FILED

DEC 13 2019

DCF Department Clerk

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

v.

CASE NO. 18-1837
RENDITION NO. DCF-19-241-FO

CAPC HEAD START- GIBSON CENTER,

Respondent.
_________________________________/

FINAL ORDER

THIS CAUSE is before me for entry of a final order concerning the Department's February 12, 2018, Administrative Complaint, notifying Respondent of the following violations: two Class I violations of section 402.302, Florida Statutes, and Rule 65C-22.001(5) and (6), Florida Administrative Code, two Class I violations of acts or omissions that meet the definition of child abuse or neglect as provided in Chapter 39, Florida Statutes, two Class I violations of section 39.201, Florida Statutes, and 65C-22.001(11), Florida Administrative Code, and a Class III violation of section 402.305(5), Florida Statutes, and Section 3 of the Child Care Facility Handbook, incorporated by reference in Rule 65C-22.001(6), Florida Administrative Code. The Department assessed administrative fines that totaled $2,525.00 and revoked Petitioner's license pursuant to section 402.310, Florida Statutes.

The Recommended Order, dated September 10, 2018, concluded Respondent only committed two of the six Class I violations charged; Respondent committed the two Class I violations of section 402.302, Florida Statutes, and Rule 65C-22.001(5) and (6), and the $500.00 fine for each violation was appropriate. The Recommended Order

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additionally concluded that the Department proved by clear and convincing evidence that there was a six-inch by twelve-inch hole in the floor of a classroom at Respondent's facility. However, it further concluded the Department did not move the standards referenced in section 402.305(5) and Rule 65C-22.001(6) into evidence; therefore, the Class III violation was not proven by clear and convincing evidence. The Department filed exceptions to the Recommended Order and the Respondent filed a Response to the exceptions.

Exceptions

Petitioner takes exception to Paragraphs 46, 49, 54, and 56 of the Conclusions of Law.

> 46. The instant case does not involve any allegations of physical, mental, or sexual abuse and/or injury. Therefore, in order to demonstrate that the incidents on September 20 and 28, 2017, amount to "abuse" within the meaning of section 39.01(2), the Department must prove by clear and convincing evidence that: (a) there was an act or omission that resulted in harm; and that (b) the harm caused or was likely to cause the child's physical, mental, or emotional health to be significantly impaired.
>
> 49. However, the statutory definition of "abuse" requires that there be harm that causes or is likely to cause the child's physical, mental, or emotional health to be significantly impaired.
>
> 54. Because disciplinary statutes must be strictly construed against the agency seeking to impose discipline, that fact cannot support a finding that there was "harm" within the meaning of section 39.01(30)(a)(3). See Munch v. Dep't of Prof's Reg., Div. of Real Estate, 592 So. 2d 1136, 1143, (Fla. 1st DCA 1992). As a result, the incidents on September 20 and 28, 2017, do not amount to "abuse" within the meaning of section 39.01(2).
>
> 56. The facts associated with the instant case do not fall within the definition of "neglect" set forth in section 39.01(45). That is particularly true given that he statute must be strictly construed in Respondent's favor.

Petitioner argues in this exception that Respondent was not responding to the needs of the two children to be in seat restraints; one child was left alone on the bus and the other child was hiding under a seat. "Either through abuse or neglect,

Respondent left the two children at risk of harm likely to cause physical injury." See 39.01(30), (45), Fla. Stat.

In support of the argument that Respondent committed acts or omissions that constitute "abuse," Petitioner is referencing the definition of "injury" found in section 39.01(30)(a)3. (2017), which states:

> Leaving a child without adult supervision or arrangement appropriate for the child's age or mental or physical condition, so that the child is unable to care for the child's own needs or another's basic needs or is unable to exercise good judgment in responding to any kind of physical or emotional crisis.

Respondent argues in its Response that the "leaving a child without adult supervision" must be an intentional act and it points to the Department's final order in the Department of Administrative Hearing Case No. 17-6741, entered on July 6, 2018. Revised Paragraph 31 of the final order stated:

> Therefore, the Department had to prove the following elements by clear and convincing evidence: (a) that the EDU employee committed a willful act; (b) that the willful act resulted in physical or mental harm; and that (c) the physical or mental hard significantly impaired the child's physical, mental, or emotional health, or was likely to do so.

The above paragraph was based off the definition of "abuse" in section 39.01(2), Florida Statutes, which states, "'Abuse' means any willful act or threatened act..." Although the Administrative Law Judge (ALJ) concluded, and Respondent conceded, that the two children were not appropriately supervised, there is no competent substantial evidence on the record to show the lack of supervision was intentional; therefore, the lack of supervision cannot be found to be a willful act.

In support of the argument that Respondent committed acts or omissions that constituted "neglect," Petitioner argues that the statute is clear. "On those two days,

through neglect, Respondent allowed the two children to be in 'an environment when such deprivation or environment causes the child's physical, mental, or emotional health to be significantly impaired or to be in danger of being significantly impaired.'" Petitioner further argues in its exception, "Neglect includes acts or omissions, and the lack of direct adult supervision, required in rule 65C-22.001(5)(a) and (6), and the negligence of individuals responsible for transporting the children, was the omission that resulted in the neglect of the two children on two separate occasions. See section 39.01(45)."

In its Response, Respondent is correct that Petitioner is misapplying the definition of "neglect." Directly proceeding the citation above that begins, "an environment when such deprivation..." the full statute citations reads, "Neglect occurs when... a child is permitted to live in an environment when such deprivation..." Section 39.01(45), (2017). Respondent is not alleged to have allowed either child to "live in an environment..." as they are a child care facility providing child care to the children, not providing them a place to live.

Petitioner's exception is denied as the ALJ correctly applied the unique set of facts of this case to the law and concluded that a finding of abuse or neglect was not supported.

Petitioner takes exception to Paragraph 23 in the Finding of Facts.

23. Deborah Nagle, Respondent's Director of Compliance, Governance, and Head Start, reported both incidents to the regional Health and Human Services ("HHS") Office in Atlanta, Georgia via an October 6, 2017, e-mail. As a federally-funded, non-profit agency, Respondent receives funding from HHS.

Petitioner takes exception to October 6, 2017, being the date in which Deborah Nagle reported the events to the regional HHS Office. Respondent agrees that October 6, 2017, was not the date of the initial report to the regional HHS Office. During Ms.

Nagle's testimony she was asked if she or someone with CAPC reported the events to the regional office and she responded, "Yes, sir, I did... I believe it was the following day." Tr. At 186-187. As this finding of fact is not supported by competent substantial evidence, Petitioner's exception is granted.

Paragraph 23 of the Finding of Facts is modified to read as follows:

23. Deborah Nagle, Respondent's Director of Compliance, Governance, and Head Start, reported both incidents to the regional Health and Human Services ("HHS") Office in Atlanta, Georgia. As a federally-funded, non-profit agency, Respondent receives funding from HHS.

Petitioner takes Exception to Paragraphs 57 and 58 of the Conclusions of Law.

57. Because the incidents on September 20 and 28, 2017, do not amount to "abuse" or "neglect" as defined in section 39.01, the mandatory reporting duty in 39.201(1)(a) was not triggered.

58. In sum, the Department only proved that Respondent committed two Class I violations.

The Department points to section 39.201, Florida Statutes, and Rule 65C-22.001(11)(6), Florida Administrative Code, as cited in Paragraphs 9-11 of the Recommended Order, to argue Respondent had reasonable cause to suspect child abuse or neglect had occurred; thereby triggering the mandatory reporting requirements. Respondent is required on a yearly basis to sign the Department's form CF-FSP 5337, Child Abuse & Neglect Reporting Requirements (CANR), acknowledging their reporting requirements. The Department argues the CANR is explicit in its requirements and specifically lists lack of supervision as an example of conduct which must be reported. Pet. Ex. 15.

The CANR is currently required by Rule 65C-22.001(7)(l), Florida Administrative Code (2017), and was previously required in September of 2017 by Rule 65C-

22.006(4)(c), Florida Administrative Code (2013). Although the Rule number has changed, the requirement that all child care personnel sign the form annually has not changed, nor has the substantive content of the CANR form which is incorporated in the rule be reference.

The Department argues that competent substantial evidence at hearing and in exhibits demonstrate reporting requirements were in place and that Respondent knew a lack of supervision must be reported. The Department uses the deposition testimony of Douglas Brown, Chief Executive Officer, to establish that he was aware of the form, and admitted to signing the form. Pet. Ex. 14A. and 15. Additionally, Deborah Nagle admitted during her testimony that she did sign the CANR. Tr. 212-213.

Respondent argues that the CANR only "acknowledges that lack of supervision may be a mandatory report if and when the supervision at issue satisfies the definition of abuse or neglect as defined by Chapter 39." Respondent further argues that even though Douglas Brown and Deborah Nagle discussed whether the bus incidents required a mandatory report, the mere "discussion or even the suspicion" that a report may be required is not dispositive of the issue. Rather, "it is the suspicion of abuse or neglect within the meaning of Chapter 39 that triggers the mandatory reporting duty."

Although Respondent signed the CANR form which describes a lack of supervision as a situation requiring mandatory reporting, the form itself cannot expand on the definition of "abuse" and "neglect" in Chapter 39. In the unique set of facts in this case, the bus incidents do not constitute "abuse" or "neglect" and therefore the mandatory reporting requirements were not triggered. Petitioner's exception is denied.

Petitioner takes Exception to Paragraph 62 of the Conclusions of Law.

> 62. The Department proved by clear and convincing evidence that there was a six-inch by twelve-inch hole in the floor of a classroom in the Gibson Center. However, the Department did not move the standards referenced in section 402.305(5) and rule 65C-22.001(6) into evidence. As a result, the Department has not proven by clear and convincing evidence that Respondent violated section 402.305(5) or rule 65C-22.001(6).

In this exception, Petitioner argues the ALJ erred in concluding there could be no violation of the rule since the handbook was not moved into evidence; the handbook did not need to be moved into evidence at hearing because the rule incorporated by reference the handbook. Rule 65C-22.001(6), Florida Administrative Code (2017), reads:

> Child Care Standards. Child care programs must follow the standards found in the "Child Care Facility Handbook," October 2017, incorporated herein by reference. The handbook may be obtained from the Department's website at www.myflfamilies.com/childcare or from the following link: http://www.flrules.org/Gateway/reference.asp?No=Ref-08747.

As the handbook was incorporated into the rule by reference, Petitioner is correct that it did not need to be moved into evidence during the hearing. This exception is granted.

Paragraph 62 of the Conclusion of Law is revised as follows, which I find to be as or more reasonable than the rejected paragraph:

> 62. The Department proved by clear and convincing evidence that Respondent violated section 402.305(5) and rule 65C-22.001(6) as there was a six-inch by twelve-inch hole in the floor of a classroom in the Gibson Center.

Petitioner takes Exception to Paragraph 65 of the Conclusions of Law.

> 65. Although Respondent implemented significant and effective corrective actions, given the severity of the violations at issue in the instant case, a $500.00 fine for each violation and any other disciplinary sanction the Department deems necessary to ensure safety at the Gibson Center (short of licensure revocation or suspension) would be appropriate.

Petitioner argues in this exception that the paragraph should be changed to reflect the exceptions, and this is correct regarding the assessment of the $500.00 fine. The $500.00 fine was only intended to be assessed for the Class I violations, not the Class III violation that was found in the revised Paragraph 62.

The Petitioner next takes exception to the ALJ's recommendation that "any other disciplinary sanction the Department deems necessary to ensure safety at the Gibson Center (short of licensure revocation or suspension) would be appropriate." Petitioner argues that Respondent's license should be revoked. The ALJ found that revocation would not be appropriate, but the Department is permitted under the recommendation to place Respondent on probation for a period of six-months during which time they cannot transport children.

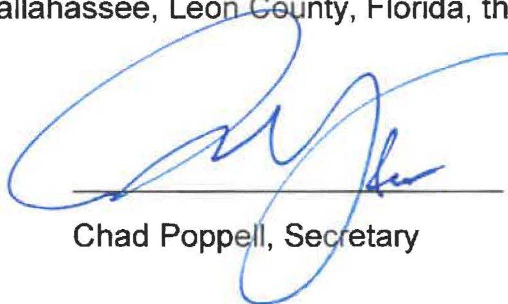
For the reasons stated above, this exception is granted in part.

Paragraph 65 of the Conclusions of Law is revised as follows, which I find to be as or more reasonable than the rejected paragraph:

> 65. Although Respondent implemented significant and effective corrective actions, given the severity of the violations at issue in the instant case, a $500.00 fine for each Class I violation is imposed. Additionally, Respondent will be placed on probation for a period of six-months during which time they cannot transport children.

Accordingly, the Recommended Order is approved and adopted as modified and the February 12, 2018, Administrative Complaint is **UPHELD** in part and **DISMISSED** in part.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 13 day of December, 2019.



Chad Poppell, Secretary

NOTICE OF RIGHT TO APPEAL

THIS ORDER CONSTITUTES FINAL AGENCY ACTION AND MAY BE APPEALED BY A PARTY PUSUANT 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 THE 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.[1]

Copies furnished to the following via U.S. Mail on date of Rendition of this Order.[1]

Katie George, Esq.
Assistant General Counsel
Department of Children and Families
160 Governmental Center, Ste. 601
Pensacola, FL 32502

Claudio Llado, Clerk
Division of Administrative Hearings
Three DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32301

Joseph L. Hammons, Esq.
The Hammons Law Firm, P.A.
17 W. Cervantes St.
Pensacola, FL 32501

Lacey Kantor, Agency Clerk

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