

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND  
FAMILIES,

Petitioner,

vs.

Case No. 14-5378

CHUTES N' LADDERS 2, LLC,

Respondent.

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RECOMMENDED ORDER

On January 23, 2015, the final hearing was held in this case in Punta Gorda, Florida, before J.D. Parrish, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Eugenie G. Rehak, Esquire  
Department of Children and Families  
Post Office Box 60085  
Fort Myers, Florida 33906

For Respondent: Phyllis Larkin, pro se  
Chutes N' Ladders 2, LLC  
1961 Royalview Drive  
Port Charlotte, Florida 33948

STATEMENT OF THE ISSUE

Whether the Department of Children and Families (DCF or Petitioner) should impose sanctions against Respondent, Chutes N' Ladders 2, LLC (Respondent), for alleged violations in the operation of a child care center.

PRELIMINARY STATEMENT

On July 23, 2014, DCF issued an Administrative Complaint against Respondent that alleged specific violations of licensing standards pertinent to child care facilities. More specifically, DCF alleged that Respondent had failed to comply with the ratio standard for staff to children and had failed to provide supervision within the standard. Petitioner seeks to impose an administrative fine in the amount of \$100.00 for the two violations.

Upon receipt of the Administrative Complaint, Phyllis Larkin, as co-owner (with her husband, Michael Larkin), timely filed a request for an administrative hearing and contested the factual basis for the complaint. DCF forwarded the case to DOAH for formal proceedings on November 14, 2014. Thereafter, the case was scheduled for hearing in accordance with the parties' Joint Response to Initial Order.

At the hearing, DCF presented testimony from Jeanette Witmer, a DCF licensing counselor. Phyllis and Michael Larkin testified on behalf of Respondent. Petitioner's request for official recognition of Petitioner's Exhibits 1 through 4 (provisions of rules relevant to this matter) was granted in advance of hearing. At hearing, Petitioner's Exhibits 6 through 10 and 13 through 15 were admitted into evidence.

A transcript of the proceeding will not be filed with DOAH. The parties were granted ten days from the time of the hearing within which to file proposed recommended orders. All proposals filed have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Respondent is licensed by DCF to operate a child care facility at 1961 Royalview Drive, Port Charlotte, Florida. Respondent's license certificate is C20CH0032. The facility's current license is effective through July 31, 2015.

2. Petitioner is charged by law to regulate and inspect all child care facilities in the state of Florida to assure compliance with all licensing standards. Licensing standards are defined by statute and rule, and are denoted on the "Inspection Checklist" used by DCF.

3. Prior to November 13, 2013, Jeanette Witmer, a DCF licensing counselor, was assigned to inspect child care facilities licensed in Port Charlotte, Florida. Among those facilities was Respondent's Chutes N' Ladders 2, LLC.

4. On November 13, 2013, Ms. Witmer went to Chutes N' Ladders 2, LLC, to perform a routine inspection. Using the Inspection Checklist, Ms. Witmer went through the facility noting pertinent facts.

5. Ms. Witmer considered the rooms designated as "infant rooms" to be two separate rooms. The capacity for each separate room was clearly and accurately posted. The combined total occupancy for the two rooms was not exceeded. The issue was not the square footage of the rooms or the layout of the rooms. An issue arose because, based upon the documentation then in use, the space was designated as two rooms.

6. As such, each room required the appropriate staffing and supervision for the space. As a practical consideration, Respondent did not treat the space as two rooms. Instead, Respondent considered a fixed table permanently built into a low wall as insufficient to constitute a divider between the two spaces. Respondent, therefore, treated the space as one room.

7. Ms. Witmer noted that supervision could not be provided to all areas of the space by persons standing in one area of the rooms. In fact, such observation formed the basis for a warning given to Respondent on that date. Since there were four children on one side of the space (room 1) and four children on the other side of the space (room 2), Ms. Witmer concluded the caregivers should have been separated, one to each side. Instead, two caregivers were located on one side of the space and could not observe the activity of an infant on the floor in the adjacent room. As a result, Respondent issued a warning for a standards

violation: not having staff appropriately stationed to meet the ratio requirement (1:4).

8. Additionally, when the staff member supervising the two- to three-year-old group could not verbally confirm how many children were under her supervision, another warning was issued. Part of the supervision standard requires staff to be cognizant of the children in their care.

9. After the routine inspection was completed, a copy of the Inspection Checklist documenting the issues noted above was provided to Respondent's facility director.

10. In follow-up to the inspection, Michael and Phyllis Larkin met with Ms. Witmer and Sherrie Quevedo, the DCF licensing supervisor, in December 2013. Among the concerns was the designation of the two rooms as two rooms instead of one large space, and the claim that supervision was an issue.

11. In reality, the facility had the appropriate number of staff to supervise the children in the two rooms. The issue presented when one of the staff went to the separate side of the space and left the children on the other side of the "desk" unattended. This warning could have just as easily been about failure to supervise the children as the ratio standard cited. Once brought to the facility's attention, the problem could have been easily resolved.

12. Similarly, the second warning was minor in that the facility would be able to instruct staff to be aware of their charges at all times. Neither of these issues should have been insurmountable for Respondent. The weight of the credible evidence supports Petitioner's assertion that the December 2013 meeting among the parties was ended on an amicable note with all in agreement.

13. Ms. Witmer next inspected Respondent's facility in connection with a complaint filed. Although eventually determined to be unsubstantiated, Ms. Witmer was required by law to review activities at the facility that allegedly occurred on April 11, 2014.

14. To that end, Ms. Witmer went to Respondent on April 16, 2014, to specifically consider licensing standards related to ratio and supervision: the two standards essential to support child safety. The allegation claimed a child had been bruised under his chin by some means.

15. Ms. Witmer and the facility director, Angela Straub, viewed the video tape kept at Respondent's center for the date in question (April 11, 2014). After reviewing the tape, Ms. Witmer determined that the child who was claimed to have been bruised was not injured. Nevertheless, in reviewing Respondent's video, Ms. Witmer observed other issues.

16. More specifically, Ms. Witmer was able to determine that B.J. (a staff person employed at the facility) committed ratio and supervision violations on April 11, 2014. When confronted by Ms. Witmer and the video depicting the issues noted, B.J. admitted the ratio and supervision violations.

17. Subsequently, Respondent terminated B.J.'s employment with the facility. Additionally, Respondent removed the "table" separating the two rooms and designated the one space for occupancy and staffing.

18. On April 16, 2014, Ms. Witmer advised Ms. Straub and Mrs. Larkin that based upon the video review of the date of the alleged incident, the two standards violations would be imposed against the facility.

19. The video tape for the April 11, 2014, activities at Respondent's facility remained in Respondent's possession. At all times material to the allegations of this case, Respondent exercised exclusive control over the video. Respondent did not maintain a copy of the video of the facility for April 11, 2014. At hearing, Respondent disputed the accuracy of Ms. Witmer's account of the citations for ratio and supervision for April 11, 2014. The persuasive weight of the credible evidence supports Ms. Witmer's account, the Inspection Checklist she maintained contemporaneously with the events, and her conclusions regarding the deficiencies noted.

20. Subsequent to the child abuse investigation being closed, and in accordance with DCF policy, the Complaint Inspection Checklist, Supplemental Inspection Sheet Complaint Form, and Notice of Administrative Action were sent to the facility. Respondent timely filed a request for an administrative hearing.

#### CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2013).

22. In this case, Petitioner bears the burden of proof to establish by clear and convincing evidence that Respondent committed the acts complained of in the Administrative Complaint. See Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); and Pou v. Dep't of Ins. & Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

23. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture & Consumer Services, 550 So. 2d 112, 116, n.5 (Fla. 1st DCA 1989), as follows:

[C]lear 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 evidence 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 the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Fla. Dep't of Bus. & Prof. Reg., 705 So. 2d 652 (Fla. 5th DCA 1998) (Sharp, J., dissenting).

24. The staffing ratios for children in licensed child care facilities are set forth in section 402.305(4), Florida Statutes. For infants from birth through one year of age, there must be one child care personnel for every four children.

25. Supervision requirements for licensed child care facilities are set forth by law. Florida Administrative Code Rule 65C-22.001(5) (a), provides:

(5) Supervision.

(a) Direct supervision means actively watching and directing children's activities within the same room or designated outdoor play area, and responding to the needs of each child. Child care personnel at a facility must be assigned to provide direct supervision to a specific group of children, and be present with that group of children at all times. When caring for school-age children, child care personnel shall remain responsible for the supervision of the children in care, shall be capable of responding to emergencies, and are accountable for children at all times, including when children are separated from their groups.

26. In this case, Petitioner has established by clear and convincing evidence that Respondent committed ratio and supervision standards violations on November 13, 2013, and April 11, 2014. Although not leading to injury or compromised safety of the children in Respondent's care, DCF is charged to fairly administer the standards dictated by the Florida legislature and to work to assure that safety in licensed child care facilities remains paramount. The sanction sought by DCF is the minimum required by law and is legally supported by the facts of this case.

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 violated the ratio and supervision standards as alleged, and imposing an administrative fine in the amount of \$100.00.

DONE AND ENTERED this 24th day of February, 2015, in Tallahassee, Leon County, Florida.



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J. D. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of February, 2015.

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.