

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)
FAMILY SERVICES,)
)
Petitioner,)
) Case No. 04-2813
vs.)
)
KIDZ KINGDOM ACADEMY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing in this proceeding on behalf of the Division of Administrative Hearings (DOAH), on October 21, 2004, in Sebring, Florida.

APPEARANCES

For Petitioner: Jack Emory Farley, Esquire
Department of Children
and Family Services
4720 Old Highway 37
Lakeland, Florida 33813-2030

For Respondent: Keith Peterson, Esquire
170 North Florida Avenue
Bartow, Florida 33830

STATEMENT OF THE ISSUES

The issues for determination are whether Respondent committed the acts alleged in a denial letter issued by Petitioner, and, if so, whether Petitioner should refuse to

renew Respondent's family day care license pursuant to Subsection 402.310(1)(a), Florida Statutes (2003).

PRELIMINARY STATEMENT

By letter dated July 14, 2004, Petitioner notified Respondent that Petitioner proposed to deny Respondent's application to renew her license to operate a family day care home. Respondent timely requested an administrative hearing.

At the hearing, the ALJ changed the style of the case, nunc pro tunc, to reflect the Department of Children and Family Services as Petitioner and the licensee as Respondent. Petitioner presented the testimony of four witnesses and submitted 13 exhibits for admission into evidence. Respondent testified and submitted no exhibits for admission into evidence.

The identity of the witnesses and exhibits, and any attendant rulings, are reported in the record of the hearing. Neither party requested the record to be published in a transcript. The parties timely filed their respective proposed recommended orders (PROs) on November 1, 2004.

FINDINGS OF FACT

1. Petitioner is the agency responsible for licensing and regulating day care homes in the state. Respondent is licensed to operate a day care home known as Kidz Kingdom Academy at 738 Glenwood Avenue, Sebring, Florida 33876 (the facility).

2. Petitioner inspected the facility nine times between November 25, 2003, and July 7, 2004. The specific dates of inspection were November 25, 2003; March 30 and 31; April 21 and 28; June 2, 11, and 15; and July 7, 2004.

3. With a few exceptions, Respondent committed 53 violations of applicable statutes and rules during the nine inspections. Approximately 13 of the 53 violations are potentially repeat violations because they involve violations of the same statute or rule. However, they may not be repeat violations because most of the violations arise from distinctly different facts, i.e., a different factual offense that violates the same statute or rule. The remaining violations are frequent violations but are not repeat violations because they do not violate the same statute or rule on more than one occasion irrespective of the factual basis of the violation. Neither party cited any statute, rule, or case law that defines a repeat violation.

4. On July 14, 2004, Petitioner issued a denial letter proposing to deny Respondent's application for renewal of her license. The denial letter is the notice of charges against Respondent.

5. The literal terms of the denial letter are ambiguous. For example, the denial letter, in relevant part, notifies Respondent that the nine inspections revealed "repeat

violations" of applicable statutes and rules. The notice of charges further notifies Respondent that based on "these violations" Petitioner proposes to deny Respondent's application for renewal of her license.

6. The reference in the denial letter to "these violations" arguably could be construed to mean the "repeat violations," however the term "repeat violation" may be defined. Alternatively, the reference to "these violations" arguably could be construed to mean the 13 "repeat violations" and the 40 frequent violations.

7. The denial letter adequately resolves the apparent ambiguity by attaching and referencing a "chart setting out specific violations" that Petitioner found during the nine inspections. The reference to "these violations" includes all 53 violations listed on the "chart." The distinction between "repeat violations" and "frequent violations" is not material to the grounds stated in the denial letter for the proposed refusal to renew Respondent's license.

8. The denial letter does not include an allegation that Respondent has failed to pay an outstanding fine that Petitioner previously imposed against Respondent. During testimony, however, Petitioner's agency representative testified that she would recommend that the agency renew the license if Respondent were to pay the fine.

9. The testimony of the agency representative is not relevant and material to an allegation that Respondent failed to pay an outstanding fine. The denial letter does not include any such allegation, and Petitioner cannot refuse to renew Respondent's license on grounds not included in the denial letter. Nor did the agency representative provide any written evidence of the imposition of an unsatisfied fine.

10. The testimony of the agency representative is relevant and material to Petitioner's argument during the hearing that any one violation, or all of them together, threaten children or others with serious harm within the meaning of Subsection 402.310(1)(b), Florida Statutes (2003). The agency representative is the person charged with responsibility for evaluating the severity of the alleged offenses and explicating the evidentiary grounds for the proposed agency action. It is axiomatic that the agency representative would not recommend renewal of the license upon payment of the fine if any one or all of the 53 violations represented any harm to the public, including children.

11. One or all of the 53 violations do not threaten harm to children or other members of the public within the meaning of Subsection 402.310(1)(b), Florida Statutes (2003). Although Petitioner showed by clear and convincing evidence that Respondent committed the 53 violations, Petitioner failed to

show by clear and convincing evidence that one or all of the 53 violations threatened children or others with serious harm.

12. One "repeat violation" involved missing hand towels in the bathroom or hand towels mounted too high for children to reach. Respondent regularly replenished hand towels and placed them where children could reach them.

13. Respondent failed to adequately supervise children during nap times. Volunteers, rather than full-time staff, sometimes supervised children. However, full-time staff members were close by in the adjacent room.

14. Respondent repeatedly failed to comply with applicable standards of maintenance and cleanliness. On one occasion, the microwave oven needed to be cleaned and sanitized.

15. During one inspection, some ceiling tiles in the facility were "coming down and showed evidence of water damage," and there was some evidence of "rodent or vermin infestation." Respondent corrected both violations in a timely manner.

16. On March 30 and June 11, 2004, lighting at the facility was inadequate. Respondent adequately corrected the violation during each inspection by turning on more lights and opening the blinds during nap time.

17. Gaps in a wood fence enclosing the play area were too large. However, a chain link fence immediately inside the

wooden fence prevented a child from exiting through the gaps in the wooden fence.

18. During two inspections, the facility placed soiled diapers in an open container. The facility corrected both violations at the time of the inspection by covering the containers or taking them outside.

19. On November 25, 2003, the facility left some electrical plugs in the music room uncovered. The inspection was a preliminary inspection, and the facility corrected the problem before any follow inspection. No follow-up inspections cite Respondent for a similar violation.

20. On March 30, 2004, the facility used highchairs that had been recalled. The facility immediately corrected the problem by taking the recalled highchairs out of service and replacing them with new high chairs not subject to a recall.

21. On March 30, 2004, a wooden climber for a slide in the playground was wobbly. A "slat was not secured to the railing." In addition, a latch on a toddler swing did not function properly. Respondent corrected both violations at the time of the inspection.

22. On June 11, a swing and a rope ladder were broken. A fence was beginning to sag. Respondent corrected both violations before a follow-up inspection.

23. On March 30 and 31, 2004, Respondent failed to maintain signed parental authorizations for the facility to administer prescription medications to children at the facility. Respondent corrected the deficiencies immediately by requiring the parents to remove the medications from the facility because the parents failed to comply with the facility's request for a signed authorization form.

24. Petitioner alleged, but did not show by clear and convincing evidence, that Respondent failed to give medications to children as prescribed. Petitioner submitted no evidence that Respondent ever administered the specific medication at issue contrary to the prescribed dosage or without a signed authorization.

25. On November 11, 2003, and June 11, 2004, Respondent failed to properly dispose of a bottle after use by leaving the bottle in an infant room after use. Respondent corrected the violation at the time of inspection by moving the bottle to the kitchen where Respondent properly stored the other bottles for subsequent cleaning. In addition, Respondent failed to properly refrigerate baby formula supplied to the facility for one of the infants in Respondent's care. Petitioner failed to show how long the formula had not been refrigerated. Respondent corrected these deficiencies at the time of inspection.

26. On November 25, 2003, and June 2, 2004, Respondent failed to maintain immunization records for some of the children at the facility. Immunization records for other children had expired. The parents had not returned the completed immunization records to the facility by the deadline of December 5, 2003.

27. Respondent failed to maintain health examination records for 14 students. Petitioner did not show that this was an ongoing or uncorrected violation.

28. From November 25, 2003, through June 2, 2004, Respondent failed to maintain forms required to be signed by employees that the employees understood the requirements for reporting child abuse and neglect. On June 2, 2004, Respondent failed to maintain on file a signed affidavit of good moral character for an employee. The insufficiencies could have been corrected by obtaining the signature of the respective facility employees.

29. From November 25, 2003, through June 11, 2004, Respondent failed to maintain required records showing that background screening for facility employees had been completed. On June 11, 2004, Respondent had a fingerprint card on file for an employee, but had not submitted the card to the Department of Law Enforcement within five working days of the first day of employment. Respondent failed to maintain documentation that

volunteers at the facility were in fact volunteers. Petitioner submitted no evidence of which volunteers or employees were involved, the beginning date for employment or volunteer service, or whether the individuals continued to be volunteer or be employed at the time of the alleged deficiency.

30. Petitioner alleges that Respondent failed to maintain required attendance records on June 2, 2004, for a field trip. The inspector did not reconcile attendance lists from the staff managing the field trip with those maintained by staff at the facility. The two lists, together, may or may not have accounted for all of the children either at the facility or on the field trip. Respondent corrected the alleged deficiency at the time of the inspection. However, Respondent failed to obtain required parent permission slips for some of the students and failed to inform some parents that their children would be on a field trip.

31. Respondent failed to maintain required attendance records from April 21 through June 11, 2004. On June 11, 2004, Respondent failed to maintain proper attendance records. Approximately 16 children attended the facility on that date, but the parents of only 12 children actually signed the attendance sheet.

32. On November 25, 2003, Respondent failed to maintain a written discipline policy and failed to maintain properly signed

student discipline forms. On March 30, 2004, Respondent failed to maintain proper ratios of staff to children. On July 7, 2004, Respondent left toxic or hazardous cleaning materials exposed to children. On June 2, 2004, Respondent failed to maintain staff with adequate first aid and CPR training. On June 2, 2004, Respondent failed to post the menu and failed to adequately implement single service items.

33. Petitioner conducted re-inspections on March 31, April 28, and June 11 and 15, 2004. Of the 53 alleged violations, Petitioner cited only 13 on re-inspection. However, only four of the 13 were uncorrected deficiencies. The remaining nine were deficiencies cited for the first time on re-inspection. The four deficiencies cited as uncorrected on re-inspection were the failure to maintain attendance and background screening record reports and the failure to maintain a clean facility in good repair.

34. As previously stated, none of the violations were severe within the meaning of Subsection 402.310(1)(b), Florida Statutes (2003). The violations did not result in death or serious harm to a child. There was no evidence that the violations created a probability, rather than a possibility, of death or serious harm to a child. The agency representative would have approved the application for renewal but for an unpaid fine by Respondent. It is axiomatic that an agency

representative would not ignore severe deficiencies in exchange for the payment of a fine.

35. The licensee corrected all of the alleged violations except those pertaining to attendance records, a clean facility, and background screening record reports. Petitioner failed to show by clear and convincing evidence that the missing or incomplete background screening record reports pertained to specific employees who were currently on staff at the facility. The evidence was vague and lacked the specificity required in a license discipline proceeding.

36. Petitioner intends the denial letter to be an administrative complaint. The Administrative Complaint does not allege that the licensee has any previous violations.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the parties and subject matter of this case. §§ 120.569 and 120.57(1), Fla. Stat. (2003). DOAH provided the parties with adequate notice of the administrative hearing.

38. Petitioner has the burden of proof in this proceeding. Department of Banking and Finance, Division of Securities and Investor Protection vs. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996). Petitioner must prove by clear and convincing evidence the allegations in the denial letter and the reasonableness of the proposed penalty.

39. Petitioner proved that Respondent committed the acts alleged in the denial letter other than those identified in this Recommended Order. However, Petitioner failed to show that revocation, in the form of a refusal to renew a license, is an appropriate penalty.

40. In relevant part, Subsection 402.310(1)(a), Florida Statutes (2003), authorizes Petitioner to revoke Respondent's license or administer a fine for the violations that Respondent committed. Petitioner did not show by clear and convincing evidence that any of the deficiencies committed by Respondent were severe within the meaning of Subsection 402.310(1)(b)1., Florida Statutes (2003). Therefore, the appropriate penalty should not exceed a fine of \$100 a day for the violations committed by Respondent.

41. Subsection 402.310(1)(b), Florida Statutes (2003), prescribes the factors to be considered in formulating a penalty. Several mitigating factors support a fine of less than \$100 a day. Petitioner submitted no evidence that Respondent has any previous violations within the meaning of Subsection 402.310(1)(b)3., Florida Statutes (2003). Moreover, Respondent corrected all but four of the alleged violations before re-inspection.

42. The four uncorrected violations occurred for 16 days. In addition, Respondent committed "repeat violations" on 13

days. Petitioner submitted no evidence of aggravating factors. Therefore, a fine of \$2,900 is authorized by Subsection 402.310(1)(a), Florida Statutes (2003), and is reasonable under the facts and circumstances of this case.

43. Neither DOAH nor Petitioner may find Respondent guilty of facts or violations not specifically alleged in the denial letter, as those allegations are incorporated by reference in the chart attached to the denial letter. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (facts not alleged in the Administrative Complaint). See also B.D.M. Financial Corporation v. Department of Business and Professional Regulation, 698 So. 2d 1359, 1362 (Fla. 1st DCA 1997) (violations not alleged in the Administrative Complaint). To do so would negate the right to an administrative hearing to contest the violations alleged in the denial letter, and it would eviscerate fundamental principles of due process.

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order finding Respondent guilty of committing those acts found to be violations in this Recommended Order and imposing an administrative fine of \$2,900.

DONE AND ENTERED this 23rd day of November, 2004, in
Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of November, 2004.

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.