

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
11 DHR 09587

Filmore Academy Educational Institute Inc.,)
Petitioner,)
)
v.)
)
Division of Child Development, North)
Carolina Department of Health and Human)
Services,)
Respondent.)

DECISION

This matter was heard before the Honorable Melissa Owens Lassiter, Administrative Law Judge, on January 9, 10, and 18, 2012 in Raleigh, North Carolina.

APPEARANCES

John S. Austin
Austin Law Firm
P.O. Box 6580
Raleigh, NC 27628

Letitia C. Echols
Assistant Attorney General
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602

ATTORNEY FOR PETITIONER

ATTORNEY FOR RESPONDENT

APPLICABLE STATUTES AND RULES

N.C.G.S. §§ 110-85, 110-88(6a), 110-90(5), 110-91(4), (5), and (14), 110-98
Child Care Rules 10A NCAC 09 .0302 and .2206.

ISSUE

Whether Respondent deprived Petitioner of property, otherwise substantially prejudiced Petitioner's rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule when it revoked the three-star license issued to Filmore Academy Educational Institute, Inc. to operate Filmore Academy I (ID #92002641)?

EXHIBITS ADMITTED INTO EVIDENCE

For Petitioner: 1 - 6, 7 (as redacted), 8, 10 - 15

For Respondent 1 - 3, 4 (pp. 1, 3-7), 5 - 15, 18 - 19, and 25

Official notice taken of Respondent's Exhibits 16-17, 21-24

FINDINGS OF FACT

BASED UPON careful consideration of the witness' sworn testimony at hearing, the exhibits admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge ("ALJ") finds as follows:

Procedural Background

1. On June 16, 2011, Respondent Division issued a Notice of Administrative Action, Notice of Revocation to Petitioner revoking Petitioner's child care license for (1) violating N.C. Gen. Stat. § 110-91(14) by providing falsified information to Respondent regarding Petitioner's care of children in unlicensed space and (2) violating N.C. Gen. Stat. § 110-91(1) & (4-5) by caring for children in an unlicensed space. (R. Ex. 15)

2. On July 15, 2011, Petitioner filed a contested case petition with the Office of Administrative Hearings appealing Respondent's revocation. In its petition, Petitioner contended that Respondent made an arbitrary and capricious decision in revoking Petitioner's license by failing to properly investigate the complaint, failing to consider the bias and motivations of certain witnesses, and failing to consider lesser sanctions. (Petition)

3. On November 28, 2011, the undersigned Granted Respondent's November 18, 2010 Motion to Continue, after considering Petitioner's objections, and Respondent's reply to such objections. The undersigned continued the contested case hearing first scheduled for December 2, 2011 until January 6, 2012.

Parties/Witnesses

3. Tanya Johnson is the corporate officer and registered agent of Petitioner, which holds a three star childcare license to operate Filmore Academy I at 2312 Milburnie Rd. Raleigh, NC 27610. (R. Ex. 6, 7)

4. Ms. Johnson applied for a license to operate another child care center, Triangle Plantation Center, at 6471 Plantation Center Drive in Raleigh, but withdrew that application before completing the licensure process, months before the proposed administrative action was issued against Petitioner Filmore Academy I. (R. Ex. 13, T pp. 20, 520)

5. Respondent, Division of Child Development and Early Education¹ (the “Division” or “DCDEE”), is an administrative agency of North Carolina State Government operating under the laws of North Carolina and administering the licensing program for child care facilities in the State of North Carolina. *See* N.C.G.S. §§ 110-85, *et seq.*

6. Pursuant to N.C. Gen. Stat. § 110-85, the Division is mandated to protect children in child care facilities by ensuring these facilities provide physically safe and healthy environments where the developmental needs of the children are met.

7. Holli Britt is a child abuse/neglect consultant with the Division, who has worked for the Division for fourteen (14) years. Before her current position, Ms. Britt worked as an assistant director in childcare, and worked in classrooms. Ms. Britt holds a bachelor’s degree from North Carolina State University. Ms. Britt’s responsibilities as a child abuse and neglect consultant for the Division include investigating child abuse and neglect allegations in facilities located in Wake County and Franklin County. (T. pp. 15-16)

8. Tracy Stanley is an investigator with Wake County Human Services who has worked for the County for approximately five (5) years. Prior to her current position, Ms. Stanley worked in the mental health field providing mental health services to children and adolescents. Ms. Stanley also worked with the Division of Social Services in Harnett County. Ms. Stanley holds a bachelor’s degree in social work from North Carolina State University. Ms. Stanley’s responsibilities as an investigator for the County include investigating allegations of abuse and neglect in institutions, which are composed of day cares, foster homes, group homes, and juvenile justice. (T. pp. 102-103)

9. Carolyn James currently works with Total Outsource Systems, and has worked for Total Outsource Systems for almost six (6) months. During October and November of 2010, Ms. James worked for Petitioner at 6471 Triangle Plantation Center Drive in Raleigh (Triangle Plantation) as a child caregiver (T. pp. 130-131)

10. Deanna Hoxworth is a program manager with the Division who has worked as a program manager for the Division since 2010. Hoxworth’s responsibilities as a program manager for the Division include supervising three (3) supervisors who oversee twelve (12) investigators in forty-nine (49) counties. (T. p. 155)

11. Kimberly Mallady is the licensing enforcement section chief for the Division who has worked with the Division for nine (9) years. Ms. Mallady holds a bachelor’s degree in child development and family relations from East Carolina University. Before her current position, Ms. Mallady was a childcare director and teacher at various childcare facilities. Ms. Mallady’s responsibilities as a licensing enforcement section chief include overseeing the enforcement action process, including litigation and settlement conferences. (T. pp. 271-272)

¹ In July of 2011, the Division of Child Development became “The Division of Child Development and Early Education.”

Regulatory Background

12. There are between 8,200 and 8,300 childcare facilities in the State of North Carolina, and approximately 5,000 of them are family childcare centers. (T. p. 272)

13. Abuse/neglect investigations that give rise to administrative actions usually begin with an intake report. (T. pp. 16, 166) However, licensing violations that result in administrative action often begin without a complaint. (T. p. 167) Such licensing violations are usually cited by the Division's licensing consultants during visits. (*Id.*)

14. No statute, rule, or policy restricts abuse/neglect consultants from investigating licensing complaints. (T. p. 156)

15. The Division's abuse/neglect consultants generally investigate complaints in cooperation with local departments of social services. (T. pp. 19, 104-105)

16. Administrative actions are generally proposed by a childcare consultant and supervisor, and then sent to the regional manager for their review. (R. Ex. 11; T. pp. 36, 163-164) The regional manager then submits the proposed action to the Licensing Enforcement Section for review. (T. pp. 164-165) After Licensing Enforcement reviews the action, it is submitted to an internal review panel to determine if the administrative action is accurate, consistent, objective, and that it is in keeping with other similar actions throughout the state. (R. Ex. 12, 14, T. pp. 164-165)

17. As part of the application process for a childcare center, the prospective provider must certify that the application is complete and accurate and must initial that s/he understands "that false information provided to the Division of Child Development may be grounds for termination of this license and rejection of further application to operate a regulated child care facility." (R. Ex. 6, T. pp. 286-290) The applicant must also initial that "I understand that it is my responsibility, as a legal operator, to comply with all applicable child care laws, rules and regulations." (*Id.*)

Respondent's Investigation

18. On November 24, 2010, the Division received a complaint alleging that a child ran out of a Petitioner's childcare facility at 6471 Plantation Center Drive in Raleigh, North Carolina on November 21, 2010. (R. Ex. 2) The child was crying and chasing his mother's car down the street. (*Id.*) The mother saw the child in her rear-view mirror, and returned him to the facility. (R. Ex. 2) When the mother walked her child into the facility, the caregiver stated that he had left the children, S.R. and R.C., in the front room while he went to the back to get blankets for them. (*Id.*)

19. On November 29, 2010, Ms. Britt, the childcare consultant assigned to investigate the complaint, contacted the licensing consultant for the Triangle Plantation Point area. (T. p.19) Ms. Britt learned from Licensing Consultant LeAnne Simpkins, that the Triangle Plantation facility did not have a license but the licensure process had begun. (*Id.*) She also learned from Ms. Simpkins that "Tanya Forte" is actually Tanya Johnson. (R. Ex. 3)

20. After reviewing the Division's records of the Triangle Plantation location in the Regulatory Database, Ms. Britt contacted the alleged victim child's parent. (T. p.19) Next, Ms. Britt called Tracey Stanley, the social worker assigned by the Wake County Human Services ("DSS") to investigate the complaint at Petitioner's facility. (*Id.*) Ms. Britt and Ms. Stanley arranged to visit the Triangle Plantation location on November 30, 2010. (*Id.*)

21. On November 30, 2010, Ms. Britt and Ms. Stanley visited Petitioner's facility. (R. Ex. 4) During the visit, Ms. Stanley noticed a young man at Triangle Plantation, and asked Tanya Johnson if he was a staff member. (R. Ex. 8, T. pp) Ms. Johnson introduced the young man, Mikel Scott, as her son, not a staff member. (R. Ex 3 p.2, R. Ex 8 p. 7, T. p. 109) Ms. Johnson later acknowledged that Mikel was "like a son" to her, was her godson, and an employee with her transportation company. (R. Ex. 3)

22. Ms. Johnson represented to Ms. Britt and Ms. Stanley that she knew children R.C. and S.R. were enrolled at Filmore Academy I, but denied that she was aware that R.C. and S.R. were being cared for at the Triangle Plantation location. (R. Exs. 3, 8, T. pp. 41-42, 109-110). "She denied that the child was ever in the facility." (R. Ex. 3, p. 3) Ms. Johnson further denied that Mikel Scott cared for S.R. and R.C. at the unlicensed Triangle Plantation facility Ms. Johnson stated that Mr. Scott works for her through the transportation company she owns, but not at her childcare facilities. (R. Exs. 3, 8; T. pp. 109-110, 112)

23. Ms. Britt and Ms. Stanley told Ms. Johnson that Mikel Scott was the alleged caregiver at Triangle Plantation on November 21 2010. Ms. Johnson indicated that no child was in care on that day as no one was at the center. (R. Ex. 8, p. 7; T. pp. 42, 109) Ms. Johnson added that Mr. Scott could not possibly have cared for the children on that date, because he was in New York with her on that date. (R. Ex. 8 p. 7; T. pp. 109-110)

24. During their November 30, 2010 visit, Ms. Britt and Ms. Stanley interviewed Mikel Scott in Ms. Johnson's presence. (T. pp. 39, 110-111) Scott advised that he was employed by Ms. Johnson for transportation purposes. Ms. Britt and Ms. Stanley learned that on November 21, 2010, Scott received the two children S.R. and R.C., and retrieved blankets from the 2-year-old classroom, as he does in the morning. The children's mother was at the door when he left. When he returned to the foyer, Mr. Scott realized that the mother did not wait with the children, as she normally did, when he went to get blankets. Scott admitted that the children's mother usually gets them settled and tells them goodbye while he gets the blankets. He admitted that on that day, the mother commented about needing to leave, because it was getting late. Scott indicated that he usually transports the children to Petitioner's Longview facility shortly after they arrive. He admitted that sometimes the children have stayed at the Triangle Plantation facility because he could not get a hold of anyone at Longview. (R. Ex. 8, p. 8)

25. On December 2, 2010, Ms. Britt interviewed Lynn Whitfield, Petitioner's director. Whitfield said she was working with R.C. and S.R.'s mom by allowing the children to be dropped off at the unlicensed space for weekend care from October through November 2011. She hired Carolyn James to care for the children during the weekend. When Britt asked Whitfield if Ms. Johnson knew that children enrolled with Petitioner's facility were receiving care at the unlicensed space, Whitfield did not answer. (R. Ex. 3, p. 4)

26. On January 12, 2011, Ms. Britt interviewed Ms. C, the mother of children S.R. and R.C, by telephone. Ms. C restated her original allegations. She explained that since October 22, 2010, a person named Carolyn cared for her children, son S.R. (age 4) and daughter R.C. (age 8), at Petitioner's unlicensed facility at 6471 Triangle Plantation Drive in Raleigh, North Carolina. Ms. C's son attends the licensed Filmore Academy I on Tuesday and Thursday, and both kids attend the unlicensed facility on Fridays, Saturdays, and Sundays. Ms. C informed Britt that Ms. Johnson knew that the children received care at Triangle Plantation, because Ms. Johnson opened the facility twice and cared for the children until Ms. James arrived. (R. Ex. 3, p. 6) Ms. C reported that on one occasion, Ms. Johnson was asleep in her vehicle, and Ms. C knocked on the window to awaken Ms. Johnson. (*Id.*) Ms. Johnson smelled of alcohol, and had on a short dress with five-inch heels. (*Id.*, R. Ex. 3, p. 1)

27. On January 13, 2011, Ms. Britt called Ms. Johnson, and asked Johnson if she had opened the facility to care for S.R. and R.C., and if she had been drinking when S.R. and R.C. arrived at the facility. (R. Ex. 3, p. 6; T. pp. 487-488) Ms. Johnson denied that she opened the center to care for S.R. and R.C., and denied that she used alcohol. (*Id.*)

28. Mikel Scott transported S.R. and R.C. to the Triangle Plantation center on Fridays, and was at the Triangle Plantation facility when Ms. James arrived. (R. Ex. 3 p. 4, T. pp. 136- 137) Mikel Scott was there most Saturday and Sunday mornings when Ms. James arrived for work at the Triangle Plantation to care for S.R. and R.C. (*Id.*) Mikel and Ms. Lynn had a key to the center, but James never got a key. Other times, Ms. Lynn or Tanya Johnson was there until Ms. James arrived at 8 a.m. (R. Ex. 3 p.4) As soon as James arrived, they would leave. (T. p. 137)

29. Mikel Scott was not qualified by the Division to care for children as a "caretaker" under the statutory definition of that term. (T. pp. 118, 176)

30. A preponderance of the evidence showed that Carolyn James cared for S.R. and R.C. at the Triangle Plantation during October and November of 2010. (T. p. 133) James worked at the Triangle Plantation facility from October 22, 2010 until November 22, 2010 on an as-needed basis. James usually worked from 3:00 pm until 10 pm on Fridays, and from 8:00 am until 7:00 pm on Saturdays and Sundays. (T. p. 133-135) On Friday afternoons, James cared for 2-3 children. When James arrived at the center, Mikel [Scott] was there most of the time. (T. p. 136)

31. When James worked at the Triangle Plantation facility, she had not taken any training, submitted to a criminal background check, undergone any health screenings, or received any CPR training. (T. p. 134-135) Ms. Lynn Whitfield, aka Lynn Austin or Lynn Black ("Ms. Lynn"), told James to work on an as-needed basis until the center opened, because they were going to get their license. Once the center opened, James would have to back down from watching S.R. and R.C., and continue her education to get a degree or a certification in early child. (T. pp. 133)

32. On Sunday November 7, 2010, Carolyn James met Ms. Johnson at the Triangle Plantation center to receive R.C. and S.R., because Mikel was not there. (T. pp. 140- 141)

When James arrived at the facility at 7:00 am, Ms. Johnson had the children in her car. Ms. James cared for the children at the Triangle Plantation center on November 7, 2010.

33. During the November 30, 2010 visit, Ms. Stanley picked up an advertisement for Filmore Academy I, II, III & IV, which indicated that there were four licensed three-star Filmore Academy facilities that accepted childcare vouchers for payment. (R. Ex. 9)

34. There is only one facility licensed as “Filmore Academy” by the Division. (T. pp. 170-171) Only licensed facilities may accept vouchers. (T. p. 176) A voucher may only be used at the facility named on the voucher. (T. p. 176) The vouchers state the amount for which the child may receive care, and the number of times that the voucher may used. (T. p. 433) (*Id.*)

35. Ms. Johnson explained that Petitioner bills time to a child’s voucher from the moment the transportation service picks the child up, until the time the child is returned home. (T. p. 530)

36. Based upon its investigation, Wake County CPS determined that it did not have jurisdiction over the Triangle Plantation facility because it was unlicensed. (R. Ex. 10, T. pp. 117-119) In addition, since Mikel Scott did was not a qualified caregiver, Wake County CPS could not investigate him. For these reasons, Wake County DSS lacked the authority or jurisdiction to substantiate abuse or neglect against Petitioner, and closed its case against Petitioner. (R. Ex. 10)

37. Respondent became concerned in this case, because the Division cannot monitor the health and safety of children when they are cared for in other locations and spaces. (T. p. 168) The Division does not have jurisdiction to monitor the care of children in unlicensed spaces.

Administrative Action

38. At the conclusion of her investigation, Ms. Britt recommended issuing a revocation of Petitioner’s license to her supervisor, because “two children enrolled at Petitioner’s facility received care on a regular basis at an unlicensed facility.” (R. Ex. 11) Specifically, Ms. Johnson made false statements to the Division when she denied knowing care was provided to children S.R. and R.C. on Fridays, Saturdays, and Sundays, in October and November 2010, at the unlicensed 6471 Triangle Plantation facility. Attendance sheets submitted to Wake County Human Services Subsidy Department documented that Petitioner provided care to those children on those days. The children received care from a caregiver who was not qualified by the Division. After Deanna Hoxworth reviewed the recommendation, she discussed it with Ms. Britt and her supervisor, and made necessary edits. “The center owner who denies knowledge of this arrangement was observed by a parent caring for the children at the unlicensed facility on at least two occasions.” (R. Ex. 11, p. 2) Hoxworth forwarded her recommendation of revocation of Petitioner’s license to the Division’s Internal Review panel. (T. p. 177)

39. On April 12, 2011, the Division’s Internal Review Committee (“IRC”) reviewed the proposed Revocation, and recommended proceeding with the administrative action. (R. Ex. 12) They reviewed all information submitted to it including the violations, summaries from consultants’ visits to the facility and of the consultants’ interviews conducted during their

investigations. (T. p. 276) The IRC also reviewed an internal matrix listing all IRC decisions in the past three years. (T. p. 279)

40. By letter and Notice dated May 4, 2011, the Division notified Petitioner of the proposed revocation of her childcare license. The Division proposed revocation of Petitioner's childcare license for: (1) violating N.C. Gen. Stat. § 110-91(14) by the provider [Ms. Johnson] providing false information to Respondent when she denied knowledge that children were cared for in an unlicensed space, and (2) violating N.C. Gen. Stat. § 110-91(1) and (4, 5) by caring for two children in an unlicensed space. Respondent informed Ms. Johnson that she could submit written information, as to why the revocation should not be taken, within fifteen days of receipt of the notice. (R. Ex. 13)

41. On May 19, 2011, Ms. Johnson responded to the Proposed Administrative Action, and included letters in support of Petitioner maintaining a license to operate Filmore Academy I. (R. Ex. 14) Johnson attached Petitioner's compliance history assessment forms, from September 11, 2009 to March 10, 2011, to her May 19th response to Respondent. These forms showed that Petitioner had a 100% compliance rate for those 18 months. (R. Ex. 14, pp. 14-17)

42. In her May 19, 2010 response to Division's Proposed Administrative Action, Ms. Johnson stated that she was out of town every weekend from October 2, 2010 to the Thanksgiving holidays. (R. Ex 14, p. 2)

43. Johnson's statement was inconsistent with Carolyn James' statement that Johnson had two children in her car, when James arrived for work on Sunday, November 7, 2010. Johnson's statement, that she was out of town every weekend from October 2nd until Thanksgiving, was also inconsistent with Johnson's hearing testimony, where Johnson acknowledged helping out with transportation for kids on November 19, 2010. Johnson acknowledged that Ms. Lynn called Johnson at 4:30 am on November 19, 2010, and asked Johnson to help with transportation for Petitioner's business, as Mikel Scott would not be at Triangle Plantation when R.C. and S.R.'s mother arrived. (T. p. 469) James went to Triangle Plantation "so that a parent wouldn't be waiting in the cold with her children." (T. p. 466, 469) Mikel Scott was "an hour or thirty minutes or forty minutes" behind schedule. (T. p. 467) When Ms. Johnson arrived at the center, she did not open the facility, but moved the children into her vehicle. (T. pp. 466-467) When Ms. James arrived, Johnson transferred the children to Ms. James' vehicle where they waited until Mikel Scott arrived to take the children to Filmore Academy I.

44. In Johnson's May 19, 2011 response, Ms. Johnson explained that she delegated operation of Petitioner's facility to Lynn Whitfield Black as Petitioner was starting her daycare business at 6471 Triangle Plantation Drive, and Johnson's own PR/Marketing firm. Lynn Whitfield Black handled all the daily operations of Petitioner Filmore Academy I. Since Whitfield Black had worked for Johnson's family childcare business for 9 years, Johnson trusted Whitfield Black, and relied on Whitfield Black's expertise to operate Petitioner's center.

45. The preponderance of the evidence at hearing showed that at all times relevant to this case, Lynn Whitfield Black was director and/or operational director at Petitioner's facility, and was authorized to act on behalf of Petitioner in matters concerning childcare operation. (R.

Ex. 8) “Ms. Lynn” signed all attendance sheets for Petitioner’s facility, and handled the vouchers and the necessary paperwork for subsidy payment to Petitioner for all kids who attended Petitioner’s facility. (R. Exs. 18, 19) All the kids who attended Petitioner’s center used voucher or subsidies to pay for their attendance at Petitioner’s center.

46. Ms. Johnson alleged she was unaware that children were cared for in the unlicensed Triangle Plantation space. She explained that Ms. Lynn had told her children were dropped off at the Triangle Plantation space per the parent’s request, and after drop off, were carried to the Longview facility. Petitioner also alleged that she was unaware that Carolyn James had been hired by Filmore Academy and “never knew anything about Carolyn James in reference to this whole matter.” (T. p. 431) Ms. Johnson was aware that “lots of people were coming into the facility, applying for jobs . . . but there was no hiring process.” (*Id.*)

47. However, in later testimony, Ms. Johnson stated:

I knew Ms. James as a transportation driver. . . was in our—in our information under transportation as well as Mikel under Blue Mule. She was not in our information as a worker, as anybody that did anything.

(T. p. 465)

48. In her May 19, 2011 letter to Respondent, Petitioner further explained that Whitfield Black and other employees began engaging in “alleged embezzlement, improper hiring, and enrollment practices, poor receipting of copayments, and payments, and enrolling children with no payments at all.” (R. Ex. 14, p. 4) Johnson noted that on April 18, 2011, she and her lawyer “unveiled the proof necessary to file charges with Officer Perez with the Raleigh PD,” and fired Whitfield Black. Whitfield Black became hostile and angry. (R. Ex. 14, p. 4)

49. At hearing, Ms. Johnson explained that she did not include a copy of the Raleigh Police report in her May 19, 2011 letter. “I could not submit the police report because the police report wasn’t finished, so I put in my letter the information that the police had given me on the card and the detective’s name.” (T. p. 513) However, a review of Johnson’s May 19th letter revealed that Johnson indicated that charges were filed with Raleigh Police Officer Perez. She failed to provide any information such as a case number, phone number, Officer Perez’ first name, or any other identifying information.

50. In addition, neither Ms. Johnson’s May 19, 2011 letter nor her letters of support addressed the specific allegations of the proposed action. (*Id.*)

51. On June 7, 2011, Holli Britt submitted a response to Johnson’s May 19, 2011 letter to Respondent, recommending revocation of Petitioner’s license. (R. Ex. 14, pp. 2-3) Britt noted that, “Based on our investigation, there was no indication that information was provided to the Division in a malicious manner.” (R. Ex. 14)

52. On June 14, 2011, Respondent’s IRC reviewed the responses of Ms. Johnson, and Ms. Britt, and decided to proceed with revocation of Petitioner’s license “based on the seriousness of the incident.” (R. Ex. 14)

53. Kimberly Mallady, the Division's Licensing Enforcement Section Chief, attended the IRC meetings where Respondent discussed the recommendation to revoke Petitioner's license. At hearing, Mallady explained that this case involved a serious situation of falsification and care in an unlicensed space. (T. p. 311) Vouchers showed authorized payment to a licensed facility for the same time children were being cared in an unlicensed space, and that is an issue. "We have falsified attendance records by the director who is an employee of Ms. Johnson, and she is responsible for her [employee's] actions." (T. p. 313)

54. Mallady explained that Respondent decided to revoke Petitioner's license because Johnson denied knowing children were cared for at the unlicensed space on two occasions. Johnson denied such knowledge in her initial interview with Holli Britt and Ms. Stanley on November 30, 2010, and during her January 13, 2011 conversation with Ms. Britt. (R. Ex. 3; T. p. 317) However, "there were accounts from people that we interviewed that she [Johnson] did have knowledge that children were there and that she was there taking care of children until somebody else got there." (T. p. 318)

55. Mallady opined that revocation was proper in this case, because "the use of unlicensed space where there are no approved inspections and no qualified care givers presents health and safety issues." (T. pp. 298, 304)

56. The IRC uses an internal matrix of the last 3 years of its decisions in deciding the appropriate action to take in cases before the IRC. The IRC primarily uses this matrix during its first or initial determinative review of a case. During a second review of a case, the IRC primarily reviews the provider licensee's response to the proposed action. (Mallady testimony)

57. In this case, Respondent reviewed all the cases in its internal matrix (P. Ex. 11) where falsification of information was listed as the basis of a case before the IRC. The internal matrix showed that in at least five of these "falsification" based cases, the IRC initially proposed revocation of the license, but Respondent ultimately issued the provider either a provisional license or a probationary license. In some of these cases, those providers had a lesser compliance rating score than Petitioner's 100% compliance rating. In these five cases, Respondent's final decision to issue a provisional or probationary license to a provider was the result of a settlement decision made by other people, ultimately Respondent's Director, following the IRC's decision. (T. pp. 364, 367)

58. At the same time, this matrix also showed that Respondent revoked a provider's license in at least five cases where the basis for the action was falsification of information provided to Respondent. (P. Ex. 11)

59. A preponderance of the evidence at hearing proved that children S.R. and R.C. were enrolled at Petitioner's facility for care in October and November 2010. During that time, these children were authorized to receive care at Petitioner's licensed facility, under the voucher system for days and times including Fridays, Saturdays, and Sundays. During October and November 2010, Carolyn James cared for these children at an unlicensed facility at the 6471 Triangle Plantation Drive. (R. Exs. 18, 19; T. pp. 248-253)

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case pursuant to Chapters 110 and 150B of the North Carolina General Statutes.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder and the notice of hearing was proper.

3. The primary purpose of childcare regulation in the state is defined as providing for the health, safety, and developmental well-being of children in childcare facilities. N.C.G.S. § 110-85.

4. Under N.C.G.S. §§ 110-105(a)(3), the Division has the authority to inspect a facility “without notice if there is probable cause to believe that an emergency situation exists or there is a complaint alleging a violation of licensure law.”

5. The person applying for a childcare center license is the one who will be legally responsible for the operation of the center, including compliance with childcare statutes and rules. 10A NCAC 09.0302

6. Pursuant to N.C.G.S. § 110-90(5), the Division has the authority to issue administrative actions, up to and including revocation of a license, when a facility ceases to meet standards adopted by the Child Care Commission.

7. Under 10A NCAC 09 .2206(a), the Division has the authority to issue a revocation of a license when a violation of any “statutes or rules has been willful, continual, or hazardous to the health or safety” of children.

8. Pursuant to N.C.G.S. § 110-98, it is unlawful for anyone to provide child care that is not in compliance with Chapter 110 Article 7 of the North Carolina General Statutes or to advertise child care without disclosing the child care facility’s identification number located on the license or letter of compliance.

9. Children must be cared for in facilities that meet building code and fire safety standards for childcare established by the North Carolina Department of Insurance. Each facility must be inspected annually for compliance. N.C.G.S. § 110-91(4), (5)

10. Pursuant to N.C.G.S. § 110-91(14),

Any effort to falsify information provided to the Department shall be considered by the Secretary to be evidence of violation of this Article on the part of the operator or sponsor of the childcare facility and shall constitute a cause for revoking or denying a license to such childcare facility.

11. At all times relevant to this matter, Petitioner was subject to the child care licensure laws and rules of the State of North Carolina as it operated with a child care license issued by Respondent.

12. At all times relevant to this matter, Tanya Johnson, as Petitioner's operator, was legally responsible for the operation of Petitioner Filmore Academy.

13. A preponderance of the evidence presented at hearing established that Petitioner violated childcare requirements by caring for children enrolled at Filmore Academy I at an unlicensed facility. N.C.G.S. § 110-91(4),(5)

14. Tanya Johnson's testimony before this court that she met Ms. C at Triangle Plantation, but did not open the facility during the time Carolyn James worked for Petitioner, was inconsistent with her response to the Division's Proposed Administrative Action stating that she was out of town every weekend from October 2, 2011 to the Thanksgiving holiday.

15. Tanya Johnson's false statement to the Division of Child Development that Mikel Scott could not have cared for children at Triangle Plantation on November 21, 2010 because he was in New York with her, constitutes falsification of information to the Division.

16. Tanya Johnson's denial of awareness that children enrolled at Filmore Academy I were being cared for at Triangle Plantation to the Division is not credible.

17. A preponderance of the evidence at hearing showed that Tanya Johnson willfully falsified information to the Division during its investigation of the abuse/neglect complaint concerning care of children in unlicensed space. Such falsification constitutes cause for revoking Petitioner's license.

18. Pursuant to N.C.G.S. §§ 110-90(5), 110-91 (14), and 10A NCAC 09 .2206, Respondent had the authority and jurisdiction to revoke Petitioner's three-star license.

19. Respondent did not exceed its authority or jurisdiction, act erroneously, fail to act as required by law or rule, deprive Petitioner of property, act arbitrarily or capriciously, or otherwise substantially prejudice Petitioner's rights by revoking Petitioner's three-star license.

20. Respondent followed the procedures for investigation and evaluation of the complaint against Petitioner as detailed by North Carolina General Statutes and childcare rules in revoking the Petitioner's three-star license.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned determines that Respondent should **UPHOLD and AFFIRM** the Division's decision to revoke Petitioner's three-star childcare license.

NOTICE

The North Carolina Department of Health and Human Services, Division of Child Development will make the final decision in this case. The agency is required to give each party an opportunity to file exceptions to this recommended decision and to present written arguments to those in the agency who will make the final decision. N.C.G.S. § 150-36(a) The agency is

required by N.C.G.S. § 150B-36(b)(3) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorney of record and to the Office of Administrative Hearings.

This the 12th day of June, 2012.

Melissa Owens Lassiter
Administrative Law Judge

