STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

v.

CASE NOS. 19-0136
RENDITION NO. DCF-19-153-FO

L.O.T. EARLY LEARNING CENTER, LLC, d/b/a LITTLE INNOVATORS,

Respondent.
_____/

FINAL ORDER

THIS CAUSE is before me for entry of a final order concerning the Department's Administrative Complaint dated December 4, 2018, imposing a fine of $100.00 for committing a Class I violation of Standard #4-3, Child Left Premises- Staff Unaware. The Recommended Order, dated June 7, 2019, concluded there was no clear and convincing evidence that the children ever left the facility premises which is required to prove the alleged violation. The Petitioner filed exceptions to the Recommended Order and the Respondent's filed a Response to the exceptions.

Although the Petitioner filed what is titled "Department's Exceptions to ALJ's Recommended Order" the filing serves as a motion to relinquish jurisdiction to the Department to conduct a hearing subject to section 120.57(2), Fla. Stat. Petitioner argues that the administrative law judge (ALJ) should relinquish jurisdiction because there are no material issues of disputed fact. To support this argument the Petitioner points to the prehearing stipulation filed on March 11, 2019, in which the parties "stipulated that in general, children that walk away from child care staff are not deemed

left outside the facility, rather they are deemed to have left the premises." The argument is that because of this prehearing stipulation there was no factual dispute over whether or not the children left the premises; the ALJ found that there was no clear and convincing evidence that the children left the premises.

Section 120.57(1)(i), Fla. Stat., states in pertinent part:

> When, in any proceeding conducted pursuant to this subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the administrative law judge determines that the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceedings pursuant to subsection (2)...

The Petitioner is asking that the Department, after a recommended order has been issued by the ALJ following a hearing, order that the ALJ should have relinquished jurisdiction instead of conducting a hearing and writing a recommended order, is not authorized by the statute. As the Respondent stated in is Response, a plain reading of the statutory provision shows that Petitioner should have made this motion to the ALJ prior to the hearing taking place. The ALJ then would have made a ruling pursuant to section 120.57(1)(i), Fla. Stat., as to whether or not there remained any issues of material fact in dispute. Filing this motion as a party's exception to the recommended order is not contemplated by statute. Therefore, the Department's Exceptions to ALJ's Recommended Order is denied.

Accordingly, the Recommended Order is approved and adopted, and the Administrative Complaint dated December 4, 2018, is **AFFIRMED**.

DONE AND ORDERED at Tallahassee, Leon County, Florida, this 5th day of September, 2019.

for

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]

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Lacey Kantor, Agency Clerk

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

vs. Case No. 19-0136

L.O.T. Early Learning Center, LLC, d/b/a Little Innovators,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on March 14, 2019, at sites in Tallahassee and Miami, Florida.

APPEARANCES

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For Respondent: Eric B. Epstein, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a licensed child care facility, committed a Class I Violation by allowing two children to leave the facility premises, unattended, as

Petitioner alleges; and, if so, whether the licensee should be assessed a fine of $100.00.

PRELIMINARY STATEMENT

On December 4, 2018, Petitioner Department of Children and Families issued an Administrative Complaint against Respondent L.O.T. Early Learning Center, LLC, d/b/a Little Innovators, charging the licensed daycare provider with a Class I Violation of "Standard #4-3, Child Left Premises—Staff Unaware."

The licensee timely exercised its right to be heard in a formal administrative proceeding. On January 8, 2019, the agency referred the matter to the Division of Administrative Hearings, where the case was assigned to an Administrative Law Judge.

The final hearing took place, after a brief, unopposed continuance, on March 14, 2019, with both parties present. Petitioner called two witness: Marie Christine Ebbe, family services counselor; and Godswill Mbadiwe, child protective investigator. Petitioner's Exhibits 1 through 12 were received in evidence without objection. Respondent presented the testimony of its executive director, Shemiah Hale, together with that of Theodore J. David, a professional surveyor. Respondent's Exhibits 1 through 34 were admitted into evidence without objection.

The final hearing transcript was filed on April 24, 2019. Each side submitted a Proposed Recommended Order on or before the deadline established at the conclusion of the hearing, which was May 6, 2019.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2018, 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 L.O.T. Early Learning Center, LLC, d/b/a Little Innovators ("LOT"), holds a license, numbered C11MD1611, which authorizes the company to operate a child care facility in Miami Gardens, Florida. As the operator of a licensed child care facility, LOT falls under the regulatory jurisdiction of Petitioner Department of Children and Families ("DCF").

2. On the morning of September 20, 2018, a group of children in the care of LOT were on the playground, which is located outdoors, on the east side of the school building. Two teachers supervised this playtime. Somehow, two children, both about two years old, slipped away from the group, unnoticed.

3. The little explorers walked around the back of the building (its south side), turned right at the southwest corner,

and headed towards the front of the daycare center, traveling north along a sidewalk on the west side of the facility. A fence should have stopped the children from actually reaching the front of the building, but they managed to squeeze through the gate. Once through the gate, the children could have continued to walk, unimpeded, off the facility premises and into potentially dangerous places, such as the road.

4. Fortunately, however, they never got that far. Indeed, the two children probably never even made it off the sidewalk adjacent to the school. Their excursion was cut short by a Good Samaritan who came along at the right time and escorted the unattended wanderers back inside. There is no clear and convincing evidence that the children ever left the facility premises.

Ultimate Factual Determination

5. LOT is not guilty of violating Standard #4-3, Child Left Premises—Staff Unaware, because the evidence failed to establish that the children left the school property, which is an essential element of the disciplinable offense.

CONCLUSIONS OF LAW

6. 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.

7. 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 LOT 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).

8. 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:

> [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 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).

9. 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:
>
> 1. Impose an administrative fine not to exceed $100 per violation, per day. However, if the violation could or does cause death or serious harm, the department or local licensing agency may impose an administrative fine, not to exceed $500 per violation per day in addition to or in lieu of any other disciplinary action imposed under this section.

§ 402.310(1)(a), Fla. Stat.

10. In its Administrative Complaint, DCF alleged that "[c]hildren managed to exit the [licensee's] facility without staff knowledge." On that basis, DCF brought one charge against LOT, namely a Class I Violation of "Standard #4-3, Child Left Premises—Staff Unaware."

11. Florida Administrative Code Rule 65C-22.010(1)(e)1. defines a "Class I Violation" as "an incident of noncompliance with a Class I standard as described on CF-FSP Form 5316, October 2017 . . . , which is incorporated by reference." The Form's title is Child Care Facility Standards Classification Summary (the "Summary").

12. The Summary defines licensing standard 4.3[1]/ as follows: "A child was not adequately supervised and left the facility premises without staff supervision. **CCF Handbook, Section 2.4.1, B.**" (Boldface in original; other emphasis added).

13. Rule 65C-22.001(6) incorporates, by reference, the Child Care Facility Handbook, October 2017 (the "Handbook"). Section 2.4.1 of the Handbook provides as follows:

> B. Child care personnel must be assigned to provide direct supervision to a specific group of children and be with that group of children at all times. Children must never be left inside or outside the facility, in a vehicle, or at a field trip location by themselves.

14. 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).

15. 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.").

16. LOT observes, correctly, that licensing standard 4.3, as described in the Summary, is not a terribly accurate paraphrase of section 2.4.1(B) of the Handbook. However, because the specific charge in the Administrative Complaint is a Class I Violation of licensing standard 4.3; and because rule 65C-22.010(1)(e) defines a Class I Violation as noncompliance with a licensing standard as described in the Summary, the undersigned looks to the Summary for the operative statement of the essential elements of the disciplinable offense.

17. The offense has two elements, one of which is that a child must have left the *facility premises* without staff supervision. The term "facility premises" is not defined, but it is not ambiguous, either. The noun "facility," as used in this term, serves as an adjective;[2/] it modifies the other noun, "premises." Clearly, the "facility" in view is the daycare, whose "premises" comprise the land, building(s), and other

improvements (e.g., the playground, sidewalks, parking lot, etc.), which, collectively, form the campus of the daycare.

18. DCF argues that "facility premises" refers only to the daycare *building*, so that each time a child goes outdoors, he leaves the facility premises, even if he stays within the daycare *property*. The undersigned considers this to be an unnatural reading of the term but acknowledges that it might not be an impermissible construction. If so, however, the outcome of this case remains the same, because if DCF's interpretation is reasonable, then the term "facility premises," being susceptible of more than one permissible reading, is ambiguous. If "facility premises" is ambiguous, then the law requires that the term be construed so as to limit its punitive reach. The construction that favors the licensee reads "facility premises" to include not just the building, but the whole daycare campus. The undersigned considers such construction to be the best, if not the only, way to understand this language.

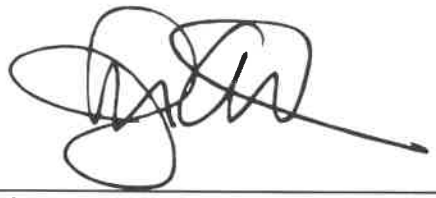
19. The undersigned has determined that the children involved in the subject incident of September 20, 2018, never left LOT's facility premises, because they remained at all times on school property—or, at least, there is no clear and convincing evidence that they left the school property. Thus, an essential element of Child Left Premises—Staff Unaware was not proved.

20. In conclusion, just to be clear, the undersigned is not suggesting or implying that what happened here was compliant with all licensing standards or that it was somehow "all right" that the children were roaming around, unsupervised, on the school property. DCF could have charged a lesser offense relating to inadequate supervision, one that does not require proof that the children left the facility premises for example, and thereby increased its chances of obtaining a finding of guilt. As things stand, however, LOT must be found not guilty as charged.

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 LOT *not* in violation of licensing standard 4.3, Child Left Premises—Staff Unaware.

DONE AND ENTERED this 7th day of June, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of June, 2019.

ENDNOTES

[1/] LOT contends that the Administrative Complaint charges a violation of a licensing standard ("Standard #4-3") that does not exist, since the Summary classifies the offense as licensing standard 4.3. Because it is obvious that four-*dash*-three is the same as four-*point*-three for purposes of identifying the relevant licensing standard, LOT's pedantic argument is rejected.

[2/] The technical term for a noun that does this is *noun adjunct*.

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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.