and held on August 25, 2004. At the hearing, official recognition was taken of Sections 402.26 - 402.319, Florida Statutes (2004), and Florida Administrative Code Chapter 65C-22. Respondent presented the testimony of Tangela Muskin, former pre-kindergarten teacher at Petitioner's facility; Susan Wujastyk, former child protective investigator for Respondent; and Patricia Richard, a supervisor in Respondent's child care licensing division. Respondent moved to keep the record open in order to take the testimony of T. Hogan, a properly-subpoenaed witness who failed to appear. The motion was granted and Respondent was given seven days from the date of the hearing to conduct the deposition of the witness and to file the transcript with DOAH within a reasonable time thereafter. No transcript of the testimony of the witness has been filed as of the date of this Recommended Order.

Petitioner testified on her own behalf at the hearing and offered the testimony of Ray A. Almodovbar, owner of East/West Pest Control, Inc.; and Joy Campbell, Anita Gardener, and Mary Peterson, employees at the facility. Petitioner's Exhibits 1 and 2 were received into evidence.

The hearing was recorded; however, a transcript of the hearing was not prepared and filed with DOAH.

Petitioner timely filed her proposed recommended order on September 3, 2004. Respondent has not filed its proposals as of the date of this Recommended Order.

FINDINGS OF FACT

Based on the testimony and evidence received at the hearing, the following findings are made:

A. The Parties

1. Respondent is the state agency responsible for licensing and regulating child care facilities.

2. Respondent routinely conducts inspections of licensed child care facilities to determine whether facilities are in compliance with the applicable statutes and rules. Any problems found during the inspections are noted on a report, which is provided to the facility's operator immediately following the inspection. When appropriate, the inspection report provides a time frame within which the problems must be corrected.

3. Regular inspections are conducted approximately twice a year. More frequent inspections--monthly or every six weeks--are conducted on child care facilities which have a provisional license rather than a standard license. Respondent also conducts inspections in response to complaints it receives, and

it has the authority to inspect child care facilities at any time with or without notice.

4. Petitioner is the owner and operator of a licensed child care facility located at 2625 North Hiawasee Road, Orlando, Florida, which is operated under the business name: Today's Kids Daycare Center (hereinafter "Petitioner's facility" or "the facility").

5. Petitioner has operated the child care facility at the above address for approximately five years and previously worked as director of another child care facility for five years. Petitioner has taken all required training in order to be licensed. As a result, she is, or should be, familiar with the rules regulating child care facilities.

B. The Incident

6. Following a complaint, Susan Wujastyk, former child protective investigator for Respondent, interviewed the mother of the child, W.P., at the child's school on March 5, 2004, in relation to an alleged incident which occurred at Petitioner's facility on March 3, 2004. She then prepared a preliminary report and went to Petitioner's facility to investigate further. Respondent's child care licensing division was also notified and an inspector came to the facility, as well.

7. On or about March 3, 2004, the child, W.P., a pre-kindergarten student at Petitioner's facility, swallowed an unknown solid substance while in Tangela Muskin's classroom. Muskin believed the substance to be rat pellets and lead W.P. to Petitioner, who was in another room, and told her of her suspicions.

8. Petitioner, who had taken some nursing courses at the local community college, put on a rubber glove and swabbed the child's mouth to dislodge any other substances that might still be in the child's mouth. She also gave him some milk, with the intent to make him throw up. Petitioner then inspected the vomit but found no foreign substances in it. Petitioner did not call "9-1-1" for emergency assistance, nor did she call the poison control center. Instead, she observed W.P. for a period of time and sent him back to his classroom.

9. Muskin also testified that she found the child, W.P., with a bag labeled rat pellets and claimed that Petitioner, in the presence of another employee at the facility, threw the rat pellets in the trash and told Muskin and the other employee not to report this to anyone. This statement is not credible.

10. Petitioner testified that she attempted to call the child's mother, but could not reach her by telephone. Thereafter, she waited for the child's father to come and pick him up and she told him that W.P. had swallowed something but

that Petitioner believed that she got all of the material out of his mouth. She advised him to take the child to the emergency room, but the father declined to do so. This statement appears to be credible.

11. Susan Wujastyk inspected the facility on March 5, 2004, as part of her investigation of this matter and found two pellets under a toy chest in Muskin's classroom. Wujastyk thought they were rat pellets; however, that fact was never verified. An examination of the child, W.P., on March 5, 2004, found no evidence of ingestion of a toxic substance, and his condition was found to be stable.

12. Petitioner retains a pest control company that performs regular services at the facility, but does not use rat pellets or any form of rodent control devices. Three of Petitioner's employees testified that they perform regular inspections of the facility and none of them ever found rat pellets or other toxic substances on the premises.

13. Following the joint investigation, a joint report was prepared and approved by Respondent's staff, and it was recommended that Petitioner's license be revoked.

14. Thereafter, on March 23, 2004, the acting district director sent a letter to Petitioner informing her that her license was being revoked and advised Petitioner of her right to "appeal" that decision through the administrative process.

15. Subsequently, on June 10, 2004, Petitioner was sent a letter informing her that her license would not be renewed. The basis for the denial was the same as the revocation letter.

16. At the hearing, Patricia Richard testified that she was particularly concerned that Petitioner was aware the W.P. may have swallowed a toxic and other dangerous substance and did not take immediate action to report it to "9-1-1" or the poison control center; and did not take it upon herself to take the child to a health care professional for examination but waited for the parents to arrive to inform them of the incident. Richard also testified that it was improper for Petitioner to put her fingers down the child's throat in order to induce vomiting. She characterized these as serious child safety violations and failure to follow proper emergency procedures. These were the primary reasons she recommended that Petitioner's child care license be revoked and not renewed.

17. Petitioner, in her testimony, did not deny giving the child milk and swabbing his mouth with her finger, but did deny that she stuck her fingers in his mouth in order to induce vomiting.

18. The evidence is not clear and convincing that the child, W.P., swallowed a toxic or hazardous material; and it is not at all clear from the evidence what it was that the child swallowed. However, it is clear that the child swallowed

something that was suspected to be toxic; and when this fact was reported to Petitioner, she did not follow proper emergency procedures and did not properly notify the child's parents promptly.

19. Petitioner has demonstrated that her license for a child care facility should not be denied or revoked but that a lesser penalty should be imposed.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1), 120.60(5), and 402.310(2), Florida Statutes (2004).²

21. Respondent has the burden to prove by clear and convincing evidence the grounds to revoke or deny renewal of Petitioner's child care facility license. See Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); Coke v. Department of Children and Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998); Accord Marcia Edwards Family Day Care Home v. Department of Children and Family Services, Case No. 02-784 (DOAH February 5, 2003), adopted in toto, DCF Case No. 03-086FO (March 4, 2003); Department of Children and Family Services vs. Dorothy Dempsey Family Day Care Home, Case No. 02-1435 (DOAH August 7, 2002), adopted in toto, DCF Case No. 02-305FO (December 1, 2002).

22. The clear and convincing evidence standard has been described as follows:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Inquiry Concerning Judge Davey, 645 So. 2d 398, 404 (Fla. 1994), (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)) (internal brackets omitted). Accord Westinghouse Electric Corporation, Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992) ("Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous").

C. Violations of the Licensing Statutes and Rules at Respondent's Facility

23. Subsection 402.310(1)(a), Florida Statutes, provides that Respondent may "deny, suspend, or revoke a license . . . for the violation of any provision of ss. 402.301-402.319 or rules adopted thereunder."

24. The rules adopted by Respondent to implement Sections 402.301 through 402.319, Florida Statutes, are codified in Florida Administrative Code Chapter 65C-22.

25. Wujastyk's inspection report served as a basis for Respondent's March 23, 2004, revocation letter and the June 10, 2004, denial letter. It cited the following rules/statutes, which Petitioner allegedly violated: Florida Administrative Code Rule 65C-22.004(2)(d) (emergency procedures and notification).

26. Florida Administrative Code Rule 65C-22.040(2)(d) provides:

(d) Emergency Procedures and Notification.

1. Emergency telephone numbers, . . . must be posted on or near all facility telephones and shall be used as necessary to protect the health, safety and well-being of any child in day care.

2. Custodial parents or legal guardians shall be notified immediately in the event of any serious illness, accident, injury or emergency to their child and their specific instructions regarding action to be taken under such circumstances shall be obtained and followed. . .

3. All accidents and incidents which occur at a facility must be documented and shared with the custodial parent or legal guardian on the day they occur.

27. Although Respondent offered evidence that a violation of the provisions relating to failure to properly store toxic

substances occurred (Florida Administrative Code Rule 65C-20.010(1)(b)) Respondent did not include such violation on the charging document or the revocation letter of March 23, 2004. These letters served as the Administrative Complaint, and, therefore, the alleged violation cannot be used as a basis for denying the revocation or renewal of Petitioner's license. Marcelin v. State Department of Business and Professional Regulation, Construction Industry Licensing Board, 753 So. 2d 745 (Fla. 3d DCA 2000); Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998). Although the inspector found pellets suspected of being toxic during her inspection on March 5, 2004, this testimony and Muskin's are insufficient to prove the charge, had the allegation been included in the March 23 or June 10 letters.

28. The evidence is clear and convincing that Petitioner failed to follow proper emergency procedures when notified that W.P. may have ingested a toxic substance and failed to notify the child's parent immediately when the emergency was brought to her attention in violation of Florida Administrative Code Rule 65C-22.004(2)(d)1. and 2.

29. The evidence is clear and convincing that Petitioner violated the provisions of this Rule. Petitioner's explanation that she believed that the child had merely bitten off a piece of a styrofoam cup and swallowed a portion of it is not

convincing. Petitioner's explanation that she swabbed the child's mouth and gave the child some milk to induce vomiting and then determined that nothing serious had happened to the child, does not excuse Petitioner's inaction. Petitioner failed to call "9-1-1" or poison control and failed to notify the parents immediately. This is a serious violation. Petitioner offered no reasonable explanation why the "9-1-1" was not called or poison control was not consulted. Petitioner's statement is not sufficient to excuse her neglect of this important safety requirement.

D. Appropriate Penalty

30. Subsection 402.310(1)(b), Florida Statutes, directs Respondent to consider the following factors in determining the appropriate disciplinary action for a violation of Subsection 402.310(1)(b), Florida Statutes:

(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.

31. Petitioner argues, inter alia, that revocation is not appropriate under the circumstances of these cases and that less severe sanctions (such as a fine, suspension or provisional licensing) were available to Respondent.

32. A provisional license is issued where Respondent has continued concerns regarding the day care home's compliance with the applicable statutes and rules. A provisional license is issued in lieu of denying a license renewal or suspending or revoking the day care home's license. A provisional license gives the licensee an opportunity to correct the areas of noncompliance, and because such homes are inspected more frequently, Respondent has an opportunity to monitor the licensee's progress. The issuance of a provisional license would be appropriate in these cases.

RECOMMENDATION

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

RECOMMENDED that the Department of Children and Family Services issue a final order as follows:

1. Finding Petitioner guilty of violating the provisions of Florida Administrative Code Rule 65C-22.004(2)(d)1. and 2. (one count each).

2. Finding Petitioner not guilty of violating the provisions of Florida Administrative Code Rule 65C-20.010(1)(b) or similar provisions.

3. Imposing a fine of \$200, and a one-month suspension of Petitioner's license, followed by the issuance of a provisional license.

DONE AND ENTERED this 5th day of October, 2004, in Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2004.

ENDNOTES

^{1/} The "notice" by which this case was referred to the Division of Administrative Hearings designated Selina Brew as Petitioner and the Department of Children and Family Services as Respondent. Those designations were not changed by the Clerk of the Division of Administrative Hearings, as reflected in the case style above. However, the facts show that this is a license revocation proceeding in which the Department of Children and Family Services is the party seeking the affirmative relief.

^{2/} All references to Sections are to the 2004 version of the Florida Statutes. All references to Rules are to the current version of the Florida Administrative Code.

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.