

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF CHILDREN AND
FAMILIES,

Petitioner,

Case No. 21-2081

vs.

A TO Z FOR KIDS, D/B/A A TO Z FOR KIDS,

Respondent.

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021), before Cathy M. Sellers, an Administrative Law Judge of the Division of Administrative Hearings ("DOAH"), on August 23 and 31, 2021, by Zoom conference at sites in Miami and Tallahassee, Florida.

APPEARANCES

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

For Respondent: Beatrice Chaves-Velando
A to Z for Kids
6450 Collins Avenue, # 504
Miami Beach, Florida 33141

STATEMENT OF THE ISSUES

The issues in this case are: (1) Whether Respondent committed three violations of Standard #17-02 of Petitioner's Child Care Facility Handbook within a two-year period; and (2) if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On June 2, 2021, Petitioner, Department of Children and Families, served Respondent, A to Z for Kids, with an Administrative Complaint, alleging that Respondent violated standard #17-02 of the Child Care Facility Handbook on three separate occasions. Petitioner proposed to impose a \$100.00 fine, pursuant to section 402.310, Florida Statutes,¹ and Florida Administrative Code Rules 65C-20.012 and 65C-22.010. On June 9, 2021, Respondent timely filed a request for administrative hearing involving disputed issues of material fact. On June 24, 2021, Petitioner referred this proceeding to DOAH to conduct an administrative hearing pursuant to sections 120.569 and 120.57(1).

The final hearing initially was set for August 23, 2021, but due to technical difficulties with the Zoom conference, was continued to August 31, 2021. The final hearing was held on August 31, 2021. Petitioner presented the testimony of Rodresia Smiley and Eddy Vielot, and Petitioner's Exhibits A through G were admitted into evidence without objection. Beatrice Chavez-Velando testified on behalf of Respondent, and Respondent's Composite Exhibit A was admitted into evidence without objection.

A final hearing transcript was not filed at DOAH. The parties were given until September 10, 2021, to file their proposed recommended orders.

¹ All references to chapter 402 are to the 2020 version, which was in effect at the time of the alleged violations.

On September 3, 2021, Respondent filed a letter that constitutes her proposed recommended order. Also on September 3, 2021, Petitioner filed a Motion for Enlargement of Time to Submit Proposed Recommendation, requesting that the deadline for the parties to file their proposed recommended orders be extended to September 20, 2021. On September 7, 2021, the undersigned entered an Order Granting Extension of Time until September 20, 2021, for the parties to file their proposed recommended orders. Petitioner filed its Proposed Recommended Order on September 20, 2021. On September 29, 2021, Respondent filed a reply letter to Petitioner's Proposed Recommended Order. Because replies to proposed recommended orders are not authorized under Florida Administrative Code Rule 28-106.215, Respondent's reply letter was not considered in preparing this Recommended Order.

The parties' proposed recommended orders were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner is the state agency responsible for licensing, inspecting, and monitoring child care facilities pursuant to chapter 402.

2. Respondent is a child care facility licensed by Petitioner, operating under License No. C11MD0802. Respondent's facility is located at 1343 Alton Road, Miami Beach, Florida 33139. Beatrice Chaves-Velando is the Director.

II. Allegations in the Administrative Complaint

3. The Administrative Complaint states that this is an administrative action to impose a total penalty of \$100.00 for violations of applicable child

care facility standards, pursuant to section 402.310 and rules 65C-22.010 and 65C-20.012.²

4. During Petitioner's three separate inspections of Respondent's child care facility, conducted on January 12, February 17, and March 4, 2021, Respondent was cited for violating Standard #17-02, dealing with the condition of the outdoor play area and fencing for the facility.

5. Under Petitioner's rules, violating Standard #17-02 constitutes a Class II violation.

6. Petitioner proposes to impose a fine in the amount of \$50.00 for the second violation, identified on February 17, 2021, and another fine of \$50.00 for the third violation, identified on March 4, 2021, for a total fine of \$100.00.

III. Evidence Adduced at the Final Hearing

7. Rodresia Smiley, a Family Services Counselor with Petitioner, conducted inspections of Respondent's facility child care facility on January 12, February 17, and March 4, 2021.

8. In the course of each of these inspections, Smiley found that Respondent committed a violation of Standard #17-02, regarding the condition of the outdoor play area and fencing for the facility.

9. The noncompliance description in the Inspection Checklist for each of the three inspections was the same: "17-02 [t]he facility's outdoor play area contained litter, nails, glass or other hazards that posed a threat to the health, safety or well-being of the children. CCF Handbook, Section 3.5, A."

The January 12, 2021, Inspection

10. On January 12, 2021, Smiley conducted a license renewal inspection of Respondent's facility and completed an inspection report.

² Florida Administrative Code Chapter 65C-20 governs family day care homes and large family child care homes, as those terms are defined in section 402.302(8) and (11). No evidence was presented that Respondent's facility constituted either of these types of facilities, and Petitioner's Proposed Recommended Order does not address alleged violations of chapter 65C-20. Accordingly, this Recommended Order does not address alleged noncompliance with chapter 65C-20.

11. Smiley testified that in the course of her inspection, she observed a wooden gate, which she described in the inspection report as a "fence,"³ that was in disrepair. The gate, when closed, blocked a sidewalk along the side of the building leading to the play area in the back of the building.

12. Smiley testified, and photographic evidence confirms, that the wooden boards of the gate were being held together by blue tape, and that they would become loose or fall off the gate if not supported by the tape. Smiley testified, credibly, that there was a loose nail or screw⁴ sticking out, and that the nail/screw fell out of the gate and onto the ground in an area to which the children may have access.

13. The photographic evidence shows that the gate is immediately adjacent to the play area, where children could play—and, at the time the photographs were taken, were playing—barefoot, such that they could step on nails or screws that had fallen to the ground due to the gate being in a state of disrepair.

14. Although Respondent contended that children did not play in the area where the gate is located, the photographic evidence shows that there is no barrier separating the play area from the gate, so that children are able to access that area. To this point, one of the photographs admitted into evidence shows a soccer ball lying on the sidewalk immediately next to the gate.

15. Smiley cited Respondent for a violation of Standard #17-02, based on her determination that a child could injure himself/herself on the loose boards and/or the nail/screw that had fallen to the ground. She made the

³ The inspection reports describe the structure in disrepair as a "fence." The structure consists of a section of wooden fencing that functions as a gate to block access to a sidewalk along the side of the facility leading from the play area. Whether characterized as a "fence" or "gate," the structure, which was depicted in photographs presented by Petitioner and Respondent, was accessible to children; was shown to be in a state of disrepair; and was held together by blue tape.

⁴ Similarly, it is immaterial whether the object sticking out of the gate was a nail or a screw. The point is, either object, if stepped on, could injure a child.

following comment on the January 12, 2021, Inspection Checklist: "Outdoor Play Area/Fencing CCF Handbook, Section 3.5.":

FSC observed a broken fence on the side of the playground being held together by blue tape. On the bottom of the fence where it was loose, there was a nail hanging out. After pointing it out to the staff member she removed the nail from the wood. Technical assistance was provided that staff members should check the playground daily to ensure that there are no hazardous items present that could cause injuries to the children.

16. Smiley provided technical assistance, which is Petitioner's standard operating procedure when a violation is identified. Specifically, she explained, to Respondent's employee, the nature of the problem and why it constituted a hazard to the children at the facility.

17. Under Petitioner's progressive enforcement rules, a child care facility is given the opportunity to correct the violation before disciplinary sanctions are imposed. If the violation is not corrected by the third inspection, an administrative fine is imposed.

18. Because the January 12, 2021, violation was the first for Respondent's facility in a two-year period, no fine was imposed for this violation.

19. Chaves-Velando was provided, and signed, a copy of the January 12, 2021, inspection report.

20. The stated due date for correcting the violation documented in the inspection report was: "[c]ompleted at time of inspection."

The February 17, 2021, Inspection

21. Smiley conducted a reinspection of Respondent's facility on February 17, 2021.

22. At that time, she completed another inspection report, documenting that the violation of Standard #17-02, which previously was identified on January 12, 2021, had not been corrected. Specifically, the particular board that previously had been loose apparently had been repaired, but a different

board on the gate was broken and had become loose, again resulting in a hazard to children due to a nail or screw sticking out of the gate.

23. On the inspection checklist completed during her February 17 inspection, Smiley noted the facility's continued noncompliance under paragraph 17, "Outdoor Play Area/Fencing CCF Handbook, Section 3.5." She commented that: "FSC observed the fence on the side of the playground still broken and loose. A screw is sticking out of the fence and appears to need to be replaced. Technical assistance provided below."

24. During the reinspection, Smiley again spoke with an employee at Respondent's facility, who acknowledged that the gate needed to be repaired.

25. The February 17, 2021, inspection report established a March 3, 2021, due date by which Respondent was to complete the repair.

26. Respondent did not sign the February 17, 2021, inspection report; however, Smiley credibly testified that she provided a copy of the second inspection report to Respondent on February 22, 2021, at 1:35 p.m.

The March 4, 2021, Inspection

27. Smiley conducted the second reinspection—i.e., the third inspection—of Respondent's facility on March 4, 2021. Once again, she found that Respondent had not repaired the gate.

28. Smiley completed another inspection report, again finding noncompliance under paragraph 17, "Outdoor Play Area/Fencing CCF Handbook, Section 3.5." Her comments stated: "[a]t the time of inspection, the fence was still observed not to be in good repair. A piece of the wood on the fence was loose with a screw sticking out. Technical Assistance provided below."

29. On questioning at the final hearing, Smiley clarified that Respondent was cited for the loose board and loose nail or screw that was sticking out of the gate and could fall onto the ground in an area immediately adjacent to the area where children play. Smiley did not observe glass or litter in the

play area, and her noncompliance determination for Respondent's facility was not based on her having found glass or litter in the play area.

30. Smiley provided the March 4, 2021, inspection report to Eddy Vielot, another Family Services Counselor at the Department of Children and Families, who, in turn, provided the inspection report to Chavez-Velando.

31. Vielot also testified on Petitioner's behalf. He clarified that it is immaterial whether the identified hazard was a nail or a screw; the issue is that the presence of a nail or screw sticking out or on the ground in an area accessible to children creates a hazard, because a child could be injured by stepping on the nail or screw.

32. Following the second reinspection, Vielot received a text message from Chaves-Velando dated March 8, 2021, explaining that at some point after the first inspection, the gate had been repaired but "the board got loose again." This text message was sent after the second reinspection on March 4, 2021, and confirms that as of the time of (and after) the date of the second reinspection, the gate remained in a state of disrepair, and, thus, continued to present a hazard to children at the facility.

Respondent's Defenses

33. Chavez-Velando testified on behalf of Respondent and presented photographs of Respondent's facility, which were admitted into evidence.

34. Chavez-Velando testified that she did not notice that the gate needed repair, and that only one screw was loose. She contended that the boards were not loose, and asserted that the inspection report had said there was a loose screw, rather than a loose board.⁵

35. She also testified that the blue tape on the gate which was present at the time of the first inspection had been placed there by Respondent's

⁵ Item 17 in the inspection report states, in pertinent part: "FSC observed a broken fence on the side of the playground being held together by blue tape. On the bottom of the fence where it was broken, there was a nail hanging out." The word "it" in that sentence clearly refers to the gate itself being broken, and this is confirmed by Petitioner's Exhibit A, a photograph depicting boards on the gate held in place by tape because they were loose.

employees to indicate that the gate needed to be repaired. She stated that the employees did not tell her that the gate needed to be repaired, and that she only found out about the condition of the gate when she read the first inspection report.

36. She acknowledged that the gate had been installed seven or eight years ago; was weathered; and that the nail/screw holes grew larger over time, causing the screw to fall out. She testified that Respondent tried to have the gate repaired after the first inspection, but that she was unable to find a repairman willing to do a "small job."

37. She also contended that Petitioner's photos of the gate looked "very distorted," and asserted that the photographs of the gate that she presented at the hearing were more accurate depictions of its condition. However, on questioning at the final hearing, she acknowledged that the photographs she presented at the hearing were taken after the gate was repaired, at some point following the second reinspection. She testified that the gate is now in good condition.

38. Chavez-Velando contended that she only received the first inspection report, and did not receive the second or third inspection reports. She testified that the only reason she signed the first inspection report was because Respondent's license renewal was contingent upon her signing it.

39. However, even if Respondent did not receive the second and third inspection reports, Respondent clearly was on notice, pursuant to the first inspection report (which she signed), that the gate was in disrepair and that a nail or screw was sticking out and had fallen out of the gate and onto the ground. Additionally, Chavez-Velando's March 8, 2021, text message to Vielot confirms that she knew that the gate needed to be repaired, and that it still had not been repaired at the time of the second reinspection.

IV. Findings of Ultimate Fact

40. The question whether a person or entity engaged in conduct that violates statutes or rules, as charged in an administrative complaint, is one 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).

41. Based on the foregoing findings of fact, it is determined that Petitioner has proved, by clear and convincing evidence, that Respondent committed the violations alleged in the Administrative Complaint.

42. Specifically, Petitioner proved that a gate in a state of disrepair at Respondent's facility was identified as a basis for noncompliance with Standard #17-02 on January 12, 2021, and that by the time of the reinspections on February 17 and March 4, 2021, Respondent still had not repaired the gate.

43. Petitioner also proved, by clear and convincing evidence, that the state of disrepair of the gate at the time of the three inspections resulted in nails or screws being present in an area immediately adjacent to, and accessible from, the outdoor play area, thereby posing a threat to the health, safety, or well-being of the children at Respondent's facility, in violation of Section 3.5, A. of the Child Care Facility Handbook, as incorporated into Standard #17-02.

44. Accordingly, it is found, as a matter of ultimate fact, that Respondent engaged in conduct that violated the applicable statutory and rule provisions, as charged in the Administrative Complaint.

CONCLUSIONS OF LAW

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

46. This is a disciplinary proceeding against Respondent's child care facility license, pursuant to section 402.310(1). Petitioner bears the burden, by clear and convincing evidence, to establish the grounds for discipline against Respondent's license. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. 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).

47. In *Evans Packing Co. v. Department of Agriculture and Consumer Services*, 550 So. 2d 112 (Fla. 1st DCA 1989), the court defined the clear and convincing evidence standard 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).

48. Respondent is a "child care facility" as defined in section 402.302(2).

This statute states in pertinent part:

"Child care facility" includes any child care center or child care arrangement which provides child care for more than five children unrelated to the operator and which receives a payment, fee, or grant for any of the children receiving care, wherever operated, and whether or not operated for profit.

49. Pursuant to section 402.310(1)(a)1., Petitioner may impose an administrative fine not to exceed \$100.00 per violation per day as a disciplinary sanction for violating sections 402.301 through 402.319 and the rules adopted pursuant to these statutory provisions.

50. Chapter 65C-22, titled "Child Care Standards," establishes the licensure and operating standards applicable to child care facilities in Florida.

51. Rule 65C-22.001(6) states, in pertinent part: "[c]hild care programs must follow the standards found in the Child Care Facility Handbook, May 2019, incorporated herein by reference."

52. Standard 3.5 in the Child Care Facility Handbook states, in pertinent part: "3.5 Outdoor Play Area A. The outdoor play area must be clean and free from litter, nails, glass and other hazards."

53. CF-FSP Form 5316, the Child Care Facility Standards Classification Summary, which is incorporated by reference in rule 65C-22.010(1)(e), states, in pertinent part: "17. Outdoor Play Area/Fencing CCF Handbook, Section 3.5." This form describes Standard #17-02 as follows: "17.2 The facility's outdoor play area contained litter, nails, glass or other hazards that posed a threat to the health, safety or well-being of the children. CCF Handbook, Section 3.5, A."

54. CF-FSP Form 5316 classifies the violation of Standard #17-02 as a Class II violation.

55. As discussed above, the evidence clearly and convincingly establishes that Respondent violated Standard #17-02, and, thus, Child Care Facility Handbook Standard 3.5, on three separate occasions within a two-year period. In doing so, Respondent committed three Class II violations of Petitioner's rules and incorporated standards.

56. Rule 65C-22.010, titled "Enforcement," establishes the grounds under which Petitioner may impose administrative fines for violating chapter 402 and administrative rules, including the Child Care Facility Handbook standards, applicable to child care facilities.

57. "Standards" are defined as the requirements for the operation of a licensed facility provided in statute or in rule. Fla. Admin. Code R. 65C-22.010(1)(c).

58. A "[v]iolation," in the context of Class I, II, or III violations, means noncompliance with a licensing standard, as described in an inspection report

resulting from an inspection under section 402.311. Fla. Admin. Code R. 65C-22.010(1)(e).

59. A "Class II Violation" is defined as an incident of noncompliance with an individual Class II standard, as described on CF-FSP Form 5316. Class II violations are less serious in nature than Class I violations. Fla. Admin. Code R. 65C-22.010(1)(e)2.

60. Disciplinary sanctions for violations of applicable standards are applied progressively, for the violation of each child care facility standard. Fla. Admin. Code R. 65C-22.010(2)(a).

61. Rule 65C-22.010(2)(b) provides a grace period under which the violation of a standard which occurred more than two years before a subsequent violation of the same standard is not counted for purposes of imposing discipline.

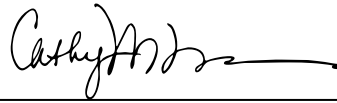
62. For the second violation of the same Class II standard within a two-year period, Petitioner imposes an administrative fine of \$50.00 for each such violation. Fla. Admin. Code R. 65C-22.010(2)(d)2.a.

63. Here, the evidence clearly and convincingly establishes that Respondent committed three Class II violations within a two-year period. Accordingly, the appropriate penalty, pursuant to rules 65C-22.010(2)(b) and 65C-22.010(2)(d)2.a., is imposition of a \$100.00 administrative fine against Respondent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Department of Children and Families, enter a final order determining that Respondent, A to Z for Kids, committed three Class II violations within a two-year period, and imposing a \$100.00 administrative fine.

DONE AND ENTERED this 9th day of November, 2021, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 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.