

STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES

CHILDREN'S ACADEMY PRESCHOOL,  
INC., d/b/a CHILDREN'S ACADEMY  
PRESCHOOL I,

Petitioner,

CASE NO. 15-6474  
RENDITION NO. DCF-16-137-FO

vs.

DEPARTMENT OF CHILDREN  
AND FAMILIES,

**FILED**

**JUL - 6 2016**

Respondent.

DCF Department Clerk

**FINAL ORDER**

THIS CAUSE is before me for entry of a final order concerning the Department's intended denial of Petitioner's application to renew its license to operate a child care facility. The Recommended Order concluded that the Department had shown that Petitioner had committed a Class I Violation but that the Department could not revoke Petitioner's license under the terms of Rule 65C-22.010, Florida Administrative Code, and recommended that the Department issue a \$1,400 fine and convert Petitioner's license to probationary status. The Petitioner and the Department both filed exceptions to the Recommended Order.

**Petitioner's Exceptions**

**Findings of Fact, Paragraph 23.**

Petitioner takes exception to Findings of Fact, paragraph 23, which provides:

23. Fleary concluded, and the undersigned finds, that the conditions found in the kitchen area, bathrooms, and storage depicted in the Department's Exhibits 2 and 5 jeopardized the health and safety of the children and staff,

and exposed the children and staff to safety and health risks.

Petitioner takes exception to the foregoing but provides no explanation for that exception. Petitioner's exception is denied.

**Conclusions of Law, Paragraph 87.**

Petitioner takes exception to Conclusions of Law, paragraph 87, which provides:

87. Based on the credible and persuasive evidence, the undersigned finds that the Class I violation under section 14-04 of the "Checklist" was not brought into compliance by October 9, 2015.

Petitioner contends that there is no basis, as defined in Conclusions of Law, paragraph 82, or in the record, for a Class I violation. Petitioner asserts that the incidents of noncompliance in this matter are not as serious in nature as described in the Class I standard as described on CF-FSP Form 5316. Petitioner contends that the incidents of noncompliance in this matter would at the very most be classified as a Class III or II violation.

According to Petitioner, the record reflects and the ALJ found that Petitioner had no instances of noncompliance prior to the allegations in this action and, therefore, under F.A.C 65C-22.010(d)4, these instances would be classified as "Technical Support Violations" and not Class I, II or III Violations.

The record contains competent substantial evidence to show that Petitioner has committed a Class I violation. Rule 65C-22.020(1)(d)1., Florida Administrative Code, provides that Class I violations are the most serious in nature, pose an imminent threat to a child including abuse or neglect and which could or does result in death or serious harm to the health, safety or well-being of a child. Respondent's Exhibit 3 established that Petitioner had committed a Class I Violation:

**Non-Compliance Description**

14-04 An Area of the facility was observed to be a serious health hazard to children in care.

**Comments**

There were serious health hazards observed. There were living and dead roaches and dropping throughout the entire facility and in the food preparation and storage area. There was evidence of serious water damage, holes in the ceiling and ceiling food cabinets which allowed roaches and vermin to access the food storage areas. Areas of the facility was observed to be in poor and not in good repair condition. There was evidence of improper garbage disposal too close to the children play area. There were broken and damaged equipments, improper garbage disposal not kept inside the garbage dumpster which is the breeding ground for rodent and vermin. The areas of the classrooms were observed with peeling paint, water damage to the ceilings and walls as well as kitchen and bathroom areas. Based on these violations they constitute a class one citation.

**Due Date** 10/09/2015

**Violation Level** Class 1

(Resp. Exh. 3, page 21 of 33)

Ian Fleary explained why the foregoing violation was a Class I Violation:

Q. And what was the most serious violation in this renewal inspection report that was issued?

A. 14.4, a class I violation.

Q. And what is a class I violation?

A. A class I violation is a violation of the most serious consequence and most serious instance.

Q. And why is it so serious for child care licensing?

A. A class I violation may constitute to health and safety issues with children. It may

also involve child abuse and/or neglect and may cause harm or serious injury to a child.

Q. And with respect to the harm and what a class I definition is, does that have to happen, that harm?

A. Not necessarily, ma'am. There is a potential for harm.

Q. Okay. And when you went out to Children's Academy Preschool, when you made these observations with Ms. Derize and other staff members, can you tell us what you felt the potential harm to the children would be?

A. The condition of the facility, the repair condition, the mold, the walls that were deteriorated, the water damage, the food that was compromised by rodent, and rodent droppings, live roaches pose a serious health risk to children consuming and/or breathing the air that was there at the time.

(TR41, L9 – TR42, L14)

The record therefore supports a conclusion that Petitioner committed a Class I Violation within the meaning of Rule 65C-22.020(1)(d)1., Florida Administrative Code. The ALJ found that conditions of Petitioner's facility, particularly the kitchen and bathrooms, were deplorable and shocking. The conditions of those areas were foul, unsanitary, and exposed the children to health and safety hazards.

Moreover, as discussed below, Petitioner's violations clearly show that it has not met the all standards required by sections 402.301 through 402.319, Florida Statutes. The Department retains its authority under section 402.308(3), Florida Statutes, to deny any application for renewal if, upon reexamining the facility, it is not satisfied that, all standards required by sections 402.301 through 402.319, Florida Statutes have been met. Petitioner's exception is denied.

#### **Department's Exceptions**

##### **Conclusions of Law, Paragraph 90.**

The Department takes exception to Conclusions of Law, paragraph 90, which (along with its endnote) provides:

90. The rule adopted to implement this provision, 65C-22, expressly provides that a license may only be revoked or denied for a Class I violation for the third or fourth violation in a two-year period. 19/

[endnote] 19/ In the absence of any specific law or rule to the contrary, this conclusion is not changed merely because Petitioner was up for renewal of its license. The undersigned has not been provided any statute or rule from the parties suggesting that a renewal applicant is held to a different standard than an active licensee. If this case had been presented as a violation reported by the public with disciplinary enforcement imposed, the path and options would have been even more clear. Regardless, a renewal scenario does not dictate a different outcome. For renewal of a license, the condition of the premises is still judged against the same standards as it would be had a violation been anonymously reported or discovered. (See generally § 402.308(3)(b) and (d), Fla. Stat.). The parties have not cited any statute or rule to the contrary.

The Department contends that the ALJ misinterpreted rule 65C-22.010(2)(e)1.a., Florida Administrative Code, asserting that subsection (2)(e)1.a. of the rule applied and provided that the Department would impose a fine of not less than \$100, nor more than \$500 per day, for each violation and also provided discretion to impose other disciplinary sanctions in addition to the fine.

Rule 65C-22.010(2)(e)1, Florida Administrative Code, provides:

(e) Disciplinary sanctions for licensing violations that occur within a two year period shall be progressively enforced as follows:

1. Class I Violations.

a. For the first and second violation of a Class I standard, the department shall, upon applying the factors in Section 402.310(1), F.S., issue an administrative complaint imposing a fine not less than \$100 nor more than \$500 per day for each violation, and may impose other disciplinary sanctions in addition to the fine.

The Department contends that denial or revocation are among the "other disciplinary sanctions" available under paragraph 1.a. of the rule. The Department asserts that denial is justified in this case, based on the egregiousness of the Class I violation, which the ALJ found "...result in extended exposure of children and staff to unsanitary conditions... and would unduly harm the public by allowing a publicly unhealthy and unsanitary condition to continue to exist."

The ALJ's reading of the rule as precluding denial or revocation as an option under paragraph 1.a. of the rule, confuses mandatory with permissive terms and fails to accord a reasonable meaning to the words of the rule. Section 402.310(1)(s), Florida Statutes, enumerates the sanctions that the Department may impose as an administrative fine, conversion of a license or registration to probation status, or denial, suspension, or revocation of a license or registration. Paragraph 1.a. of the rule requires the imposition of a daily fine ranging from \$100 to \$500 and permits the Department to "impose other disciplinary sanctions in addition to the fine." The term "in addition to" clearly refers to sanctions other than higher fines, so it must encompass other sanctions enumerated under Section 402.310(1)(a), Florida Statutes, that is conversion of a license or registration to probation status, or denial, suspension, or revocation of a license.

The ALJ contends that denial of a license is not an "other disciplinary sanction" available under paragraph 1.a. because it is one of the required actions under

paragraph 1.b. However, the fact that a sanction is required by paragraph 1.b. does not mean that it is not permissible under paragraph 1.a. The ALJ fails to recognize that the intent behind paragraph 1.a. is to provide options for additional sanctions, and that denial and revocation are both considered disciplinary sanctions for purposes of subsection (2) of the rule. Further, the ALJ's reading of the phrase "any other disciplinary sanctions" in paragraph 1.a. limits the other sanctions to the single sanction of conversion of a license to probation status. It makes no sense to use the phrase, "other disciplinary sanctions," a plural reference, if the intent was to simply refer to the one sanction that the ALJ believes is available.

Moreover, regardless of the characterization of the violations in Rule 65C-22.101, Florida Administrative Code, the Department retains its authority under section 402.308(3), Florida Statutes, to deny any application for renewal if, upon reexamining the facility, it is not satisfied that all standards required by sections 402.301 through 402.319, Florida Statutes, have been met. Section 402.308(3)(b), Florida Statutes, provides:

(b) Prior to the renewal of a license, the department shall reexamine the child care facility, including in that process the examination of the premises and those records of the facility as required under s. 402.305, to determine that minimum standards for licensing continue to be met.

Section 402.308(3)(d), Florida Statutes, then provides:

(d) The department shall issue or renew a license upon receipt of the license fee and upon being satisfied that all standards required by ss. 402.301-402.319 have been met. A license may be issued if all the screening materials have been timely submitted; however, a license may not be issued or renewed if any of the child care personnel at the applicant facility have failed the screening required by ss. 402.305(2) and 402.3055.

Read in para materia, these provisions specifically require a reinspection prior to renewal of a license and that a license will be renewed if the Department is satisfied that all standards required by sections 402.301 through 402.319, Florida Statutes, continue to be met. Conversely, they authorize denial of renewal if the Department is not satisfied that all statutory standards continue to be met.

Here, it is clear that Petitioner's facility did not satisfy the standards for sanitation and safety and, therefore, the Department was authorized to deny renewal under the statute. Petitioner's noncompliance was substantial. As found by the ALJ, the conditions of Petitioner's facility, particularly the kitchen and bathrooms, were deplorable and shocking. The conditions of these areas were foul, unsanitary, and exposed the children to health and safety hazards. The Department's exception to Conclusion of Law paragraph 90 is granted. However, given the context of the analysis in paragraph 90, Conclusions of Law paragraphs 88 and 91 are also rejected.

#### Adoption of Findings of Fact

There being no exceptions to, and otherwise finding no basis to reject or modify the Findings of Fact in the Recommended Order (paragraphs 1 through 63), the same are approved and adopted herein.

#### Adoption of Conclusions of Law

With the exception of paragraphs 88 through 91, which are replaced with paragraphs 88 and 89 as set forth below, the Conclusions of Law in the Recommended Order are approved and adopted herein. The following modified versions of paragraphs 88 and 89, which I find are as or more reasonable than those that were modified or replaced are approved and adopted herein.



88. Having concluded that Petitioner has committed a Class I Violation, Petitioner should be assessed a daily administrative fine of \$100 for the period from September 25 through October 9, 2015, for a total amount of \$1,400, in accordance with the provisions of rule 65C-22.01022.010(2)(e)1, Florida Administrative Code, to be paid within 60 days. In addition, Petitioner's application for renewal should be denied in accordance with the provisions of rule 65C-22.010(2)(e)1.a., Florida Administrative Code.

89. Moreover, as Petitioner has clearly been shown to have not met all standards required by sections 402.301-402.319, Florida Statutes, but has been shown to have been in substantial noncompliance with those standards, its application for renewal should be denied per the terms of section 402.308(3)(d), Florida Statutes.

#### Rejection of the Recommendation


The ALJ's recommendation is rejected. After a review of the complete record, including Department Exhibits 2, 3, 4 and 5 and the testimony of Ian Fleary (TR, Pp. 28-103) and Manuel Falla (TR, Pp. 105-142), it is concluded that the ALJ's recommendation of converting Petitioner's license to probationary status is insufficient. The cited exhibits and testimony established that the conditions of Petitioner's facility, particularly the kitchen and bathrooms, were deplorable and shocking and that those areas contained foul and unsanitary conditions that exposed the children to health and safety hazards. Moreover, it is quite clear from the Department's inspections that minimum standards for

licensing had not continued to be met, justifying denial of renewal in accordance with section 402.308(3)(d), Florida Statutes.

Accordingly, the Recommended Order is approved and adopted as modified above. Petitioner is hereby assessed a daily administrative fine of \$100 for the period from September 25 through October 9, 2015, for a total amount of \$1,400, to be paid within 60 days of the date of this Final Order. Further, Petitioner's application for renewal of its child care license is **DENIED**.

**DONE AND ORDERED** at Tallahassee, Leon County, Florida, this 6 day of

June, 2016.

  
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Mike Carroll, Secretary

**NOTICE OF RIGHT TO APPEAL**

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY A PARTY PURSUANT TO SECTION 120.68, FLORIDA STATUTES, AND RULES 9.110 AND 9.190, FLORIDA RULES OF APPELLATE PROCEDURE. SUCH APPEAL IS 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.<sup>1</sup>

<sup>1</sup>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.<sup>2</sup>

Karen Milia Annunziato  
Assistant General Counsel  
Department of Children and Families  
401 Northwest 2nd Ave., Ste. N-1014  
Miami, Florida 33128

Tanishia Findlay Stokes, Esquire  
Law Office of T. Findlay Stokes, P.A.  
8362 Pines Boulevard, Suite 270  
Pembroke Pines, Florida 33024

Sadiki Mosi Alexander, Esquire  
Findlay Stokes, Lynch & Brown, PLLC  
8362 Pines Boulevard, Suite 254  
Pembroke Pines, Florida 33023

Claudia Llado, Clerk  
Division of Administrative Hearings  
Thee DeSoto Building  
1230 Apalachee Pkwy  
Tallahassee, FL 32399-3060



Agency Clerk

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<sup>2</sup>The date of the "rendition" of this Order is the date that is stamped on its first page.