

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)
FAMILY SERVICES,)
)
Petitioner,) Case No. 09-4059
)
vs.)
)
THE BILTMORE SCHOOL AND GINA)
ROMERO,)
)
Respondents.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 12, 2009, by video teleconference with connecting sites in Miami and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Frances Arlene Faccidomo, Esquire
Department of Children and Families
401 Northwest 2nd Avenue, Suite N-1014
Miami, Florida 33128

For Respondents: Gina Romero, pro se
The Biltmore School
1600 Southwest Red Road
Miami, Florida 33155

STATEMENT OF THE ISSUE

The issue for determination is whether Respondents committed the offense set forth in the Amended Notice of Fine for Violation

of Child Care Standards dated July 15, 2009 and, if so, whether Petitioner should impose a fine of \$50 upon Respondents.

PRELIMINARY STATEMENT

By Amended Notice of Fine for Violation of Child Care Standards (Amended Notice) dated July 15, 2009, the Department of Children and Family Services (DCF) notified Gina Romero and The Biltmore School (School) that it (DCF) was imposing a fine of \$50, pursuant to Section 402.310, Florida Statutes, against the School for failing to have documentation of Level 2 screening for its staff in violation of Florida Administrative Code Rule 65C-22.006(4). Further, the Amended Notice notified Ms. Romero and the School that such a failure was a Class II violation of Florida Administrative Code Rule 65C-22.006(4); and that DCF was imposing an administrative fine of \$50 for the violation. Ms. Romero and the School disputed the allegations of fact and requested a hearing. This matter was referred to the Division of Administrative Hearings on July 30, 2009.

The final hearing was scheduled in accordance with the parties' joint request. At the hearing, DCF presented the testimony of two witnesses and entered six exhibits (Petitioner's Exhibits numbered 1 through 6) into evidence. The School presented the testimony of two witnesses and entered 11 exhibits (Respondents' Exhibits numbered 1 through 11) into evidence.

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on December 7, 2009. An extension of time was granted for the parties to file their post-hear submissions. The parties timely filed their post-hearing submissions, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. No dispute exists that, at all times material hereto, the School was licensed as a day care facility by DCF, having been issued license number C11MD1288.

2. No dispute exists that, at all times material hereto, the School was located at 1600 Southwest 57th Avenue, Miami, Florida 33155.

3. Gina Romero is the director and owner of the School.

4. On July 29, 2008, an employee of DCF, Theresa Williams-Burney, conducted a routine inspection of the School. At the time, Ms. Williams-Burney was the licensing counselor for the School.

5. The School's administrative assistant, Melissa Ferrer, was present during the routine inspection and assisted Ms. Williams-Burney during the inspection. Ms. Ferrer's duties

included interacting with both the parents and children.

Ms. Ferrer had been employed at the School for two years.

6. During the routine inspection, Ms. Williams-Burney discovered that the School was not in compliance in the areas of training, personnel records, and background screening documents. She noted the areas of non-compliance in an inspection checklist.

7. Regarding the background screening documents, i.e., Level 2 screening items, after randomly reviewing personnel files, Ms. Williams-Burney discovered that the documents had not been submitted for several staff members within the required time-period of their employment at the School. She noted in a supplemental inspection sheet the names of the staff members who had not been screened.

8. Ms. Ferrer signed both the inspection checklist and the supplemental inspection sheet, which noted the deficiencies, on the date of the routine inspection, July 29, 2008.

9. After completing the routine inspection, Ms. Williams-Burney provided technical assistance to the School, which included reviewing all non-compliant items with the School and informing the School as to how to obtain proper screening for its staff.

10. On May 7, 2009, an employee of DCF, Gary McLeary, performed a renewal of licensure inspection of the School. Mr. McLeary was the licensing counselor for the School.

11. During the renewal inspection, Mr. McLeary reviewed all files at the School and discovered that the School was not in compliance in the areas of children's health/immunization records and background screening documentation. He noted the areas of non-compliance in a renewal inspection checklist. Being non-compliant with background screening meant that the documentation in the file was either expired or missing.

12. As to the background screening documents, i.e., Level 2 screening items, after reviewing the personnel files, Mr. McLeary discovered that the documents, although required, were missing for two staff members at the School, Ms. Ferrer and Maria Chinchilla. He specifically noted in a supplemental inspection checklist that Ms. Ferrer was missing her Federal Bureau of Investigation (FBI) results, i.e., clearance letter, and that Ms. Chinchilla was missing her Florida Department of Law Enforcement (FDLE) results.

13. Ms. Ferrer and Ms. Romero were present during the renewal inspection. However, Mr. McLeary's contact was mostly with Ms. Ferrer.

14. As to Ms. Ferrer, she was under the impression that the School had received her FBI results, but that they were only missing from her personnel file. Ms. Ferrer's personnel file did not contain any document evidencing that she or the School had

made a request to the FBI as to the status of her clearance letter.

15. On the same day of the inspection, Mr. McLeary returned to his office and searched in his system for Ms. Ferrer's FBI results. DCF is able to access a clearance letter from the FBI. He located Ms. Ferrer's clearance letter, which was dated February 5, 2008, and discovered that it had been erroneously addressed to another daycare; he faxed the clearance letter to the School. Nevertheless, the School had failed to make inquiry of the FBI for over one year as to the status of Ms. Ferrer's clearance results.

16. Regarding Ms. Chinchilla, her FDLE clearance results were not in her personnel file. Typically, FDLE results are received by a facility within one month after submission; FDLE sends the results directly to the facility. No documentation was in her file evidencing that the FDLE results had been previously requested. Further, even though a fingerprint card was in her file, it had expired; and no current fingerprint card was in her file. Ms. Chinchilla had been employed at the School for over two years.

17. Ms. Ferrer signed both the renewal inspection checklist and the renewal supplemental inspection sheet, which noted the deficiencies, on the date of the renewal inspection, May 7, 2009.

18. Also, after the renewal inspection, Mr. McLeary provided the School the form that was required to request FDLE results in order for the School to request the FDLE results for Ms. Chinchilla.

19. The School has now employed the services of a private company to perform the Level 2 screening on its (the School's) behalf. With the private company handling the process, the screening is completed within a two-week period.

20. The School is currently in compliance with all requirements.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

22. The ultimate burden of proof is on DCF to establish by clear and convincing evidence that the School violated Section 402.310, Florida Statutes (2008), and Florida Administrative Code Rule 65C-22.006(4), as alleged in the Amended Notice dated July 15, 2009. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); § 120.57(1)(j), Fla. Stat.

23. Florida Administrative Code Rule 65C-22.006, titled "Record Keeping," provides in pertinent part:

(4) Personnel Records. Records shall be maintained and kept current on all child care personnel, as defined by Section 402.302(3), F.S., and household members if the facility is located in a private residence. These shall include:

(a) An employment application with the required statement pursuant to Section 402.3055(1)(b), F.S.

(b) Position and date of employment.

(c) CF-FSP Form 5337, March 2009, Child Abuse & Neglect Reporting Requirements, which is incorporated by reference, must be signed annually by all child care personnel.

(d) Initial Screening. Screening information must be documented on CF-FSP Form 5131, March 2009, Background Screening and Personnel File Requirements, which is incorporated by reference. Screening includes the following:

1. Level 2 screening as defined in Section 435.04, F.S., which includes at a minimum Federal Bureau of Investigations (FBI), Florida Department of Law Enforcement (FDLE), and local law enforcement records checks. For the purpose of issuing a license, any out-of-state criminal offense, which if committed in Florida, would constitute a disqualifying felony offense, shall be treated as a disqualifying felony offense for screening purposes under this rule.

2. An employment history check must include the previous two years, which shall include the applicant's job title and a description of their regular duties, confirmation of employment dates, and level of job performance. Failed attempts to obtain the employment history must be documented in the personnel file, and include date, time, and the reason the information was not obtained.

3. CF Form 1649A, January 2007, Child Care Attestation of Good Moral Character, which is incorporated by reference, must be completed

for all child care personnel annually or in accordance with the local licensing authority. A copy of the CF Form 1649A may be obtained from the department's website at www.myflorida.com/childcare.

24. Section 435.04, Florida Statutes (2008), titled "Level 2 screening standards," provides in pertinent part:

(1) All employees in positions designated by law as positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall include, but not be limited to, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal records checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

25. Section 435.05, Florida Statutes (2008), titled "Requirements for covered employees," provides in pertinent part:

Except as otherwise provided by law, the following requirements shall apply to covered employees:

(1)(a) Every person employed in a position for which employment screening is required must, within 5 working days after starting to work, submit to the employer a complete set of information necessary to conduct a screening under this section.

(b) For level 1 screening, the employer must submit the information necessary for screening to the Florida Department of Law Enforcement within 5 working days after receiving it. The Florida Department of Law Enforcement will conduct a search of its

records and will respond to the employer agency. The employer will inform the employee whether screening has revealed any disqualifying information.

(c) For level 2 screening, the employer or licensing agency must submit the information necessary for screening to the Florida Department of Law Enforcement within 5 working days after receiving it. The Florida Department of Law Enforcement will conduct a search of its criminal and juvenile records and will request that the Federal Bureau of Investigation conduct a search of its records for each employee for whom the request is made. The Florida Department of Law Enforcement will respond to the employer or licensing agency, and the employer or licensing agency will inform the employee whether screening has revealed disqualifying information.

(d) The person whose background is being checked must supply any missing criminal or other necessary information to the employer within 30 days after the employer makes a request for the information or be subject to automatic disqualification.

26. The evidence demonstrates that certain employees at the School, who interacted with both parents and children, failed to have their Level 2 screening completed in a timely manner.

27. Also, the evidence demonstrates that the first occurrence was noted during a routine inspection of the School by DCF on July 29, 2008. DCF provided the School with technical assistance at that time, which included informing the School as to how to obtain proper screening for its staff.

28. Further, the evidence demonstrates that another occurrence was noted less than a year later during a renewal

inspection on May 7, 2009. Moreover, no documentation was contained in the personnel files of the affected employees to demonstrate that the School had made inquiry to the FBI or the FDLE regarding the missing screening results.

29. The School did demonstrate that it had taken measures to remedy future non-compliance. Further, the School demonstrated that it was currently in compliance with all requirements.

30. Hence, DCF demonstrated that the School had violated Florida Administrative Code Rule 65C-22.006(4), as alleged in the Amended Notice.

31. Section 402.310, Florida Statutes (2008), provides in pertinent part:

(1)(a) The department or local licensing agency may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder:

1. Impose an administrative fine not to exceed \$ 100 per violation, per day. However, if 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 in addition to or in lieu of any other disciplinary action imposed under this section.

2. Convert a license or registration to probation status and require the licensee or registrant to comply with the terms of probation. A probation-status license or registration may not be issued for a period that exceeds 6 months and the probation-status license or registration may not be

renewed. A probation-status license or registration may be suspended or revoked if periodic inspection by the department or local licensing agency finds that the probation-status licensee or registrant is not in compliance with the terms of probation or that the probation-status licensee or registrant is not making sufficient progress toward compliance with ss. 402.301-402.319.

3. Deny, suspend, or revoke a license or registration.

(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 or registrant to correct the violation or to remedy complaints.

3. Any previous violations of the licensee or registrant.

32. Florida Administrative Code Rule 65C-22.010, titled "Enforcement," provides in pertinent part:

(1) Definitions.

* * *

(c) "Standards" are requirements for the operation of a licensed facility provided in statute or in rule.

(d) "Violation" means a finding of noncompliance by the department or local licensing authority of a licensing standard.

* * *

2. "Class II Violation" is the second or subsequent incident of noncompliance with an individual Class II standard as described on CF-FSP Form 5316. Class II violations are less serious in nature than Class I violations, and could be anticipated to pose a threat to the health, safety or well-being of a child, although the threat is not imminent.

* * *

(2) Disciplinary Sanctions.

(a) Enforcement of disciplinary sanctions shall be applied progressively for each standard violation. In addition, providers will be offered technical assistance in conjunction with any disciplinary sanction. The department shall take into consideration the actions taken by the facility to correct the violation when determining the appropriate disciplinary sanction.

* * *

(e) Disciplinary sanctions for licensing violations that occur within a two year period shall be progressively enforced as follows:

* * *

2. Class II Violations.

* * *

b. For the second violation of the same Class II standard, the department shall issue an administrative complaint imposing a fine of \$ 50 for each violation. This violation, and subsequent violations, of the same standard within a two year period will be classified as "Class II."

33. DCF desires to impose an administrative fine of \$50, as indicated in its Amended Notice. The penalty is warranted.

RECOMMENDATION

Based on 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 The Biltmore School and Gina Romero violated Florida Administrative Code Rule 65C-22.006(4) and imposing an administrative fine of \$50.

DONE AND ENTERED this 2nd day of February, 2010, in Tallahassee, Leon County, Florida.



ERROL H. POWELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of February, 2010.

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.