

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

vs.

Case No. 13-1686

AGAPE INVESTMENT GROUP INC.,
d/b/a AGAPE CHILDCARE AND
FAMILY SERVICES

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 23, 2013, via video teleconference with sites in Tallahassee and Jacksonville, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: David Gregory Tucker, Esquire
Department of Children
and Families
Post Office Box 2417
Jacksonville, Florida 32211

For Respondent: Tausha Howard, pro se^{1/}
Agape Childcare and Family Services
542588 US Highway 1
Callahan, Florida 32011

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Respondent committed the violations as alleged in the Administrative Complaint and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On April 11, 2013, the Department of Children and Families (the Department or DCF) issued an Administrative Complaint to Respondent, Agape Investment Group, Inc., d/b/a Agape Childcare and Family Services (hereinafter Agape) seeking to impose an administrative fine and revocation of Respondent's license for alleged violations of Florida Administrative Code Rule 65C-22.001(4)(b)2., for failure to maintain proper staff-to-children ratio; rule 65C-22.006(2)(c), for failure to maintain current and complete immunization records; and rule 65C-22.006(4)(d)1., for failure to maintain background screening records on one individual. Agape disputed the allegations of the Administrative Complaint and requested an administrative hearing.

The Department forwarded the request for a hearing to the Division of Administrative Hearings (the Division or DOAH) on or about May 10, 2013. The final hearing was set for July 23, 2013. The case was heard as scheduled.

At hearing, the Department presented the testimony of one witness, Tracey Flanders. The Department's Exhibits lettered A through C were admitted into evidence. The Respondent presented the testimony of Tausha Howard. Respondent did not offer any exhibits. The Department requested Official Recognition of DCF Form CF-FSP 5316, entitled Child Care Facility Standards Classification Summary (Form 5316). The request was granted.

At the conclusion of the presentation of evidence, there was a discussion regarding an additional Administrative Complaint that had just recently been referred to the Division from DCF regarding Respondent. The instant case was held in abeyance pending resolution of the second Administrative Complaint (DOAH Case No. 13-2520). Subsequently, two more administrative complaints (DOAH Case Nos. 13-4127 and 14-1477, totaling four) have been referred to the Division.^{2/} During a case management conference on April 11, 2014, it was determined that the Recommended Order in this case should no longer be delayed and by Order dated April 14, 2014, the parties were ordered to file any proposed recommended orders no later than April 28, 2014.

A one-volume Transcript was filed on August 7, 2013. Petitioner filed a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Respondent did not file a post-hearing written submission.

All references to statutes are to Florida Statutes (2013) unless otherwise noted.

FINDINGS OF FACT

1. The Department of Children and Families is the agency charged with the responsibility of licensing child care facilities in the State of Florida. § 402.305, Fla. Stat.

2. Respondent was licensed by the Department to operate a child care facility located in Callahan, Florida.

3. Tausha Howard is the co-owner/director of Agape, and has been since it opened approximately 10 years ago.

4. Tracey Flanders is a family services counselor. As a family services counselor, Ms. Flanders is responsible for inspecting child care facilities and family child care homes. Agape was one of the child care facilities that she inspected. She has been a family services counselor for three years and prior to that was a child protective investigator for DCF. Prior to her employment with DCF, she was a preschool teacher for eight years, which included some supervisory responsibilities and knowledge of compliance with DCF rules.

Out of Ratio/Improper Supervision

5. The Administrative Complaint charged Respondent with being out-of-ratio regarding the number of children per staff member in violation of Florida Administrative Code Rule 65C-

22.001(4)(b)2. Specifically, the Administrative Complaint alleges as follows:

During a routine inspection conducted on March 6, 2013, DCF licensing counselor Tracey Flanders observed that: There was one (1) staff member supervising seven (7) children between the ages of one (1) and two (2) years old. A ratio of one staff for (6) children is required.

6. This violation is based on Ms. Flanders' observations during a March 6, 2013 routine inspection of Agape. She did a walk-through of the facility and examined the children's records. As part of her walkthrough, she went to all of the classrooms. In each classroom, she counted the children and inspected for cleanliness.

7. While in the toddler room, Ms. Flanders observed the children playing on the floor around the teacher. She counted seven children between the ages of one to two years old being supervised by one teacher. There was one two-year-old and six one-year-old children.

8. Ms. Flanders explained at hearing that in mixed age groups, the required ratio of the youngest child applies. For mixed aged groups of children between one and two years of age, the minimum staff to child ratio is one staff member to six children.

9. Agape has a classroom for preschool children, as well as one for the toddler children.

10. Ms. Howard, however, disagrees that there were seven children in the toddler room and insisted that there were only six. She believes there was some kind of "miscommunication or oversight" because the seventh child (W.) had recently "aged out" of the toddler room and had been moved to the preschool class. The toddler class was where W. was assigned prior to his second birthday and reassignment to the preschool class. At the time of the inspection, the preschool children were out on the playground and came in while Ms. Flanders was present. Ms. Howard recalls she was standing in the baby room window. According to Ms. Howard, W. was being redirected from "bothering the blocks" to go rejoin the preschool group who was having story time. Therefore, she contends that the child was not in the toddler room, but was being redirected into the preschool classroom.

11. Ms. Flanders insists that Ms. Howard was not with her when this incident happened, that the children were playing on the floor, and that the two-year-old in question (W.) was not moved from the toddler room to the preschool room when she was there. Accordingly, she cited Respondent for an out-of-ratio violation.

12. Prior to the March 6, 2013 routine inspection, Agape had previous instances of being in violation of the ratio requirements. As a result of prior Administrative Complaints

which included ratio violations, DCF and Respondent entered into a settlement agreement in March 2013, in which Respondent acknowledged that there have been five Class II ratio violations within a two-year period. Additionally, Respondent agreed that if future ratio violations occurred, the license "will again be subject to suspension or revocation." The settlement agreement also stated that Respondent would finish out its then current probationary status through March 11, 2013, at which time Agape would be returned to an annual license. It is assumed that since the instant Administrative Complaint was dated April 11, 2013, that the license is currently on regular license status.

Immunization Form Violation

13. The Administrative Complaint charged Respondent with not having required immunization forms for children in its care, in violation of Florida Administrative Code Rule 65C-22.006(2)(c). Specifically, the Administrative Complaint alleged that during the routine inspection by Ms. Flanders on March 6, 2013, she observed that a current form 680, Florida Certification of Immunization, was missing for two children.

14. This allegation was based upon a file review made by Ms. Flanders which revealed that immunization records for two of the children, H.A. and M.C., had expired. The same violation was cited three previous times within a two-year period.

15. On a reinspection, the center's immunization records were current.

16. According to Ms. Howard, the child, H.A., was out of the center for a medical reason and was not enrolled in the center at that time. However, his file was still there. Further, she discussed this with Ms. Flanders and afterwards wrote a statement that H.A. was not currently enrolled in the school and placed it in his file. As for child M.C., the child was enrolled but was no longer attending the center until M.C. obtained a current immunization record. Ms. Flanders explained that the child care facility must inform her if a child is enrolled but not attending. In that event, she skips that child's record during her review.

Level 2 Screening Documentation

17. The Administrative Complaint charged Respondent with a violation of Florida Administrative Code Rule 65C-22.006(4)(d) and alleged the following:

Documentation of Level 2 screening was missing for one (1) staff member. The Preschool Teacher's adult son, D.W., was observed in the classroom with children on more than one occasion. Director stated D.W. is at the facility one (1) to two (2) hours a day, every other day. Licensing Counselor previously advised provider D.W. could not be present without passing a Level 2 screening.

18. These charges were based on Ms. Flanders observing the adult son (D.W.) of one of the preschool teachers sitting at the desk in the preschool room with the children present, and the content of a conversation she had with Ms. Howard regarding this issue.

19. There is an exception to the background screening requirement for volunteers who work there less than 10 hours a month. Accordingly, Ms. Flanders spoke to Ms. Howard to determine how often D.W. was at the school. According to Ms. Flanders, Ms. Howard told her that he would come to the daycare and wait before work every other day for an hour or two before walking to Winn-Dixie. Ms. Flanders calculated that every other day would be 15 days a month, for one or two hours each time. Therefore, she determined that he was there more than 10 hours a month. D.W. does not have background screening on file.

20. The Administrative Complaint states that the same violation was previously cited on May 14, 2011, resulting in Technical Assistance, making this the second Class II violation within two years about persons caring for children without background screening.

21. Ms. Howard, however, denies that D.W. was ever in her child care center that frequently. According to Ms. Howard, D.W.'s family temporarily (for about a month to a month and a

half) had only one car. During that time, D.W. would come to the center, but was only there a total of 2 hours in a month. "Again, D.W. is not in my center. He's not ever been in my center every other day. He's not ever been in my center more than 30 minutes to an hour." Moreover, Ms. Howard asserts that when D.W. was in her center, he was not with the children but was in a classroom where there were no children.

22. Both Ms. Flanders and Ms. Howard were credible witnesses.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(1), Fla. Stat. This proceeding is de novo. § 120.57(1)(k).

24. The Department of Children and Families is the agency charged with the responsibility of licensing child care facilities in the State of Florida. § 402.305, Fla. Stat.

25. Section 402.310 authorizes the Department to take adverse action regarding the license of the child care facility, and reads, in pertinent part, as follows:

Disciplinary actions; hearings upon denial, suspension, or revocation of license or registration; administrative fines.-

(1)(a) The department or local licensing agency may impose 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 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
. . . .

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 to correct the violation or to remedy complaints.

3. Any previous violations of the licensee or registrant. (emphasis added).

26. Florida Administrative Code Rule 65C-22.010 defines classes of violations and sets forth a framework of disciplinary sanctions. It states, in pertinent part:

Enforcement.

(1) Definitions.

* * *

(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.

3. "Class III violation" is the third or subsequent incident of noncompliance with an individual Class III standard as described on CF-FSP Form 5316. Class III violations are less serious in nature than either Class I or Class II violations, and pose a low potential for harm to children.

* * *

(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.

* * *

e. For the fifth and subsequent violation of the same Class II standard, the department shall issue an administrative complaint to suspend, deny, or revoke the license, and the department shall also issue an administrative complaint imposing an additional fine of \$100 per day for each violation.

* * *

4. Children's Health Immunization Records Disciplinary Sanctions.

* * *

d. For the fourth violation of the same Class III Children's Health and/or Immunization standard, the department shall issue an administrative complaint imposing a fine in the amount of \$30 for each violation.

27. Section 402.305(2) reads in pertinent part:

402.305 Licensing standards; child care facilities.-

* * *

(2) PERSONNEL.— Minimum standards for child care personnel shall include minimum requirements as to:

(a) Good moral character based upon screening. This screening shall be conducted as provided in chapter 435, using the level 2 standards for screening set forth in that chapter.

28. A volunteer in a child care facility who assists on an intermittent basis for less than 10 hours per month is not included in the term "personnel" for purposes of screening if a person who meets the screening requirement of section 402.305(2) is always present and has the volunteer in her line of sight. § 402.302(3), Fla. Stat.

29. Florida Administrative Code Rule 65C-22.006(4) sets forth the required content of personnel records, including Level 2 screening information and copies of training information and credentials.

30. Florida Administrative Code Rule 65C-22.006(2)(b) and (c) require the child care facility to obtain for each child a current, complete, and properly executed Florida Certification or Immunization Form, and to keep an up-to-date version of the form on file for as long as the child is enrolled in the facility.

31. Florida Administrative Code Rule 65C-22.001 reads in pertinent part as follows:

65C-22.001 General Information.

(4) Ratios.

(a) The staff-to-child ratio, as established in Section 402.305(4), F.S., is based on primary responsibility for the direct care of children, and applies at all times while children are in care.

(b) Mixed age groups.

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

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

32. The Department has the burden to prove by clear and convincing evidence the grounds for taking disciplinary action, including revocation or denial of an application to renew an existing daycare license. Coke v. Dep't of Child. and Fam. Svcs., 704 So. 2d 726 (Fla. 5th DCA 1998); Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

33. For proof to be considered "'clear and convincing' . . . 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 the witnesses must be lacking in confusion as to the 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 Davey, 645 So. 2d 398, 404 (Fla. 1994).

34. Regarding the child to staff ratio, the undersigned is persuaded that W., the two-year-old who was with the toddlers at the time of Ms. Flanders' inspection, was no longer assigned to the toddler room, but had moved on to the preschooler room. While the Department proved that a ratio violation occurred, it was inadvertent, and was most likely the result of the child going to his or her former class across the hall after coming in from the playground.

35. As this was the sixth Class II violation within a two-year period, the Department was authorized to issue an administrative complaint seeking suspension, denial or revocation. However, the recommended penalty is less severe than what is sought from the Department.

36. Regarding the immunization record issue, the Department met their burden of proof. Although the children were not currently attending the facility, they were still enrolled and therefore an up-to-date health form was required to be kept in each child's file. As this was the fourth Class III violation within a two-year period, the Department's imposition of a \$30 per day fine pursuant to Florida Administrative Code Rule 65C-22.010(2) is appropriate here.

37. The Department did not meet its burden in proving the allegations regarding background screening for D.W. At hearing, Ms. Howard refuted Ms. Flanders' recollection of Ms. Howard's statements to her regarding how frequently and for what duration D.W. was at the child care center. The undersigned cannot, without hesitation, find that D.W. was at the facility frequently enough to require that a background screening be done and on file for D.W. Moreover, the Department did not establish that D.W. meets the definition of volunteer as contemplated by section 402.302(3) in that there is no evidence that he was assisting at the facility.

38. Subsequent to the hearing, Respondent hired a Qualified Representative, who has also been accepted as Respondent's Qualified Representative for the subsequent cases transmitted by the Department regarding Respondent. While the Department seeks revocation, placing Respondent back on probationary status pending the outcome of those subsequent cases, so that all facts may be presented and so Respondent has the opportunity to be represented in the latter proceedings, is more appropriate.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Children and Families enter a final order placing Respondent's license on probation

until the related cases involving Respondent have been heard and final orders entered; and imposing a fine of \$100 per day for one day, and \$30 per day for eight days, for a total of \$340.

DONE AND ENTERED this 8th day of May, 2014, in Tallahassee, Leon County, Florida.



BARBARA J. STAROS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of May, 2014

ENDNOTES

^{1/} Agape retained a Qualified Representative after the hearing. He did not appear at the hearing.

^{2/} During the telephonic case management conference, counsel for the Department indicated that there were potentially two additional administrative complaints against Respondent yet to be referred to DOAH.

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.