

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

Case Nos. 13-2377

vs.

13-2393

AMANDA'S CHILDCARE AND
PRESCHOOL INC., d/b/a, AMANDA'S
CHILDCARE AND PRESCHOOL,

Respondent.

_____ /

RECOMMENDED ORDER

An administrative hearing was conducted in this case on
September 4, 2013, in Deland, Florida, before James H. Peterson,
III, Administrative Law Judge with the Division of
Administrative Hearings.

APPEARANCES

For Petitioner: Jane Almy-Loewinger, Esquire
Department of Children
and Families
210 North Palmetto Avenue, Suite 447
Daytona Beach, Florida 32114

For Respondent: Joseph Corneck, pro se
Amanda's Childcare and Preschool
123 West Rhode Island Avenue
Orange City, Florida 32763

STATEMENT OF THE ISSUE

Whether Amanda's Childcare and Preschool is subject to a civil penalty and licensure action for failing to comply with staff-to-student ratios and for having tools on the daycare playground, in violation of Florida Administrative Code Rules 65C-22.001(4) and 65C-22.002(1)(a), and chapter 402, Florida Statutes.

PRELIMINARY STATEMENT

Following a routine inspection of Amanda's Childcare and Preschool (Respondent) conducted on January 28, 2013, the Department of Children and Families (Department) issued and served an Administrative Complaint upon Respondent by certified mail on February 13, 2013, seeking civil penalties against Respondent. The Administrative Complaint alleged that Respondent violated rule 65C-22.001(4) by having only one staff person for 21 children when one staff person for every 20 children is required, and also alleged that Respondent violated rule 65C-22.002(1)(a) by having lumber and electrical cutting tools within reach of children on a playground. The Administrative Complaint advised Respondent that it had 21 days from receipt within which to request a hearing.

Respondent, through its owner, Joseph Corneck, timely filed a written request for a hearing on the Administrative Complaint. The Department referred the case to the Division of

Administrative Hearings (DOAH), apparently twice, resulting in assignment of two cases with two separate case numbers, DOAH Case Number 13-2377 and DOAH Case Number 12-2393. Thereafter, the two cases were consolidated by an order of consolidation dated July 5, 2013.

At the administrative hearing in this matter, the Department presented the testimony of Department family services counselor Kalyn Yeager and Department family counselor supervisor, Jennifer Adams. The Department offered two exhibits that were received into evidence as Exhibits P-1 and P-2, with the caveat that statements therein could not be relied upon for the truth of matters asserted unless corroborative of competent evidence. (Transcript, p. 76). Mr. Corneck testified on behalf of Respondent, but did not offer any exhibits. The parties were given 10 days from the filing of the transcript within which to file proposed recommended orders. A one-volume Transcript of the proceedings was filed on September 13, 2013. The Department timely filed a Proposed Recommended Order which has been taken into consideration in preparing this Recommended Order. Respondent did not file a proposed recommended order.

FINDINGS OF FACT

1. Respondent is licensed by the Department to operate a facility known as Amanda's Childcare & Preschool located at 123 West Rhode Island Avenue, Orange City, Florida 32763.

2. Respondent is owned by Joseph Corneck.

3. During the morning of January 28, 2013, Mr. Corneck was working on the construction of a climbing apparatus in a playground at Respondent's daycare facility.

4. There were no children playing on the playground at the time of Mr. Corneck's construction activities.

5. Rather, there were 20 kindergarten-aged children inside an adjacent classroom while Mr. Corneck was outside working.

6. Near lunchtime, Ms. Carolyn, a staff member who was supervising the classroom, lined the children up so that they could use the two available bathrooms and wash up for lunch.

7. Because of crowding by the number of children lining up for only two bathrooms, Ms. Carolyn asked seven boys in the group to line up outside the classroom along the exterior wall near the door adjacent to the playground.

8. Ms. Carolyn asked Mr. Corneck to assist in watching the boys while they were in line.

9. Mr. Corneck left the apparatus that he was working on, which was approximately 30 feet away, and came over to the boys to watch over them while they were in the line.

10. Mr. Corneck left the tools that he was working with, consisting of a hammer and a cordless drill gun, back on a platform of the apparatus. The platform where he left the tools was approximately four to six feet high. He also left the materials he was working with and a ladder near the apparatus.

11. While Mr. Corneck was watching the boys, Department family services counselor Kalyn Yeager stopped by for a routine inspection. She noticed the boys outside the classroom and apparently concluded that they had access to the tools and materials.

12. Mr. Corneck, however, did not allow the boys to play on the playground that day. There is no evidence that the children were allowed access to the tools or playground apparatus, and there is insufficient evidence to suggest that the children otherwise had access to those tools or materials, or that they were ever in danger or potential danger because of his construction activities.

13. After the inspection, Ms. Yeager had a conversation with Mr. Corneck in which he advised that he had shown some of the day care students how to use tools. Mr. Corneck, however, never told Ms. Yeager that he had given a demonstration to the kindergarten-aged children who were present on the day of the inspection. Rather, his reference to a tool demonstration was about another occasion or occasions when he had demonstrated the

use of tools to some of the older boys in Respondent's after-school care.

14. At the final hearing, Ms. Yeager could not recall the number of children who were there the day of her inspection. The evidence is otherwise inadequate to show that Respondent violated any applicable staff-to-child ratio standards.

15. In sum, the Department failed to prove the alleged violations set forth in the Administrative Complaint.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See §§ 120.569 and 120.57(1) Fla. Stat.^{1/}

17. The Department, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dep't of Health & Rehab. Svcs., 348 So. 2d 349 (Fla. 1st DCA 1977). Because the Department is seeking to prove violations of a statute or rule and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

18. As the licensing authority for child care facilities, the Department has the authority to investigate and take action

to enforce licensing standards for child care facilities found in sections 402.301 through 402.319, Florida Statutes, and in rules developed by the Department pursuant the statutory authority set forth in section 402.305.

19. As a licensed child care facility, Respondent is subject to rules 65C-22.001(4) and 65C-22.002.^{2/}

20. Rule 65C-22.001(4), under which the staff ratio allegation is based, provides:

(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 supervision 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.

(c) For every 20 children, a facility must have one credentialed staff member pursuant to Section 402.305(3), F.S.

21. Rule 65C-22.002(1)(a), cited by the Department in the portion of the Administrative Complaint regarding tools and materials on the playground, provides:

Physical Environment.

(1) General Requirements.

(a) All facilities must be clean, in good repair, free from health and safety hazards and from vermin infestation.

22. As noted in the Findings of Fact, above, the Department did not prove by clear and convincing evidence facts sufficient to show that Respondent violated rule 65C-22.001(4) or 65C-22.002(1)(a) as alleged in the Administrative Complaint.

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 dismissing the Administrative Complaint.

DONE AND ENTERED 15th day of October, 2013, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of October, 2013.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2012 version.

^{2/} References to the Florida Administrative Code are to the versions in effect on January 28, 2013.

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.