STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF CHILDREN AND FAMILIES,

Petitioner,

Case No. 19-2417

vs.

OUR CHILDREN'S WORKSHOP,

Respondent.
_____/

RECOMMENDED ORDER

On July 1, 2019, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Stefanie Beach Camfield, Esquire
Department of Children and Families
Building 2, Room 204Z
1317 Winewood Boulevard
Tallahassee, Florida 32399-0700

For Respondent: Mark J. Stempler, Esquire
Becker & Poliakoff, P.A.
Seventh Floor
625 North Flagler Drive
West Palm Beach, Florida 33401

STATEMENT OF THE ISSUE

The issue is whether Petitioner may revoke Respondent's designation as a Gold Seal Quality Care (Gold Seal) provider of

child care services, pursuant to section 402.281(4)(a) and (5), Florida Statutes (2017).

PRELIMINARY STATEMENT

On October 10, 2017, the Broward County Child Care Licensing and Enforcement Office (County Office) issued to Respondent a Notice of Violation (NOV) in connection with Respondent's license to operate a child care facility. The NOV alleges that, on the same date, 16 children departed from a 12-passenger van.

The NOV states that Broward County Ordinance (Ordinance) section 7-11.11(g) provides Respondent with the right to request a hearing within 15 days from receipt of the NOV to contest the allegations of the NOV. Absent a timely request for a hearing, the NOV warns that "the [alleged] violation(s) shall be deemed to have existed and the [Respondent] waives the right to contest the substantive issues contained in the [NOV] at a later date."

On May 18, 2018, the County Office issued an Administrative Complaint against Respondent seeking an administrative fine of $100 for the violation alleged in the NOV. The Administrative Complaint alleges that Respondent committed a Class I violation on October 10, 2017, by "having more children in [its] van than determined acceptable by the manufacturer's designated seating capacity": specifically, 16 children departed from a vehicle with a capacity of 12 persons, including the driver, in

violation of Florida Administrative Code Rule 65C-22.001(6)(d) and Ordinance section 7-11.12(f)(1) and (g)(1).

Respondent never requested a hearing in response to the NOV or the Administrative Complaint. On November 30, 2018, Petitioner issued a letter of intent (LOI) to terminate Respondent's Gold Seal for the Class I violation cited in the Administrative Complaint. The LOI gives Respondent 21 calendar days from receipt for Respondent to request a hearing.

On December 31, 2018, Respondent filed a Request for Formal Administrative Hearing. The request states that Respondent received the LOI on December 11. The request claims that the loss of the Gold Seal would cause the financial failure of Respondent and contests the allegations concerning the over-capacity passenger van, claiming that the van contained 15 or 16 seat belts for passengers and another seat belt for the driver and that only 15 children had occupied the van. The request contends alternatively that the County Office had previously approved the van without finding that the transporting of 15 children in the 15 available seat belts would constitute a violation of any sort.

Petitioner transmitted the case to DOAH on May 13, 2019, and the hearing took place as originally scheduled. Petitioner called three witnesses and offered into evidence six exhibits: Petitioner Exhibits C, D, E, G, H, and M. Respondent called one

witness and offered into evidence two exhibits: Respondent Exhibits 4 and 5. All exhibits were admitted.

The court reporter filed the transcript on July 19, 2019. The parties filed proposed recommended orders by August 5, 2019.

FINDINGS OF FACT

1. For over 20 years, Respondent has operated a licensed child care facility in Pompano Beach. For several years, Respondent has held a Gold Seal designation for this facility.

2. On October 10, 2017, a County Office inspector observed 16 children exiting a "12-passenger" van owned and operated by Respondent for the transport of children enrolled in its day care facility. At the facility, the inspector prepared the NOV, which, citing rule 65C-22.001(6)(d), characterizes the offense as a Class I violation and, citing Ordinance section 7-11.11(g), gives Respondent 15 days within which to request a hearing on the alleged violation. The inspector served the NOV on Respondent on October 10, 2017.

3. Respondent did not timely request a hearing on the violation alleged in the NOV.

4. On May 20, 2018, the County Office issued the Administrative Complaint, which proposes an administrative fine of $100. The Administrative Complaint largely tracks the NOV, except that it contends in the alternative that rule 65C-22.001(6)(d) limits the maximum number of children who

may be transported in the van to the manufacturer's designated seating capacity or the number of factory-installed seat belts.[1/] The Administrative Complaint gives Respondent 15 days within which to request a hearing on the administrative fine.

5. Again, Respondent took no action other than, at some point, to pay the fine.

6. The present dispute arose when Petitioner issued the LOI to terminate Respondent's Gold Seal designation, which is unmentioned in the NOV and Administrative Complaint. Although the number of children on the van appears not to be in dispute, there are substantial disputed questions of fact concerning the passenger capacity of the van and the number of seat belts--factory-installed and otherwise--present in the van on the date of the inspection. However, these issues could only have been addressed in a hearing on the NOV.

7. Broward County is one of four counties in Florida to have entered into a contract with Petitioner to administer and discipline the licenses of child care providers.

8. The record fails to reveal why Petitioner did not issue the LOI for more than one year after the deemed termination of Respondent's Gold Seal designation[2/] or why Petitioner did not transmit the file to DOAH for nearly five months after the receipt of Respondent's request for hearing in response to the

LOI. It is clear, however, that the responsibility for these delays does not rest with Respondent.[3/]

CONCLUSIONS OF LAW

9. DOAH has jurisdiction. §§ 120.569 and 120.57(1), Fla. Stat. (2017).

10. As applicable to a Class I violation, a provider is ineligible for a Gold Seal designation if it has had a Class I violation "within the 2 years prior to its application." § 402.281(4)(a). Likewise, a commission of a Class I violation is a ground for termination of a Gold Seal designation "until the provider has no [C]lass I violations for a period of 2 years." § 402.281(4)(a). The two-year statutory timeframes are based on violations, not agency determinations of violations.

11. Respondent complains that the NOV does not warn that a Class I violation results in the loss of a Gold Seal designation. This is no defense. It would be untenable for the law to restrict the consequences of unlawful acts or omissions by a regulated party only to those consequences of which the party was aware could be imposed for a particular violation of law.

12. Appearing to refine its ignorance-of-the-law argument, Respondent complains that Petitioner may not impose greater discipline than that cited in the NOV or Administrative

Complaint, neither of which, as noted above, mentions the termination of the Goal Seal designation. It is true that due process prohibits an agency from imposing discipline more severe than the discipline that it has chosen in the charging document. Williams v. Turlington, 498 So. 2d 468 (Fla. 3d DCA 1986). However, Williams is inapplicable to the present case. The loss of the Gold Seal designation for a Class I violation within the preceding two years is not a disciplinary penalty. The loss of the Gold Seal designation arises by operation of law, not by the exercise of any discretion vested in Petitioner or the County Office, which are free only to choose discipline ranging from an administrative fine to revocation. Respondent's Williams-based argument thus is merely a variant of its unavailing ignorance-of-the-law defense.

13. Respondent contends that Petitioner was required to prosecute the proposed termination of the Gold Seal designation in the same proceeding as the proposed Class I violation and is thus barred from prosecuting the proposed termination at this time. Although Respondent produced a recommended order so concluding, the obvious flaw in the argument and recommended order is that the determination of a Class I violation is a condition precedent to the termination of the Gold Seal designation. Strictly speaking, the commencement of a proceeding to terminate a Gold Seal designation is premature

until the final determination of a Class I violation within the applicable timeframe. Petitioner routinely chooses to prosecute both issues in the same proceeding, but this casual practice does not imply that, if Petitioner does not prosecute both claims in the same proceeding, it is barred from later prosecuting the Gold Seal termination claim on the ground of some sort of administrative splitting of a cause of action.

14. This case illustrates a second reason why the prosecution of the Gold Seal termination is not required in the same proceeding as the prosecution of the underlying violation. The jurisdiction to prosecute the Class I violation in this case is vested in the County Office, not Petitioner.

15. Section 402.306(1)(b) authorizes a county whose licensing standards meet or exceed state minimum standards to contract with Petitioner for the county to administer the state minimum standards. As found above, Broward County and Petitioner have entered into such a contract.

16. Section 402.310(1)(a) authorizes Petitioner or a local licensing agency--here, the County Office--to impose a range of discipline, from an administrative fine to revocation, against the license of a child care provider for a covered violation.[4/] But the procedures governing disciplinary proceedings against the providers of day care facilities are different, depending on which agency is prosecuting the case.

17. Section 402.306(2) requires Petitioner to proceed in accordance with chapter 120, Florida Statutes. Governed by chapter 120, Petitioner must proceed with a final order, which, as required by section 120.52(2), must be in writing and, as required by section 120.569(1), must advise the nonagency party of its right to judicial review, absent which a final order departs from the essential requirements of law and may be quashed on appeal.[5/] Thus, in a chapter 120 proceeding, the absence of a final order determining a Class I violation would leave unsatisfied a condition precedent to the termination of a Gold Seal designation.

18. But section 402.306(3) impliedly relieves a local licensing agency from the burden of compliance with chapter 120. Not mentioning chapter 120, section 402.306(3) requires a local licensing agency only to notify the provider of the grounds for discipline, and, if the provider fails to request timely a hearing, "the license shall be deemed denied, suspended, or revoked."[6/] Accordingly, Ordinance section 7-11.11(c) provides that, if the County Office finds a Class I violation, it shall issue an NOV, and Ordinance section 7-11.11(g) adds that the violation "shall be deemed to have existed" if the provider fails timely to request a hearing on the NOV.

19. Therefore, under the present facts, as of October 26, 2017, the Class I violation on October 10, 2017, was deemed to exist by operation of law.

20. As noted above, the two-year windows during which a provider may not file an application for a Gold Seal designation or a provider's existing designation is terminated run from the date of the violation, not from any subsequent date, such as a final order sustaining an NOV or a LOI. In cases not involving local licensing agencies, Petitioner may preserve a substantial portion of the two-year termination period by simultaneously prosecuting the underlying violation and the termination of the Gold Seal designation. In this case, though, the two-year periods of termination and ineligibility will have expired before Petitioner issues its final order.

RECOMMENDATION

It is

RECOMMENDED THAT the Department of Children and Families enter a final order determining that Respondent's Gold Seal designation was terminated, and it was ineligible to apply for a new Gold Seal designation, from October 10, 2017, through October 10, 2019.

DONE AND ENTERED this 4th day of October, 2019, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
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Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of October, 2019.

ENDNOTES

[1/] The new, alternative claim about seat belts is inconsistent with the fact that the first claim about passenger capacity had been deemed established months earlier.

[2/] As explained in the Conclusions of Law, the termination of the Gold Seal designation runs from the violation, not a determination of guilt by Petitioner or a local licensing agency or a later determination by Petitioner that the conditions precedent for the termination have been satisfied. Thus, any hearing on a LOI, whenever it may be issued, is a post-termination hearing. The extent to which such a procedure, including the failure of Petitioner to issue a LOI promptly, comports with procedural due process is a matter left to the courts, not DOAH or Petitioner.

[3/] The administrative law judge bears responsibility for the delay after July 1, 2019, when he erroneously denied Petitioner's Motion for Summary Judgment filed on June 24, 2019. The administrative law judge recognized that the defenses raised by Respondent were legally insufficient, but denied the motion due to the omission of a final order determining the existence of the alleged Class I violation.

[4/] This Recommended Order addresses only Class I violations, but certain Class II and III violations may also result in the termination of a Gold Seal designation.

[5/] See, e.g., Denson v. Sang, 491 So. 2d 288 (Fla. 1st DCA 1986) (per curiam).

[6/] If the provider timely requests a hearing, the county commission shall designate a person to conduct a hearing. § 402.310(3). Also, the provider may appeal a decision of the local licensing agency to the department, which shall appoint a representative to hear the appeal in accordance with chapter 120. § 402.310(4).

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.