STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES, Petitioner, vs. TENDER LOVING CARE CHRISTIAN LEARNING ACADEMY, Respondent.	)	Case No. 13-0093

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held on April 15, 2013, by video teleconference at sites in Tallahassee and Lakeland, Florida, before Thomas P. Crapps, a designated Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Cheryl Dianne Westmoreland, Esquire
Department of Children and Families
Suite 328
200 North Kentucky Avenue
Lakeland, Florida 33801

For Respondent: Charlann Jackson Sanders, Esquire
Charlann Jackson Sanders, P.A.
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STATEMENT OF THE ISSUES

Whether Respondent, Tender Loving Care Christian Learning Academy, violated section 402.305(4), Florida Statutes (2012),[1/] and Florida Administrative Code Rule 65C-22.001(4)(a), regarding proper staff-to-child for a child care facility; and, if so, the appropriate penalty.

Whether Respondent violated section 435.04(1), Florida Statutes, and Florida Administrative Code Rule 65C-22.006, by not having proper documentation of Level II background screening for a staff member; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On December 7, 2012, the Florida Department of Children and Families (Department) issued an Administrative Complaint charging Respondent with violating section 402.305(4) and rule 65C-22.001(4)(a), which set staff-to-child ratios for a child care facility; and with violating section 435.04(1), which requires a facility to have documentation of Level II background screening for all staff.

On December 18, 2012, Respondent disputed the Department's allegations and requested an administrative hearing. The Administrative Complaint was forwarded to DOAH, and the instant case was set for final hearing.

At the final hearing on April 15, 2013, the Department presented the testimony of Vicki Richmond (Ms. Richmond) and

introduced into evidence Exhibits A, B, and C. Respondent presented the testimony of Cynthia Ross-Waring (Ms. Ross-Waring) and Pristina Rattley Poe (Ms. Poe), and introduced into evidence Composite Exhibits 1 and 2.

The parties did not order a transcript of the proceedings, and submitted Proposed Recommended Orders on April 23 and April 26, 2013.

FINDINGS OF FACT

1. The Department is statutorily charged with the licensing and regulation of child care facilities. See § 402.301, et seq., Fla. Stat.; and Fla. Admin. Code R. ch. 65C-20 and 65C-22.

2. Respondent operates a child care facility located at 1234 North Martin Luther King, Jr., Avenue, Lakeland, Florida, and holds state license number C-10PO0380.

3. On August 27, 2012, Ms. Richmond, an investigator for the Department inspected Respondent's child care facility. The inspection was the result of a complaint made against Respondent that stemmed from a child custody dispute. Ms. Richmond arrived at Respondent's facility at approximately 2:40 p.m., where she saw six children being cared for by one staff member. Ms. Richmond saw two children asleep in bouncy-seats. One of the children sleeping in a bouncy-seat appeared to Ms. Richmond to be less than one year of age.

4. Ms. Richmond asked the staff member the age of the child, and the staff member told her that the child was six months old. Ms. Richmond informed the staff member that the room was out of compliance for staff-to-child ratio for supervising an infant. The staff member then removed the sleeping child from the bouncy-seat and took the child to the infant room, placing the sleeping child in a crib.

5. The Department did not bring forward any other evidence showing the age of the child that Ms. Richmond believed was less than one year of age.

6. Ms. Ross-Waring credibly testified that the child in question was her grandchild, and that the child's age was over one year of age. Ms. Ross-Waring explained that the child was small for her age because the child had been born prematurely.

7. During the inspection, Ms. Richmond recognized one of Respondent's staff members as a former employee with a different child care facility. Moreover, Ms. Richmond knew that the staff member had a prior disciplinary history with the other facility. Ms. Richmond testified that staff members with a disciplinary history are required to disclose the prior discipline to the current employer. In order to determine if the staff member had disclosed the prior discipline, Ms. Richmond reviewed Respondent's employment file for the staff member. In reviewing the employment file, Ms. Richmond found that the staff member's

records contained Level II background screening from the Agency of Health Care Administration (AHCA), but not one from the Department.

8. Ms. Richmond informed Ms. Ross-Waring, the owner and operator of the child care facility, and Ms. Poe, the director of the child care facility, that the staff member did not have the proper documentation. As a result, the staff member immediately left the premises, and did not return until she secured the Level II background screening from the Department. The staff member obtained the required background screening and returned to work on August 30, 2012, two days after the inspection.

9. Ms. Ross-Waring explained that she believed that the background check provided by the AHCA addressed the same information required by the Department. Therefore, she relied upon the AHCA background check.

10. A past inspection of Respondent's child care facility dated October 7, 2011, resulted in the finding that Respondent did not have background screening documentation for a staff member, D.S., despite D.S. being hired on August 15, 2011. Respondent did not dispute the finding of the lack of proper documentation. As a means of correcting the error, the Department provided Respondent with technical support concerning the required proper background screening documentation.

11. Respondent's failure to have the proper background screening documentation at the August 28, 2012, inspection was Respondent's second violation within two years.

CONCLUSIONS OF LAW

12. DOAH has jurisdiction over the parties and subject matter of this proceeding. §§ 120.57(1) and 120.569, Fla. Stat.

13. Because the Department seeks to impose license discipline here, the Department has the burden of proving the allegations in its Administrative Complaint by clear and convincing evidence.[2/] Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

14. In accordance with its duties pursuant to sections 402.301 through 402.319, Florida Statutes, the Department has established a licensing program for child care facilities. Section 402.305(4) and rule 65C-22.001(4) set out the minimum staff-to-child ratios.

15. Specifically, rule 65C-22.001(4)(a) provides that the staff-to-child ratio is based on the primary responsibility for the direct supervision of children and applies at all times while children are in the child care facility. Rule 65C-22.001(4)(b) provides:

> 1. In groups of mixed age ranges, where children under one (1) year of age are included, one (1) staff member shall be responsible for no more than four (4) children of any age group, at all times.

> 2. In groups of mixed age ranges, where children one (1) year of age but under two (2) years of age are included, one (1) staff member shall be responsible for no more than six (6) children of any age group, at all times.

16. In the instant case, whether Respondent violated rule 65C-22.001(4)(b) turns on the age of the child removed from the bouncy-seat by the staff member. It is a close factual question, but the undersigned finds that the Department did not meet its burden of proof by clear and convincing evidence. Clear and convincing evidence is the type of evidence that gives a fact finder "firm belief or conviction, without hesitancy, as to the truth of the allegation . . . ." Here, there was little evidence establishing the age of the child. The only testimony that the child was under the age of one was a hearsay statement from a staff member as to the child's age. Further, the Department did not bring forward evidence showing that the staff member's statement would fit within a hearsay exception, such as an admission.[3/] See § 90.803(18)(d), Fla. Stat. Moreover, even if the undersigned did find that the unidentified staff member's statement fit the hearsay exception for an admission, Respondent brought forward credible evidence that the child in question was over the age of one year. Consequently, the undersigned finds that the Department did not meet its evidentiary burden of proving the violation by clear and convincing evidence. Finally,

although Ms. Richmond does have extensive experience in inspecting child care facilities and viewing children, her testimony that the child appeared to be younger than one year of age does not create firm belief or certainty in order to establish it as a fact by clear and convincing evidence.

17. Next, turning to the issue of the improper documentation, the undersigned finds that the Department did establish by clear and convincing evidence that Respondent had failed to keep proper records concerning the staff member's Level II background screening.

18. It was undisputed that the staff member did not have the Level II background screening required by the Department. Although the staff member had a background screening that had been conducted by AHCA, the background screening for a different state agency is not sufficient under the rule.

19. Turning to the recommended penalty, the Department is required to adopt rules establishing grounds for discipline and uniform procedures for imposing discipline. § 402.310(1)(c), Fla. Stat. The Department's adopted rule for the uniform procedure imposing discipline is rule 65C-22.010. Under rule 65C-22.010(d) there are three classes of licensing violations. In pertinent part, 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.). The disciplinary sanctions for Class II violations are set out in rule 65C-22.010(e)2.b., which provides that:

> 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."

20. Applying the disciplinary sanctions set out in rule 65C-22.010, the undersigned finds Respondent's failure to have the proper background screening documentation resulted in a violation of a Class II standard. Further, the facts showed that it was Respondent's second violation for failure to have the proper documentation within 24 months. Therefore, the penalty guideline requires an administrative fine of $50.00.

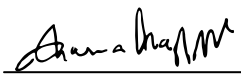
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families enter a final order finding that:

1) Respondent did not violate section 402.305(4) and rule 65C-22.001(4) concerning the staff-to-child ratios; and

2) Respondent violated rule 65C-22.010, failure to keep proper records, and that Respondent be fined $50.00 for non-compliance pursuant to rule 65C-22.010(1)(e)2.b.

DONE AND ENTERED this 30th day of April, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 2013.

ENDNOTES

[1/] All references to Florida Statutes shall be the 2012 version of the statutes, unless otherwise specified in the Recommended Order.

[2/] 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 witnesses must be lacking in confusion as to 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.

In re: Henson, 913 So. 2d 579, 590 (Fla. 2005)(quoting Slomowitz v. Walker, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)

[3/] Under section 90.803(18)(d), Florida Statutes, if an employee makes a statement concerning a matter which is connected with a duty within the scope of the employee's agency or employment, the statement is admissible against both the employee and the employer. See Castaneda ex rel. Cardona v. Redlands Christian Migrant Ass'n., 884 So. 2d 1087, 1090-91 (Fla. 4th DCA 2004)(holding, in a personal injury action against a daycare center, that statements by daycare employees were admissible against daycare employer). The Department in this case did not bring forward evidence showing the identity of the unidentified staff member or the scope of the employee's employment. There was no testimony that the scope of the staff member's employment concerned having knowledge about the child's age. Therefore, the undersigned finds that the staff member's statement does not meet the hearsay exception for an employee admission.

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.