STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SMALL FRIES DAY CARE, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	Case No. 04-3046
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
Respondent.	)	
	)	
THE GROWING TREE LEARNING CENTER AND NURSERY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-3892
	)	
DEPARTMENT OF CHILDREN AND FAMILY SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The formal hearing was conducted in Tavares, Florida, on June 13, 2005. The appearances were as follows:

APPEARANCES

For Petitioner: Robyn A. Hudson, Esquire
3900 Lake Center Drive, Suite A-2
Mount Dora, Florida 32757

For Respondent: T. Shane DeBoard, Esquire
Department of Children and
Family Services
1601 West Gulf Atlantic Highway
Wildwood, Florida 34785

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the application submitted by the Petitioner for a new one-year license for Small Fries Day Care, Inc., should be granted, or denied based upon violations of specified statutes and rules referenced below as alleged by the Respondent. It must also be resolved whether the application to operate a new facility known as the Growing Tree Learning Center and Nursery should be denied because of the same alleged instances of non-compliance with the relevant statutes and rules.

PRELIMINARY STATEMENT

This cause arose when the Department of Children and Family Services (Department) notified the Petitioner by letter of July 23, 2004, that its application for a new one-year license to operate a child care facility known as Small Fries Day Care, Inc. (Small Fries), was denied (Case No. 04-3046). The denial was based on purported violations of specified statutes and rules discovered during inspections of the facility in April, May, and July 2004. The Petitioner timely requested a formal administrative proceeding to dispute the Department's findings, and the Department allowed it to continue operating pending

resolution of the resulting formal proceeding, conditioned on an end to any violations of statutes or rules.

Also, by letter of August 3, 2004, the Petitioner was advised that its July 14th, 2004, application (Case No. 04-3892) to operate a new child care facility to be known as the Growing Tree Learning Center and Nursery was denied based upon the alleged repeated violations of statutes and rules and the Petitioner's operational history as the operator of Small Fries. This letter noted three verified instances of inadequate supervision, the most recent being May 11, 2004. The May 11, 2004, inspection also revealed failures to conduct background screening procedures and to ensure that staff received required training. In this denial, a formal administrative proceeding was also requested and also referred to the Division of Administrative Hearings. Ultimately the two cases were consolidated for hearing by the undersigned Administrative Law Judge.

The cause came on for hearing as noticed. At the hearing the Respondent Department presented two witnesses and six exhibits, all of which were admitted into evidence. Additionally, the Respondent re-called witness Diana McKenzie to testify on rebuttal. The Petitioner presented the testimony of five witnesses, including the testimony of Shirley Carter, the owner and operator of the subject facility. Additionally, the

Petitioner presented Petitioner's exhibit one which is admitted into evidence. Upon concluding the hearing the parties requested a transcript of the proceeding and elected to submit proposed recommended orders. The Proposed Recommended Orders were timely submitted and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner operates a child care facility known as Small Fries Day Care, Inc. She also has applied for a license to open a new facility known as the Learning Tree. The Department notified the Petitioner, by letter of July 23, 2004, that the application submitted for a new one-year license for Small Fries was denied. The letter of denial was based on violations of statutes and rules enforceable by the Department, which were purportedly discovered during the inspections of the facility in April, May, and July of 2004.

2. Thereafter by letter of August 3, 2004, the Petitioner was notified that her application for a license to operate a second child care facility known as the Growing Tree Learning Center and Nursery was also denied, based upon the history of alleged violations and non-compliance with statutes and rules during the operation of the Small Fries. The Petitioner requested a formal administrative proceeding to contest both decisions and the matter was referred to the Division of

Administrative Hearings. The two cases were later consolidated into the instant proceeding.

3. The Department received a complaint regarding transportation of children. It therefore dispatched an investigator, Judy Cooley, to conduct an inspection of the Petitioner's facility on April 6, 2004. The precise nature of the complaint was never substantiated. Ms. Cooley, however, upon conducting her inspection, discovered a violation of Florida Administrative Code Rule 65C-22.001(6)(f). This is a rule which mandates that children transported in a van must be counted and that both the driver of the van and one staff member must both count the children and sign a transportation log verifying that all children had exited the van. This is required to be done each time children leave or board the van. The failure to document an inspection of the van by both the driver and another staff member to ensure that all children are accounted for and out of the van is considered to be a major violation of the Department's rules and policy. The purpose of that requirement is to prevent children from being accidentally left in a van in the hot sun (or left at some location away from their home or the Petitioner's facility when the van departs a location.) If a child is left in a van in the hot sun a serious injury can result, rendering this infraction a serious one.

4. Ms. Cooley also determined that a violation had occurred concerning the "background screening" requirements upon her inspection on April 6, 2004. That is, the Petitioner's records did not show that screening had been done for all personnel employed by the Petitioner's facility.

5. On May 11, 2004, another investigation or inspection of the facility was conducted by the Department. This was because the Department had received an anonymous abuse report concerning the Petitioner's facility. Upon investigation it was determined that the report was unfounded. It had been alleged that a child had sustained an eye injury while in the custody and care of the Petitioner, but that was determined not to be the case; rather, the eye problem was determined to have been "Sty" infectious process and not a result of any injury sustained while a child was in the care of the Petitioner or her staff members.

6. The Petitioner was also charged with a violation regarding this eye injury issue for failing to file an "incident report" concerning it and failing to give a copy of the report to the child's parent the same day of the incident. This violation has not been proven by the Department because, in fact, no injury occurred. The child had to have appeared on the premises of the Petitioner's facility that day already suffering from the eye condition. Therefore, there was no "incident" occurring on the premises of the Petitioner, or while the child

was in the Petitioner's care. Therefore, there could be no incident requiring reporting to the Department and the parent under the Department's rules and policies. Apparently, the owner of the facility, Ms. Carter, later provided a copy of an incident report in the belief that the Department required it. In any event, this purported violation was not shown to have legally or factually amounted to an incident or a violation.

7. As to that May 11, 2004, inspection or investigation, however, the Department's evidence derived from that May 11, 2004, inspection which was not refuted establishes that the Child Protective Investigator (CPI) who conducted the investigation observed other violations. The investigator noted that the staff was failing to adequately supervise children and that the staff had not had required training. The CPI found that after observing the day care facility on three different occasions in a two-week period, there were always children "running around," not in their classroom and without staff providing supervision of them. The CPI noted prior reports for inadequate supervision and noted that some of the staff had not been trained in all of the required hours for teachers required by the Department's rules. These findings by the CPI were supported by unrefuted evidence adduced by the Department at hearing, and accepted as credible.

8. Ms. Cooley returned to the facility to conduct a follow-up inspection on July 23, 2004. This inspection was specifically related to the pending application filed by the Petitioner for a renewed one-year license for the facility. Ms. Cooley prepared a list of activities, conditions, or records as to the facility, its operations, the children, and the staff personnel, for purposes of indicating whether those checklist items, based upon Department rules, had been complied with or had not been complied with. There were a total of 63 specific requirements under the Department's statutes and rules for Ms. Cooley to employ in inspecting the facility. Ultimately, she found that the facility was in non-compliance on 11 out of the 63 items.

9. Ms. Cooley thus determined on this visit that the required staff-to-child ratio was improper. The facility was out of compliance on this issue by having only one staff member supervising the "infant room" with one child less than a year old, and five children aged one year. The number of staff needed is controlled by the age of the youngest child in a group. Two staff members were required in this instance instead of one.

10. Ms. Cooley also found, as a minor violation, that the facility had an open door with no screen, with only a curtain covering the opening and that children were sleeping on the

floor on only towels instead of the required individual sleeping mats (minimum one inch thick.) The owner of the facility, Ms. Carter, however, testified that indeed the mats were in use but were covered with towels and therefore they were not readily visible. It is thus difficult to determine whether all the children slept on required sleeping mats or some of them, or none of them. The testimony in this regard at least roughly amounts to an equipoise, and it is determined that this violation has not been established.

11. Another violation Ms. Cooley found to have occurred was that there were no records which would establish that the facility had conducted required fire drills for one and one-half months. Child care facilities such as this mandatorily must conduct at least once a month fire drills. They mandatorily must document each fire drill in a record for ready inspection.

12. Ms. Cooley also found that there was no record proof of enrollment by staff members in the required 40-hour training course which all employees must undergo within 90 days after they are hired. The facility also had been cited for this violation on the April 6, 2004, visit. It remained uncorrected during the interim and on the day of Ms. Cooley's second visit.

13. Another violation was found on this occasion in that, for the number of children present in the facility, there must be at least two staff members who have the necessary child

development associate credentials. There was only one staff member who had those necessary credentials. There are also no records to establish that the required in-service training for staff members had been conducted.

14. The additional three violations found by Ms. Cooley involve the failure to maintain required records concerning child immunizations, staff personnel records, and background screening records establishing that background screening had been properly done. If that required information is not appropriately filed and available at the facility, that in itself is a violation. If the file record was required to document compliance with some requirements, such as staff training, the absence of the documentation results in a presumption that there was no compliance.

15. The lack of adequate staff in the infant room necessary to meet the statutorily required staff-to-child ratio, as noted on the July 23, 2004, inspection, is a major violation under Department rules and policies. Direct supervision is mandated for children of that age at all times. The maintenance of this staff-to-child ratio is considered to be so important by the Department that its staff are not allowed to leave a facility if an improper staff-to-child ratio (inadequate) is found to exist until the problem is corrected.

16. The failure to keep records establishing timely compliance with background screening requirements for staff of the facility, provided for in Chapter 435, Florida Statutes, was found on the April 6, 2004, inspection and found to still exist at the time of the July 23, 2004, visit. The same factor was true with regard to the requirement that new staff be enrolled in the mandatory 40 hours training program within 90 days of being hired.

17. The failure to correct these problems concerning background screening and training and the documenting of it, between April 6, and July 23, 2004, becomes even more critical when one considers that Ms. Carter, the owner of the Petitioner, had been provided with technical assistance by Ms. Cooley designed to help her bring her facility into compliance in all respects at the April 6, 2004, inspection visits. These violations concerning the background screening, training requirements and then documentation are considered to be serious infractions by the Department in its interpretation of its rules, and in the carrying out of its policies.

18. In summary, although one or two of the violations were not proven and at least one, such as the failure to have a screen on a door, was not established to be a serious violation, the established violations do show an overall pattern of disregard of statutes and rules adopted for the safety, health,

and welfare of children entrusted to the care of such a child care facility owner and operator. That this was so, even the Petitioner was informed of and counseled regarding the violations. Some of them remained in non-compliance or at least again in non-compliance, upon the second inspection visit. It is not enough that the operator or owner of the facility provided the required documentation later after its absence is discovered or that she corrected the training, background screening, and other violations after they were discovered. The statutes and rules which apply require that such operations be done correctly at all times, and that performance be timely documented at all times.

19. The keeping of documentation in the facility's records concerning the violative items referenced above is not required for mere hollow bureaucratic convenience, but rather, because the Department has a very high standard of public trust in ensuring that children in such facilities are maintained in a safe fashion. It must have available, for ready inspection, at all reasonable times, the documents which support that the duties imposed by the various relevant statutes and rules are being properly carried out, so that it can know, before severe harm occurs to a child or children, that they might be at risk.

20. These established violations contribute to the overall pattern, shown by the Department, of an habitual disregard of

the statutes and rules adopted and enforced for purposes of the safety of the children entrusted to the care of the Petitioner (or at least timely compliance). Indeed, prior to the denial of a new one-year license for Small Fries and the denial of initial licensure for the proposed Growing Tree Facility, the licensing supervisor, Ms. McKenzie, conducted a review of the licensing file of the Petitioner. Ms. McKenzie thus established in the evidence in this record, that the file reflected repeated past violations involving failing to adequately supervise children and concerning the background screening and training and timely training of employees.

21. Upon completion of each inspection involved in this proceeding Ms. Carter, the operator, was given a copy of the report or checklist prepared by Ms. Cooley. She was given an opportunity at that point to respond to it or to write any comments thereon. On neither occasion, April 6, 2004, nor July 23, 2004, were there any written comments made by Ms. Carter that disputed the fact of the violations found by Ms. Cooley. There were some notes by way of explanation or of justification concerning the hiring of a teacher "for my toddlers" etc., but the notes or explanations provided by Ms. Carter in writing and in her testimony at hearing, do not refute the fact of the occurrence of the violations delineated in the above Findings of Fact. In summary, Ms. Carter's

explanations in her testimony to justify or explain the failures or the violations found above are not credible, in terms of showing that the violations did not occur.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2004).

23. Licenses to operate child care facilities automatically expire one year from the date of issuance of the license pursuant to Section 402.308(1), Florida Statutes. In order to get a new one-year license, the operator or holder of the license must submit a completely new application in accordance with Section 402.308(3)(b). That statutory provision provides in pertinent part as follows:

> Prior to the renewal of a license, the Department shall reexamine the child care facility, including in that process the examination of the premises and those records of the facility as required under s. 402.305, to determine that minimum standards for licensing continue to be met.

24. The Department shall then issue the new license "upon being satisfied that all standards required by ss. 402.301-402.318 have been met." § 402.308(3)(d), Fla. Stat. Thus the issuance of a new license is clearly not a mere ministerial act. It involves the exercise of the Department's discretion, just as much as with an initial licensure application because,

basically, a new licensing investigation and decision must be conducted each year that include the events of the most recent license year in its consideration.

25. Section 402.310(1)(a), Florida Statutes, provides that a license may be denied by the Department for violation of any provision of Sections 402.301-402.319, Florida Statutes, or the rules adopted thereunder. Thus, the Department has the burden of presenting evidence of any violations or one or more provisions of the rules or statutes. Regardless of who bears the ultimate burden of proof or persuasion, however, the Department clearly and convincingly established the repeated violations of the statute and rules at issue in this case.

26. Evidence adduced by the Department showing the violations found by Ms. Cooley was essentially unchallenged as to their occurrence. Ms. Carter attempted to excuse or justify the fact that the violations had occurred by later providing corrections or claiming to have corrected them or belatedly supplying missing documentation. That does not change the fact that the violations occurred and that violations of these statutes and rules, at least in part, are serious ones as delineated in the above Findings of Fact, in terms of potential for harm to children.

27. The relevant statutes and rules are basically for the provision of safety to children. The correction of a violation

will not undo an injury which has already occurred because the violation was allowed to stand or was belatedly corrected. Thus the explanations, apologies or promises to avoid violations in the future do not prevent the violations from being the Petitioner's responsibility. Correcting the problem after it is determined by Department personnel is not a substitute for not having the violation in the first place, or for self-correcting a problem before it has to be corrected through the mandate of Department personnel. This is especially the case where as noted and found above, that many of the infractions occurred repeatedly or were allowed to remain uncorrected for a substantial period of time.

28. In summary, the Petitioner appears to be genuinely concerned about the welfare of children and to have compassion for the children in her care and to attempt to ensure that the children in her care are properly and safely cared for. Her attempt, however, has been shown not to be good enough. Child care facility operators are quite properly and understandably held to a very high standard of performance. This is essential in order to protect the children placed in their care by parents or in some instances by a state agency. Thus, consistent compliance must be the standard and the norm, and not explanations for non-compliance or satisfaction with partial compliance.

29. Accordingly, it is determined that, while outright permanent denial of licensure may not be justified in this situation, that very close and focused supervision should be provided in order for the Petitioner to be licensed at her present facility, Small Fries, on a provisional basis, until she demonstrates the ability to follow the statutes and rules on a consistent basis. Because of the violations found concerning her existing facility, Small Fries, there has been no justification adduced, by even a preponderance of evidence, which would justify the granting of a second license to a new facility, the Growing Tree Learning Center and Nursery, Inc.

RECOMMENDATION

That having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Children and Family Services granting a provisional license to Small Fries Day Care, Inc., conditioned on the holder of that license undergoing additional training at the direction of the Department, designed to educate the operator under the license regarding the proper, safe care, and protection of children in her custody, operation of a child care facility, including the proper screening and training of staff, record keeping, and the

other items of concern shown by the violations found in this case. Such provisional licensure shall be in effect for a period of one year when such training shall be completed, and shall be conditioned on monthly inspections being performed by relevant Department personnel to ensure compliance with the relevant statutes and rules. It is, further,

RECOMMENDED that the application for licensure by the Growing Tree Learning Center and Nursery, Inc., be denied.

DONE AND ENTERED this 12th day of September, 2005, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
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this 12th day of September, 2005.

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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.