

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND)
FAMILIES,)
)
Petitioner,)
)
vs.) Case No. 12-1059
)
JUMPSTART ENRICHMENT PROGRAM,)
INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On August 17, 2012, a disputed-fact administrative hearing was held in this case by video teleconference in Tallahassee and Orlando, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Stefanie C. Beach, Esquire
Department of Children and Families
Suite S-1129
400 West Robinson Street
Orlando, Florida 32801-1782

For Respondent: Jack P. Caolo, Esquire
131 East Woodland Drive
Sanford, Florida 32773

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner, Department of Children and Families (Department), should impose a \$75 fine on Respondent, Jumpstart Enrichment Program, Inc. (Jumpstart), and

place it on probation for up to six months for not complying with child care facility staff-to-children ratio requirements for the fourth time.

PRELIMINARY STATEMENT

On February 13, 2012, the Department filed an Administrative Complaint charging ratio violations at Jumpstart. Respondent timely disputed the facts, raised affirmative defenses, and requested a hearing. The Department referred the matter to DOAH, and it was scheduled for a final hearing.

At the final hearing on August 17, 2012, the Department called David Meconitas (a child care facility inspection supervisor employed by the Department), Shawnda Bernard and Sabrina Hayles (staff employed by Respondent), and Michael Collins (owner and director of Respondent) as witnesses and had Petitioner's Exhibits A through G admitted in evidence. Respondent called another of its employees, Conswela Green, re-called the Department's witnesses, and had Respondent's Exhibits 1 through 6 admitted in evidence.

No transcript of the final hearing was prepared. The parties' proposed recommended orders have been considered.

FINDINGS OF FACT

1. The Department has issued Respondent license C09OR0629 to operate a child care facility in Orlando under sections

402.301 through 402.319, Florida Statutes, and Florida Administrative Code Chapter 65C-22.

2. The statutes and rules have minimum staff-to-children ratio requirements that are clear, but not uncomplicated, and not always easy to implement. It is necessary to have one staff person for every four children from birth to age one, for every six aged one to two, for every ten aged two to three, for every 15 aged three to four, for every 20 aged four to five, and for every 25 aged five or older. Generally, the ratio requirement for a mixed group of children aged two or older is dictated by the age group with the largest number of children in the group. However, if children under the age of two are present, the ratio requirement for a group is dictated by the age of the youngest child. It was undisputed that staff-to-children ratio requirements are Class II standards under the Department's rules.

Citation Issued January 6, 2012

3. The Administrative Complaint alleges that a citation for insufficient staff was issued to Respondent during a Department inspection on January 6, 2012. It alleges that this was the fourth violation of the standard, justifying a \$75 fine and probation for up to six months conditioned on being subject to unannounced visits to ensure compliance with all statutes and codes and on ensuring the maintenance of appropriate staff-to-children ratio.

4. On January 4, 2012, Sabrina Hayles and Conswela Green were the staff on duty at Jumpstart. Eight children were present that morning when Ms. Hayles left the facility to go to lunch. She took two of the children with her so that Ms. Green would meet ratio requirements for the remaining six. While Ms. Hayles was gone, a grandmother dropped off another child, which put the facility out-of-compliance with staffing ratio requirements. Ms. Green asked the grandmother to stay until Ms. Hayles returned, but she said she had an appointment and could not stay. Ms. Green accepted the child into the facility and telephoned Ms. Hayles to tell her to return to the facility because they were out-of-compliance. Ms. Hayles, who already was on her way back, arrived several minutes later. The facility's being out-of-compliance was observed by staff from the Early Learning Coalition of Orange County (ELCOC), who happened to drop some paperwork off at the facility at that time. ELCOC reported the ratio violation to the Department, which investigated the allegation on January 6 and issued a citation.

5. The Administrative Complaint alleges that this was Respondent's fourth insufficient staff violation and that the previous violations were on September 9 and April 14, 2011, and on August 20, 2010.

Alleged Violation on September 9, 2011

6. There was no evidence of a staffing ratio violation on September 9, 2011. Actually, there was a staffing violation on September 7, 2011. One staff was caring for an infant and five toddlers; two staff were required. ELCOC reported the violation to the Department. When apprised of the violation, Michael Collins, the owner and director of the facility, took immediate action to increase staffing and bring the violation to an end as soon as possible. The Department investigated on September 9, 2011, verified the violation through interviews with Shawnda Bernard, and cited Respondent for the violation on September 9, 2011.

Alleged Violation on April 14, 2011

7. Another entity involved in child care and school readiness, referred to in the hearing as Devoreaux, reported to the Department on April 12, 2011, that there was one staff caring for 13 children, when two staff were required. The Department investigated on April 14, 2011, determined from interviews with staff that the violation had in fact occurred, and cited Respondent for the violation.

8. There was hearsay evidence of another staffing violation after the Department's inspection on April 14, 2012. The second alleged violation was not proven by any direct evidence or by any

hearsay evidence that would be admissible over objection in a civil action. See § 120.57(1)(c), Fla. Stat.

Alleged Violation on August 20, 2010

9. On August 20, 2010, the Department conducted a routine inspection and cited Respondent for having six children at its facility and no staff, just the owner/director, Mr. Collins. Two qualified staff were required for the six children. There was an unscreened volunteer there, who would have counted and made the staffing ratio sufficient prior to August 1, 2010, when the law changed to require staff to be screened.

First Affirmative Defense

10. In May 2011, the Department filed an Administrative Complaint against Respondent charging staffing ratio violations on August 20, 2010, and on August 6 and December 28, 2009, plus numerous other kinds of violations, including some on August 20, 2010.

11. In October 2011, the Department and Respondent settled the charges in that Administrative Complaint by payment of a \$500 fine (reduced from \$2,205) and a reduced period of probation, through August 15, 2011. The alleged facts and charges were not admitted as part of the settlement.

12. The settlement included a provision that the Department would "make no further orders and will take no further action on the Administrative Complaint and underlying violations in

connection with this proceeding that is being settled." It also including a provision in the next numbered paragraph saying:

However, if in the future, the Petitioner should have to take administrative action against the Respondent, the Respondent agrees that the Petitioner shall not be estopped from using the facts set forth in the Administrative Complaint in this case as additional basis' [sic] for any future denials, revocations or other administrative actions, taken against the Respondent by the Petitioner resulting from any future non-compliances with applicable statute, code or agreements, by the Respondent.

Since one of the "facts set forth" in the settled Administrative Complaint was that Respondent had insufficient staffing on August 20, 2010, the Department was not estopped from using those facts as it does in this case--i.e., as one of the three staffing violations that preceded the one in January of 2012.

Second Affirmative Defense

13. Because of the insufficient staffing on January 4, 2012, ELCOC withheld payment for that day under the federal school readiness program it administers, which requires qualified staff to be present.

CONCLUSIONS OF LAW

14. In accordance with sections 402.301 through 402.319, Florida Statutes (2011), the Department has established a licensing program for child care facilities such as Jumpstart. Minimum staff-to-children ratios are set out in

section 402.305(4) and in rule 65C-22.001(4) (Revised Jan. 13, 2010).

15. Under section 402.310(1)(a), the Department may fine a licensee, place a licensee on probation, or suspend or revoke a license for violating the statutes and rules governing the licensee. In determining the appropriate disciplinary action for a violation, three factors are considered: "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"; "[a]ctions taken by the licensee . . . to correct the violation or to remedy complaints"; and "[a]ny previous violations of the licensee. . . ." § 402.310(1)(b), Fla. Stat. The Department is required to adopt rules to establish grounds for discipline and uniform procedures for imposing discipline. § 402.310(1)(c), Fla. Stat.

16. Under rule 65C-22.010(d) (Revised Jan. 13, 2010), there are three classes of licensing violations. The second or subsequent incident of noncompliance with an individual Class II standard results in a Class II violation. Fla. Admin. Code R. 65C-22.010(d)2. (The licensing standards are described on CF-FSP Form 5316, March 2009, which can be obtained from the Department's website. Fla. Admin. Code R. 65C-22.010(1)(d)1.)

17. The disciplinary sanctions for Class II violations are set out in rule 65C-22.010(e)2. "For the first violation of a Class II standard, the department shall issue a formal warning letter stating the department's intent to take administrative action if further violations of the standard occur. The violation will be classified as 'Technical Support.'" Id. at subpar. a. "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.'" Id. at subpar. b. "For the third violation of the same Class II standard, the department shall issue an administrative complaint imposing a fine of \$60 per day for each violation." Id. at subpar. c. "For the fourth violation of the same Class II standard, the department shall issue an administrative complaint placing the provider's license on probation status for a period not to exceed six months, and the department shall also issue an administrative complaint imposing an additional fine of \$75 per day for each violation." Id. at subpar. d.

18. Because it seeks to impose license discipline, the Department has the burden to prove its allegations by clear and convincing evidence. See In re Davey, 645 So. 2d 398, 405 (Fla. 1994); Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670

So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

19. Two of the three prior violations alleged in the Administrative Complaint (the violations alleged on April 14 and September 9, 2011) actually occurred on the days citations were issued for violations that occurred two days earlier (April 12 and September 7, 2011). That distinction has no legal significance. The charges were specific, and Respondent was not confused or prejudiced by the wording of the Administrative Complaint. Contrast Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990). As to most recent violation charged in the Administrative Complaint, the allegation was that a citation was issued during the Department's inspection on January 6, 2012, not that the violation occurred on that date.

20. The evidence proved non-compliance with staffing ratio requirements on August 20, 2010, on April 12 and September 7, 2011, and on January 4, 2012. Under rule 65C-22.010(e)2., the last three violations of the standard were Class II violations. Under subparagraph d. of that rule, the Department "shall also issue an administrative complaint imposing an additional fine of

\$75 per day for each violation." The Department construes that statute to support a fine of \$75 in this case (in addition to probation status for a period not to exceed six months).

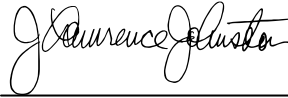
21. Respondent did not prove its affirmative defenses. The settlement agreement specifically allowed the Department to use the facts set forth in the settled Administrative Complaint, including the alleged insufficient staffing on August 20, 2010, as one of the three staffing violations that preceded the one in January of 2012. ELCOC's withholding payment of federal funds under the school readiness program for not having required qualified staff does not preclude the Department from enforcing sections 402.301 through 402.319 and chapter 65C-22.

RECOMMENDATION

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

RECOMMENDED that the Department of Children and Families enter a final order: finding Respondent guilty as charged; fining Respondent \$75; and placing Respondent on probation for six months, with unannounced visits to ensure compliance with all statutes and codes, including the maintenance of appropriate staff-to-children ratio.

DONE AND ENTERED this 17th day of September, 2012, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of September, 2012.

COPIES FURNISHED:

Stefanie C. Beach, Esquire
Department of Children and Families
Suite S-1129
400 West Robinson Street
Orlando, Florida 32801-1782

Jack P. Caolo, Esquire
131 East Woodland Drive
Sanford, Florida 32773

Gregory Venz, Agency Clerk
Department of Children and Families
Building 2, Room 204B
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

Marion Drew Parker, General Counsel
Department of Children and Families
Building 2, Room 204
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

David Wilkins, Secretary
Department of Children and
Families
Building 1, Room 202
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

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.