STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

PROJECT ESTEEM OF LEON COUNTY,

Petitioner,

v.

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent.
_____/

CASE NO. 15-0777
RENDITION NO. DCF-16-030-FO

FILED
FEB - 9 2016
DCF Department Clerk

FINAL ORDER

THIS CAUSE is before me for entry of a final order concerning whether Petitioner is exempt from licensure are a child care facility pursuant to rule 65C-22.008(2)(c), Florida Administrative Code. The Recommended Order concluded that Petitioner is not exempt. The Department filed timely Exceptions, which are addressed below. Petitioner did not file a reply to the Department's Exceptions.

The Recommended Order

1. The principle issue in this case is whether Petitioner's program is exempted from licensure as a child care facility pursuant to rule 65C-22.008(2)(c), which describes those after school programs which are exempted from licensure in accordance with section 402.305(1)(c), Florida Statutes. There are four types of after school programs that are exempted under the rule. The Administrative Law Judge (ALJ) concluded that Petitioner's program did not meet any of the exemptions because it was not located on public/nonpublic school sites, operating pursuant to an agreement with the school (first type), it provided meals for the children it served (second type), it did not allow all children to enter or leave without adult supervision (third type) and because it served

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children in grades six or below (fourth type). However, in so doing, the ALJ rejected a Department interpretation of rule 65C-22.008(2)(c)2, both as an unadopted rule and as unsupported by the language of the rule.

The Department's Exceptions

2. The Department filed timely Exceptions to the Recommended Order. In its Exceptions, the Department stated that the ALJ's ultimate conclusion regarding Petitioner's exemption was correct, but argued that there were factual findings that were not supported by competent substantial evidence and that certain conclusions of law were erroneous. Each will be discussed in turn.

Department Exception 1: Finding of Fact, Paragraph No. 8.

3. In its first exception, the Department asserts that the following finding is not supported by competent substantial evidence:

> Under the Department's rule, a comparison of the various exemptions demonstrated that safety or supervisory services during the time a student was at Petitioner's facility, was not the defining criteria for determining if a program was an after-school program exempt from licensure, since many such programs offer some supervision and control for programmatic and tort liability reasons.

The Department contends that no evidence was presented as to the supervision practices of other programs, relating to liability prevention or otherwise.

4. In reviewing the Findings of Fact in a Recommended Order, I remain mindful that it is the Administrative Law Judge's function to consider all evidence, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the

evidence, and reach ultimate findings of fact.[1] An agency may not reweigh the evidence.[2] Similarly, an agency may not reject or modify Findings of Fact in a Recommended Order if they are supported by competent substantial evidence.[3] However, it may do so if such findings are not supported by competent substantial evidence. Notably, neither the Department's exceptions nor Petitioner's reply constitute evidence.

5. A review of the record shows that no evidence was presented as to the supervision practices of other types of programs relating to programmatic, tort liability or other reasons. The record shows that the testimony addressed the characteristics of Petitioner's program, the intended application of the rule to various other types of operations and a limited discussion of single-subject programs, such as ballet and karate. The finding in paragraph 8 that "many such programs offer some supervision and control for programmatic and tort liability reasons" is not supported by competent substantial evidence. Similarly, the rule on its face differentiates among programs that provide supervision and those that do not, and Ms. Wass de Czege discussed how some of the terms of the rule relate directly to the supervision of children, while others

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[1]See *Belleua v. Dep't of Environmental Regulation*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997). The weighing of evidence and judging of the credibility of witnesses by the Administrative Law Judge are solely the prerogative of the Administrative Law Judge as finder of fact. See *Strickland v. Fla. A & M Univ., 799 So.2d 276* (Fla. 1st DCA 2001).

[2]When determining whether to reject or modify findings of fact in a recommended order, the agency is not permitted to weigh the evidence, judge the credibility of the witnesses, or interpret the evidence to fit its ultimate conclusions. See *N.W. v. Dep't of Children & Family Servs.*, 981 So.2d 599 (Fla. 3d DCA 2008); *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Aldrete v. Dep't of Health, Board of Medicine*, 879 So.2d 1244, 1246, (Fla. 1st DCA 2004). *Gross v. Dep't of Health*, 819 So.2d 997, 1001 (Fla. 5th DCA 2002).

[3]See *Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Fugate v. Fla. Elections Comm'n*, 924 So.2d 74, 77 (Fla. 1st DCA 2006).

do not. Thus, Finding of Fact Paragraph 8 as a whole is not supported by competent substantial evidence. The Department's exception is therefore granted.

Department Exception 2: Finding of Fact, Paragraph No. 9.

6. In its second exception, the Department asserts that the ALJ erred in characterizing the field trips offer by Petitioner as "summer field trips," as the record shows that Petitioner also provided field trips and transportation for the field trips during the academic year. The Department points to Exhibit 12 as an example.

7. Finding of Fact Paragraph 9 appears to be related to the exemption under rule 65C-22.008(2)(c)2. In that context, field trips would not be problematic if they were part of Petitioner's regular instructional and tutorial/academic activities. However, the record shows that they were not. According to Mr. Degraffenreidt, Project Esteem has not provided transportation for field trips during its hours of operation as an after-school program (TR, 21, 28, 89, 95). They were provided during spring break or summer break. This is consistent with Exhibit 12, which indicated that a field trip was provided during the 2014 spring break. However, Ms. Wass de Czege testified that Petitioner provided a revised response to the Department's survey indicating that field trips were only provided during the summer (TR, 121). She testified that this revised response resolved the issue for her and eliminated the field trips as an issue (TR, 122).

8. Although it appears that Petitioner did provide a field trip during summer break 2014 and that this field trip was not part of its regular instructional and tutorial/academic activities, Ms. Wass de Czege accepted the revised representation that Petitioner would only be providing field trips in the summer. The ALJ adopted that view in Finding of Fact Paragraph 9. Thus, it is not clear from the record that the ALJ's

characterization of Petitioner's filed trips as "summer filed trips" is not supported by competent substantial evidence. In this context, the Department's exception is denied. However, if Petitioner provides such field trips during the academic year, they only meet the exemption under rule 65C-22.008(2)(c)2 if they are part of its regular instructional and tutorial/academic activities.

Department Exception 3: Finding of Fact, Paragraph No. 11 (endnote 2).

9. In its third exception, the Department asserts that the following finding in endnote 2 is not supported by competent substantial evidence:

> Notably, many dance or theater schools offer classes in a variety of dance styles combined with theater training and students often remain for multiple classes. This multiple of class offerings is similar to the multiple classes/instruction provided by Petitioner.

The Department argues that is not supported by competent, substantial evidence. The Department asserts that nothing in the record supports the ALJ's findings related to the practices of dance or theater schools and there is no competent, substantial evidence to support the assertion that such unknown practices are "similar" to the Petitioner's program.

10. A review of the record shows that no evidence was presented as to the actual practices of dance or theater schools. While Ms. Wass de Czege did point to ballet classes as an example of an exempt program under rule 65C-22.008(2)(c)2, she testified that such programs are offered as single subject programs and did not testify that ballet schools offer classes in a variety of dance styles combined with theater training. The Department's exception is therefore granted.

Department Exception 4: Finding of Fact, Paragraph No. 11.

11. In its fourth exception, the Department argues that the ALJ's rejection of the Department's interpretation of rule 65C-22.008(2)(c)2 in paragraph 11 was not properly characterized as a Finding of Fact. The Department further contends that The Department's interpretation is not a "narrowing" of the language and is in fact supported by a plain language reading of the rule as written and intended by the Department.

12. In reviewing the Recommended Order, it is apparent that the ALJ included conclusions of law in her Findings of Fact. This is readily apparent from the concluding sentences in Finding of Fact Paragraphs 8, 9, 10 and 11. The ALJ apparently did so in order to directly link the factual findings in those paragraphs to the relevant exemptions under rule 65C-22.008(2)(c). Similarly, ALJ included discussions of the application of the rule in the Findings of Fact. In some respects, findings of fact are appropriate when addressing testimony concerning the agency's actual application of a rule. However, it is apparent that Finding of Fact Paragraph No. 11 includes conclusions of law. This is particularly true of the ALJ's discussion in paragraph 11 of how the Department applied the rule to Petitioner's circumstances and how its proposed interpretation compare to the ALJ's reading of the rule. The Department's challenge to the ALJ's discussion in paragraph 11 is further addressed in the discussion of its Exception 5.

Conclusion of Law, Paragraph 18: (last sentence)

13. Though not the subject of the Department's exceptions, the last sentence in paragraph 18 of the Recommended Order presents an erroneous interpretation of rule 65C-22.008(2)(c)2. As explained by the Department through the testimony of Samantha Wass de Czege, the listing of examples of exempt programs at the end of

rule 65C-22.008(2)(c)2 supports the Department's interpretation of the rule as limiting the exemption to single-subject programs "such as computer class; ballet; karate; gymnastics; baseball, and other sports." It is apparent that the ALJ did not read rule 65C-22.008(2)(c)2 as a whole and essentially stopped short of this last sentence. The last sentence in the rule provision makes clear that the Department felt it necessary to add explanatory language to the rule. When read as a whole, the language of the rule provision supports the Department's reading that the rule does not contemplate that the exemption would extend beyond single subject programs. That the statute itself does not address the layering of subjects is of no moment, as the statute clearly provides that the Department would decide that type of issue.

Department Exception 5: Conclusion of Law, Paragraph No. 22.

14. In its fifth exception, the Department challenges the ALJ's conclusion that the Department's interpretation of rule 65C-22.008(2)(c)2, Fla. Admin. Code was not a reasonable interpretation of the rule but the implementation of an unadopted policy and therefore not enforceable. The Department further argues that its interpretation does not impose additional requirements from those contained within the rule. It contends that the listing of examples of activities that meet the rule's criteria further clarifies the type of program that qualifies as an afterschool program under this exemption and supports the Department's determination in this case. The Department also argues that the ALJ erred in stating that "the clear language of the rules which must be complied with should be construed in favor of the person from whom compliance is sought," as the cited cases apply to penal provisions, not exemption provisions.

15. The Department's exception is well taken to the extent the authority cited by the ALJ is inapposite and the Department's interpretation is clearly within the range of reasonable readings of the rule, and therefore entitled to deference. While penal rules are to be construed in favor of the person against whom a penalty is sought, rule 65C-22.008(2)(c)2 is not penal.[4] However, the Department may be unable to change the ALJ's characterization of the Department's interpretation as a "policy not otherwise adopted by the agency."

18. A rule cannot be declared to be plain and unambiguous simply upon the authority of the APA. The APA does not mandate that every rule be plain and unambiguous; it only mandates that rules not be vague; that is, expressed in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. See *Dep't of Fin. Servs. v. Peter Brown Construction, Inc.*, 108 So. 3d. 723, 728 (Fla. 1st DCA 2013). The case law providing for deference to agency interpretations makes clear that there are circumstances when a rule can be subject to differing reasonable interpretations. In such circumstances, the agency's choice among those interpretations must be sustained. See *Department of Agriculture v. Sun Gardens Citrus,* 780 So.2d 922, 926 (Fla. 2d DCA 2001).

16. Importantly, the fourth sentence of rule 65C-22.008(2)(c)2 includes an explanatory list of examples of the meaning of the prior sentences, which plainly means that the preceding sentences are certainly subject to differing reasonable interpretations. Notably, each example in the fourth sentence is a single-subject

[4]The two cases cited by the ALJ to support the proposition that the language of the rule should be construed in favor of the person from whom compliance is sought are cases concerning penal statutes and rules, not exemptions from the application of law.

program, which supports the interpretation offered by the Department. Thus, construing the rule to limit the exemption to single-subject programs is not a narrowing of the rule, as it comes from the very words of the rule. However, the examples in the fourth sentence are preceded by the phrase "examples of these programs include, but are not limited to," which also means that there can be other types of instructional or tutorial/academic programs that may satisfy the rule. The Department's exceptions are well-founded and, except as discussed below, are granted.

17. In this case, the Department applied the terms of rule 65C-22.008(2)(c)2 to the facts of this case, which is not an unadopted rule. See *Environmental Trust v. Department of Environmental Protection*, 714 So. 2d 493, 499 (Fla. 1st DCA 1998). Further, an agency interpretation of a rule which simply reiterates the rule's mandate and does not place upon the rule an interpretation that is not readily apparent from its literal reading is not an unadopted rule. See *Amerisure Mut. Ins. Co. v. Fla. Dep't of Fin. Serv.*, 156 So. 3d 520, 531 (Fla. 1st DCA 2015. As discussed above, the Department's interpretation of the rule is based upon its terms. The ALJ's conclusion that the Department's interpretation of the rule is an unenforceable unadopted policy is simply incorrect. However, that conclusion is arguably not within the substantive jurisdiction of the Department. Therefore, in an abundance of caution, that aspect of the Department's exception will be denied.

Acceptance and Substitution of Portions of Recommended Order

18. The ALJ's Findings of Fact, paragraphs 1 through 7, are approved and adopted. Paragraph 8 is revised to read as follows:

8. Attendance and student progress were required to be tracked for the 21st Century Grant program and sign in and out logs were used daily for that purpose. Staff met students at the bus and checked them in. The evidence was not clear that safety was the reason Petitioner used such logs, albeit the logs did provide a safety benefit. Older students, whose attendance was logged and of which there were only a few, were free to come and go. On the other hand, elementary students, which were the bulk of Petitioner's students, were required to be signed out by an authorized adult as a safety measure for the children. Such children were prevented from leaving unless an authorized person signed them out and were clearly under the control and supervision of Project Esteem. Additionally, Petitioner, like a school, gathered health information and kept it on file for each student to ensure all health and safety needs were met for the children while at Project Esteem's program. Indeed, the website for Project Esteem, indicated that the program was designed to "help working parents" by providing a safe environment for students during non-school hours or periods when school is not in session. As such, supervision was provided by Petitioner's staff much like a school provides. Under the Department's rule, supervision and control over a child's entry and leaving the facility was one of many criteria distinguishing certain types of after-school programs defined in subsections (2)(c)2. (supervised programs) and (2)(c)3. (unsupervised entry and exit programs) of rule 65C-22.008(2)(c). However, since supervision of the students' entering and

leaving the program was provided by Project Esteem, Petitioner did not meet the requirements of rule 65C-22.008(2)(c)3. for unsupervised programs. Therefore the Department's denial of the exemption delineated in subsection (2)(c)3. of the rule should be upheld.

19. Findings of Fact, paragraphs 9 and 10, are approved and adopted.

20. Findings of Fact, paragraph 11, is revised to read as follows:

11. The Department presented an interpretation of rule 65C-22.008(2)(c)2. that exempts only programs like an after school ballet or dance school, which offer instruction in a single topic or subject area, and where a child goes after school for instruction and then leaves. The Department's witness presented the example of a program where a child goes after school for instruction in ballet for 30 minutes to an hour and then leaves. The Department felt Petitioner's manner of teaching or instructing in multiple areas at the same time was prohibited by subsection (2)(c)2. of its rule. However, as indicated earlier, the serving of meals does disqualify Petitioner from exemption under subsection (2)(c)2. of the rule. Therefore, given these facts, the Department's denial of the exemption should be upheld.

To the extent that paragraph 11 of the Recommended Order included conclusions of law, such conclusions are rejected and addressed in revised paragraph 21, which I find to be as or more reasonable than the rejected language of paragraph 11.

21. Conclusions of Law, paragraphs 12 through 17, are approved and adopted. Paragraph 18 is modified to read as follows, which I find to be as or more reasonable than the modified paragraph:

18. The Rule was promulgated by the Department to allow for exemption from licensure for certain programs that meet the criteria for an "after school program." The Department interpreted rule 65C-22.008(2)(c)2. to exempt only programs like a ballet or dance school, which offer instruction in a single topic or subject area, where a child goes after school for instruction and then leaves.

22. Conclusions of Law, paragraphs 19 through 21, are approved and adopted.

23. Conclusion of Law, paragraph 22, is rejected as a misstatement of law and replaced with the following, which I find to be as or more reasonable than the rejected paragraph:

22. The fourth sentence of rule 65C-22.008(2)(c)2 includes an explanatory list of examples of the meaning of the prior sentences, which plainly means that the preceding sentences are subject to differing reasonable interpretations. Each example in the fourth sentence is a single-subject program, where a child goes after school for instruction and then leaves. This language supports the interpretation offered by the Department. However, the examples are preceded by the phrase "examples of these programs include, but are not limited to," which also means that there can be other types of instructional or tutorial/academic programs that may satisfy the rule. Thus, the rule is subject to differing interpretations. Although reasonable, and therefore entitled to deference, the

Department's interpretation of the rule is unadopted policy that cannot be enforced by an agency. As such, the Department may not apply the rule so as to prohibit Petitioner's method of teaching, tutoring or instructing in more than one subject area at a time.[5]

24. Conclusions of Law, paragraph 23 through 25, are approved and adopted.

Accordingly, the decision to deny the exemption from licensure as a child care facility was proper and the request for hearing filed in this cause is dismissed.

DONE AND ORDERED in Tallahassee, Leon County, Florida, this 9 day of February, 2016.

Mike Carroll, Secretary

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE. A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF CHILDREN AND FAMILIES AT 1317 WINEWOOD BOULEVARD, BUILDING 2, ROOM 204, TALLAHASSEE, FLORIDA 32399-0700, AND A SECOND COPY ALONG WITH FILING FEE AS PRESCRIBED BY LAW, IN THE DISTRICT COURT OF APPEAL WHERE THE PARTY RESIDES OR IN THE FIRST DISTRICT COURT OF APPEAL. THE NOTICE OF APPEAL MUST BE FILED (RECEIVED) WITHIN 30 DAYS OF RENDITION OF THIS ORDER.[6]

[5]The ALJ's determination that the Department's interpretation was an unadopted rule was combined with her erroneous interpretation of the rule. The last two sentences in this paragraph are an attempt to separate the former, which the Department may change, from the latter, which it may not.

[6]The date of the "rendition" of this Order is the date that is stamped on its first page.

Copies furnished to the following via U.S. Mail on date of Rendition of this Order.

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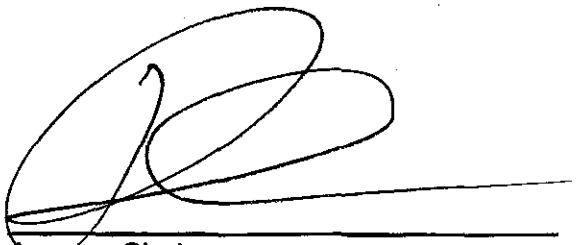

Agency Clerk