

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

vs.

Case No. 21-1467

IT'S A SMALL WORLD ACADEMY, INC.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge (“ALJ”) Mary Li Creasy by Zoom conference on July 20, 2021.

APPEARANCES

For Petitioner: Aaron Feuer, Esquire
Department of Children and Families
401 Northwest 2nd Avenue, Suite N1014
Miami, Florida 33128-1740

For Respondent: Marcia Esther Martorell, pro se
It's A Small World Academy, Inc.
2990 Northwest 81st Terrace
Miami, Florida 33147

STATEMENT OF THE ISSUES

Whether Respondent’s application for renewal of its child care facility license was untimely submitted; and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

Petitioner, Department of Children and Families ("DCF"), by Administrative Complaint dated February 1, 2021, notified Respondent that it was imposing a civil penalty in the amount of \$50.00 for the late filing of its child care license renewal application. Respondent, It's a Small World Academy, Inc. ("Small World"), timely requested an administrative hearing challenging DCF's penalty. DCF referred the matter to the Division of Administrative Hearings ("DOAH") to conduct a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes.

After a continuance granted at the request of both parties, the final hearing was conducted as scheduled on July 20, 2021. Petitioner presented the testimony of Susan Freeman, DCF Secretary Assistant, and Alexis Stevens, former DCF Family Services Counselor. Petitioner submitted Exhibits A and B, which were admitted into evidence without objection. Respondent presented the testimony of its owner, Marcia Martorell, and her daughter and business partner, Marcy Martorell.

The parties chose not to order the transcript. Both parties timely filed proposed recommended orders, which were taken into consideration in the drafting of this Recommended Order. Unless otherwise indicated, citations to the Florida Statutes refer to the version in effect at the time of the application denial.

FINDINGS OF FACT

1. DCF is the state agency that licenses and regulates child care facilities in Florida.
2. Small World is a licensed child care facility in Miami, Florida, that has been doing business at this location for at least several years. As a licensed

child care facility, Small World undergoes at least three routine inspection visits a year by DCF.

3. During its second routine evaluation in the summer of 2020, Small World was reminded by Alexis Stevens, former DCF Family Services Counselor, that its renewal application was due to be submitted to DCF at least 45 days prior to its license expiration on November 23, 2020.

Ms. Stevens provided this courtesy reminder to prevent Small World from incurring a penalty for a late filing. Ms. Stevens, who had been Small World's point of contact at DCF for several years, had no concern that Small World would be late because, in the past, Small World was never late, and it consistently filed all materials needed for renewal of its license.

4. At the beginning of October 2020, Ms. Stevens advised Small World that DCF's Miami office was closed to the public due to COVID-19 and directed Small World to mail its renewal application rather than hand-delivering it as it had done in the past. The owners of Small World were aware the renewal application needed to be submitted to DCF on or before October 9, 2020.

5. Small World's owner, Marcia Martorell, completed the renewal application packet on October 1, 2020. On the next day, her daughter mailed the application packet from the Miami post office to DCF's Miami office by certified, return receipt requested, mail. They reasonably anticipated that, at most, delivery would occur within a few days and in plenty of time to avoid the October 9, 2020, deadline.

6. According to the United States Postal Service ("USPS") tracking record, the application package was signed for by an individual at the DCF Miami office on October 13, 2020. However, the actual "green card" receipt bears no signature, and instead is marked "CO19" (presumably for COVID-19) on October 15, 2020.

7. DCF Secretary Assistant, Susan Freeman, received the package on October 13, 2020, from the DCF mailroom and date-stamped each page.

Ms. Freeman does not know on what date the package arrived in the mailroom. Ms. Freeman testified that although the office was closed to the public, most days the staff came to the office to complete their assigned duties, including receiving checks and other mail, including license renewal packages. However, she also recalled that the office was completely closed to personnel for several days due to riots in Miami.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

9. This is a disciplinary proceeding against Respondent's child care facility license, pursuant to section 402.310(1), Florida Statutes. Petitioner bears the burden, by clear and convincing evidence, to establish the grounds for discipline against Respondent's license. *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Coke v. Dep't of Child. & Fam. Servs.*, 704 So. 2d 726 (Fla. 5th DCA 1998).

10. In *Evans Packing Company v. Department of Agriculture and Consumer Services*, 550 So. 2d 112 (Fla. 1st DCA 1989), the court defined clear and convincing evidence as follows:

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 evidence 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. at 116 n.5 (citing *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

11. Whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier-of-fact in the context of each alleged violation. *See McKinney v. Castor*, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); *Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995); *Langston v. Jamerson*, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

12. Respondent is a child care facility as defined in section 402.302(2). Section 402.308(1) requires a child care facility license to be renewed annually. Pursuant to section 402.305(2)(e) and (10), Petitioner has adopted rules establishing child care facility licensure requirements.

13. The application for license renewal “must be submitted to the licensing authority at least 45 days prior to the expiration date of the current license to ensure that a lapse of licensure does not occur.” Fla. Admin. Code R. 65C-22.001(1)(d).

14. Florida Administrative Code Rule 65C-22.010(2) provides:

(c) Failure to submit a completed CF-FSP Form 5017, Application for a License to Operate a Child Care Facility, which is incorporated by reference in paragraph 65C-22.001(1)(a), F.A.C., for renewal of an annual license at least 45 days prior to the expiration date of the current license constitutes a licensing violation. The Department shall impose an administrative fine of \$50.00 for the first occurrence, \$100.00 for the second occurrence, and \$200.00 for each subsequent occurrence within a five year period.

15. Notably absent from the pertinent statutes and rules is the definition of the word “submit.” DCF takes the position that submission is equivalent to sent to, and receipt by, DCF. Respondent argues that its application was “submitted” when sent or mailed.

16. Because the term “submit” is not defined by the statutory provision and is subject to differing interpretations, the statute is ambiguous and, thus, statutory interpretation is appropriate.

17. Merriam-Webster defines “submit” as: “to present or propose to another for review, consideration, or decision.” Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/submit?src=search-dict-box> (last visited August 13, 2021). This definition fails to shed light on whether “submit” necessarily encompasses the action of receipt.

18. DCF correctly acknowledges that there is no caselaw involving DCF that directly addresses this issue. It cites to the case of *Department of Children and Families v. North Florida Daycare, Inc., d/b/a Alachua County Child Care Center*, Case No. 10-8248 (DOAH Nov. 18, 2010; DCF Mar. 10, 2011), wherein an application due on June 21, 2010, was considered untimely when placed in the mail on June 21, 2010, and received by DCF a week later. However, in that case, testimony was provided at hearing regarding the necessity of DCF’s receipt of the application 45 days prior to the license expiration. No such testimony was offered in the instant matter.

19. Further, in *North Florida Daycare*, neither the ALJ’s Recommended Order, nor DCF’s Final Order, undertook any analysis of the meaning of the word “submit.”

20. Fortunately, it is unnecessary in this case to determine whether both mailing *and* receipt by DCF are needed to meet the 45-day submission requirement.

21. DCF failed to prove by clear and convincing evidence on what date the renewal application of Respondent was received. Although Ms. Freeman date-stamped the document on October 13, 2020, four days after it was due, she also confirmed that her office experienced closures during that timeframe due to COVID-19 and riots.

22. The USPS tracking information in this case is of no probative value regarding receipt. Rather than obtaining a signature upon delivery, the return receipt was marked “CO19” on October 15, 2020. No testimony from a USPS official was presented regarding how this could occur after the application was date-stamped by DCF two days earlier. This leaves open the

possibility that the renewal application was, in fact, received some time earlier and not logged in timely due to an office closure or absent staff.

23. The equities in this case lean in favor of Respondent who mailed the renewal application from Miami to DCF in Miami a week before it was due. Given the exceptional conditions of the time, it is patently unfair to penalize Respondent.

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 dismissing the Administrative Complaint.

DONE AND ENTERED this 17th day of August, 2021, in Tallahassee, Leon County, Florida.



MARY LI CREASY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of August, 2021.

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.