STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 17-5759

WIZ KIDZ LEARNING 2 INC., d/b/a WIZ KIDZ LEARNING 2,

Respondent.[1/]
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on January 5, 2018, and February 16, 2018, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Patricia E. Salman, Esquire
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For Respondent: Curtis C. Turner, Jr., Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a child care facility operating under a probation-status license, violated the terms of probation by committing three Class II

Violations, as Petitioner alleges, and if so, whether the license should be suspended or revoked; and, alternatively, whether, if Respondent committed the alleged Class II Violations (or any of them), Petitioner should deny Respondent's application for renewal of license.

PRELIMINARY STATEMENT

On September 26, 2017, Petitioner Department of Children and Families issued a Notice of Intent to Deny Child Care Facility Licensure, which informed Respondent Wiz Kidz Learning 2, Inc., that Respondent's pending application for renewal of license would be denied because, on August 17, 2017, Respondent had been "cited for 3 class II violations and 7 class III violations in direct violation of [its] probationary license terms."

The licensee timely exercised its right to be heard in a formal administrative proceeding. On October 17, 2017, the agency referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge.

The final hearing began as scheduled on January 5, 2018, with both parties present. During the hearing, it became apparent that the agency was actually seeking to revoke a new probation-status license, effective from September 2, 2017, until March 1, 2018, which had been issued while Respondent's

application for renewal of license was pending. The hearing was continued so that the agency could issue an administrative complaint.

Petitioner issued and filed an Amended Administrative Complaint on January 5, 2018, which charged Respondent with three Class II Violations in violation of the terms of probation, and sought to revoke Respondent's license on those grounds.

The final hearing resumed, as scheduled, on February 16, 2018. The agency called two witnesses, its employees Melinda Harrison and Quendra Gomez. Petitioner's Exhibits 1A, 1B, 8, 11, and 12 were received in evidence without objection. Stephanie Scafie, an employee of Respondent, testified on Respondent's behalf. Respondent's Composite Exhibit C was admitted into evidence.

The final hearing was transcribed, but neither party ordered a transcript of the proceeding. Each side submitted a Proposed Recommended Order. (Respondent's was filed at 8:00 a.m. on March 2, 2018, the day after the deadline established at the conclusion of the hearing but has been considered, nonetheless.)

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2017, except that all references to statutes or rules defining

disciplinable offenses or prescribing penalties for committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

FINDINGS OF FACT

1. Respondent Wiz Kidz Learning 2, Inc. ("Wiz Kidz"), holds a probation-status Certificate of License, numbered C11MD1914, which authorizes the company to operate a child care facility in Palmetto Bay, Florida, for six months, from September 2, 2017, through March 1, 2018. The licensee does business under the name Wiz Kidz Learning 2. As the operator of a licensed child care facility, Wiz Kidz falls under the regulatory jurisdiction of Petitioner Department of Children and Families ("DCF").

2. At the time of the final hearing, Wiz Kidz had been a probation-status licensee for more than six months. DCF had converted Wiz Kidz' license to probation status effective June 29, 2017, after finding Wiz Kidz guilty of violating the staff-to-child ratio rules four times in a two-year period, as charged in an Amended Administrative Complaint dated May 25, 2017, which Wiz Kidz had not contested. The conditions of probation were that Wiz Kidz would pay all outstanding fines, not violate the staff-to-child ratio rules again, not commit any other Class I or Class II Violations while on probation, and submit to biweekly inspections.

3. Wiz Kidz' initial probation-status license had been due to expire on September 1, 2017. Shortly before that date, however, Wiz Kidz had submitted a renewal application, which meant that, by operation of law, the probation-status license would not expire until DCF had finally acted upon Wiz Kidz' application for renewal.[2/] Instead of simply allowing Wiz Kidz to operate on the "unexpired" license, however, DCF issued a new probationary license to Wiz Kidz effective from September 2, 2017, to March 1, 2018, which essentially renewed the initial probation-status license for another six-month period of probation.[3/]

4. On August 17, 2017, DCF employees Claudia Alvarado Campagnola and Quendra Gomez conducted an inspection of the Wiz Kidz facility between the hours of 9:00 a.m. and 2:00 p.m., during which they observed three alleged incidents of noncompliance with "Class II" (mid-level) licensing standards, namely: (1) storing a toxic substance in a place accessible to children; (2) failing to provide adequate direct supervision; and (3) failing to possess a current attendance record during a fire drill. On September 26, 2017, DCF issued to Wiz Kidz a Notice of Intent to Deny Child Care Facility Licensure, which gave notice that DCF planned to deny Wiz Kidz' pending application for renewal of license because, on August 17, 2017, Wiz Kidz had been "cited for 3 class II violations and

7 class III violations in direct violation of [its] probationary license terms."

5. The "toxic substance" seen on August 17, 2017, was an alcoholic beverage. Upon entering the facility, Ms. Gomez noticed two unopened bottles of champagne at the back of a shelf, behind (and partially obscured by) a large plastic toy and other items. There is no photograph of the shelf in evidence, and the descriptive testimony lacked precision; as near as the undersigned can tell, this shelf was several feet long, about one foot deep, and mounted about five feet high on one of the classroom walls. One detail is not disputed: the shelf was above the heads of even the oldest children in care (between the ages of six and seven years). Thus, even if a child could have seen the bottles, he would not have been able to take possession of them without deliberate effort; because the bottles were well out of reach, the child would have needed to stand on a stepladder or its equivalent (e.g., a suitable chair) to get his hands on them.

6. There is no evidence that a stepladder was available. Ms. Gomez testified that a child could have pulled over a chair and climbed on it to reach the champagne bottles. Perhaps so. On the other hand, while the undersigned can reasonably infer that there were chairs in the classroom, he cannot reasonably infer that any of them would have been fit to enable a child to

access the bottles. To establish the element of "accessibility" based on the theory that a chair could be used as a stepladder, DCF needed to prove that a *suitable* chair was actually there for a child present in the classroom to use. This it failed to do. There is no evidence regarding the dimensions of the available chairs, nor any evidence concerning the heights of the children. The witnesses provided only a rough idea of the height of the shelf; their reasonably consistent accounts constitute clear and convincing evidence of the general fact that the shelf was higher than the kids' heads, but not of the actual measurement. Absent proof of these material facts, Ms. Gomez's testimony regarding the way a child could have gotten hold of the champagne bottles is too speculative to support a finding that these items were, in fact, physically accessible to the children.

7. In addition, there is no evidence suggesting that a child could have dragged a chair over to the shelf and clambered up without attracting the attention of an adult. Given that the shelf was located in the classroom, the undersigned infers that no child reasonably could have pulled this off, unless the adult in the room were asleep at the switch.

8. Finally, it is worth mentioning that *if* a child were able to stand on a chair and grab a champagne bottle without being caught, he still would not have access to the "toxic

substance" in the bottle unless he could somehow pour it out. There is no evidence in the record concerning how one opens a champagne bottle, but common experience teaches the undersigned that a young child (the children in care were less than eight years old) likely would have difficulty twisting out the cork. In any event, DCF failed to prove that any of the children at Wiz Kidz reasonably could have popped the cork on the champagne, and therefore it failed to prove that the *champagne* was accessible to a child.

9. The other two alleged violations occurred during a fire drill, which the inspectors required Wiz Kidz to conduct, in their presence, during the children's nap time. Three children exited the facility in their bare feet. The area where the children were assembled after evacuating the "burning building" was near a dumpster; some litter and tree branches were on the ground. From these facts, which were not seriously disputed, DCF infers that the children were not adequately supervised.

10. The undersigned rejects this inference, which does not reasonably and logically follow from the basic facts. To begin, there is no rule that requires children always to wear shoes. Thus, that some of the children had removed their footwear before taking a nap is of no concern. When the alarm went off, staff evidently did not make these children pause to put their shoes back on, which would have protected their feet——but

delayed their exit. To be sure, it is probably a good practice, generally speaking, to prevent young children from going outside barefoot. Clearly, however, it is best not to let them perish in a fire; in an emergency, getting to safety is the highest priority. Because the purpose of a fire drill is to simulate an actual emergency, the fact of the barefoot children prompts undersigned to infer, not that staff failed to provide adequate supervision, but that staff facilitated the speediest escape under the circumstances.

11. During the fire drill, one of the teachers failed to take along a current attendance record when leaving the building, which (unlike the wearing of shoes) *is* mandated by rule.

Ultimate Factual Determinations

12. Wiz Kidz is not guilty of storing a toxic substance in a place accessible to children because the evidence failed to establish an incident of noncompliance with Florida Administrative Code Rule 65C-22.002(1)(f).

13. Wiz Kidz is not guilty of failing to provide adequate direct supervision because the evidence failed to establish an incident of noncompliance with rule 65C-22.001(5)(a).

14. The undersigned determines, based upon clear and convincing evidence, that a staff member failed to possess a current attendance record during a fire drill, which constitutes

an incident of noncompliance with licensing standard No. 33-12, which implements rule 65C-22.002(7)(e). This was Wiz Kidz' first occasion of noncompliance with licensing standard No. 33-12.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

16. A proceeding, such as this one, to impose discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, DCF must prove the charges against Wiz Kidz by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

17. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear 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 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.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

18. Section 402.310, Florida Statutes, authorizes DCF to impose discipline against licensed child care facilities. This statute provides, in pertinent part, as follows:

> [DCF] or [a] local licensing agency may administer any of the following disciplinary sanctions for a violation of any provision of ss. 402.301-402.319, or the rules adopted thereunder:
>
> * * *
>
> 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 not be issued for a period that exceeds 6 months and the probation-status license or registration may not be renewed. 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 with ss. 402.301-402.319.

§ 402.310(1)(a), Fla. Stat. (emphasis added).

19. DCF charged Wiz Kidz, a probation-status licensee, with the commission of three Class II Violations. A single Class II Violation would constitute noncompliance with the terms of Wiz Kidz' probation.

20. Rule 65C-22.002(1)(f) provides that "[a]ll potentially harmful items including cleaning supplies, flammable products, poisonous, toxic, and hazardous materials must be . . . stored in a locked area or must be inaccessible and out of a child's reach." Licensing standard No. 15-01 makes it a potential level II offense if a "toxic substance was accessible to children." See CF-FSP Form 5316, Child Care Facility Standards Classification Summary, July 2012, incorporated by reference in Fla. Admin. Code R. 65C-22.010(1)(d)1.

21. Rule 65C-22.001(5)(a) provides that "[c]hild 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." Licensing standard No. 05-15 makes it a potential level II offense if "[o]ne or more children were not adequately supervised in that [ ], which was anticipated as posing a threat to the health, safety or well-being of a child, but the threat was not imminent." See CF-FSP Form 5316.

22. Rule 65C-22.002(7)(e) provides that "[a] current attendance record must accompany staff out of the building during a drill or actual evacuation, and be used to account for all children." Licensing standard No. 33-12 makes it a potential level II offense if "[t]he facility operator/staff failed to possess a current attendance record during a fire drill, emergency preparedness drill or an actual emergency." See CF-FSP Form 5316.

23. Rule 65C-22.010(1)(d)2. defines a "Class II Violation" as "the second or subsequent incident of noncompliance with an individual Class II standard as described on CF-FSP Form 5316."[4/]

24. Rule 65C-22.010(1)(d)4. defines a "Technical Support Violation" as "the first or second occurrence of noncompliance of an individual Class III standard or the first occurrence of noncompliance of an individual Class II standard."[5/]

25. The foregoing statutory and rule provisions "must be construed strictly, in favor of the one against whom the penalty

would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011)(statutes imposing a penalty must never be extended by construction).

26. Further, the grounds proven must be those specifically alleged in the administrative complaint. See, e.g., Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458 So. 2d 842, 844 (Fla. 2d DCA 1984). Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. See § 120.60(5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an

administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action . . . ."); see also Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").[6/]

27. As discussed above, the undersigned has determined as a matter of ultimate fact, based upon clear and convincing evidence adduced by DCF, that Wiz Kidz caused or allowed a single incident of noncompliance with licensing standard No. 33-12 to occur on August 17, 2017.

28. Because this was a first occurrence of noncompliance with standard No. 33-12 for Wiz Kidz, the incident constitutes a Technical Support Violation, not a Class II Violation, as those terms are defined in rule 65C-22.010.

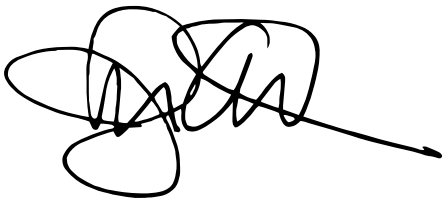
29. The commission of a Technical Support Violation is not unambiguously prohibited by the terms of Wiz Kidz' probationary license.[7/] To establish a violation of probation, therefore, DCF needed to prove that Wiz Kidz committed at least one Class I or Class II Violation. This it failed to do.[8/]

30. Therefore, notwithstanding the incident of noncompliance with licensing standard No. 33-12, Wiz Kidz remained in compliance with the terms of probation.

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 finding Wiz Kidz *not* in violation of the terms of probation. It is further RECOMMENDED that Wiz Kidz' application for renewal of license not be denied based on the commission of a Technical Support Violation.

DONE AND ENTERED this 20th day of March, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of March, 2018.

ENDNOTES

[1/] The undersigned has amended the caption to reflect the proper alignment of the parties, so that the Department of Children and Families is Petitioner and the licensee is Respondent.

[2/] See § 120.60(4), Fla. Stat.

[3/] Although not at issue here, the legality of this renewal is questionable because a "probation-status license or registration may not be renewed." See § 402.301(1)(a)2., Fla. Stat.

[4/] The rule provision quoted above is the version that was in effect on August 17, 2017. This definition was later substantially amended, effective October 25, 2017.

[5/] The rule provision quoted above is the version that was in effect on August 17, 2017. This definition was later repealed, effective October 25, 2017.

[6/] In its Proposed Recommended Order, DCF cites rule 65C-22.002(1)(h), which provides that "[n]o narcotics, alcohol, or other impairing drugs shall be present on the premises." A violation of this rule, however, is a separate offense from the violation of rule 65C-22.002(1)(f) with which DCF charged Wiz Kidz. Therefore, the undersigned has not considered whether Wiz Kidz violated rule 65C-22.002(1)(h).

[7/] The relevant terms of probation are that Wiz Kidz shall "not violate any Class I or Class II Standard" while on probation. Since a licensee's first instance of noncompliance with a Class II Standard constitutes a Technical Support Violation rather than a Class II Violation, the probationary terms at issue are ambiguous as to whether a violation of a Class II Standard that does not also constitute a Class II Violation is a violation of probation. Such ambiguity must be resolved in favor of the licensee.

[8/] Notably, DCF has not asserted or argued that a mere Technical Support Violation violates the terms of probation. Instead DCF has simply ignored the distinction between Technical Support Violations and Class II Violations, tacitly (and incorrectly) equating the first occurrence of noncompliance with a Class II Standard to a Class II Violation.

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.