

STATE OF NORTH CAROLINA		IN THE OFFICE OF
COUNTY OF FORSYTH		ADMINISTRATIVE HEARINGS
		11 DHR 11738
Betty Parks)	DECISION
Petitioner,)	
)	
v.)	
)	
Division of Child Development Department)	
of Health and Human Services,)	
Respondent.)	

This matter was heard before the Honorable J. Randall May, Administrative Law Judge, on May 1, 2012 in High Point, North Carolina.

APPEARANCES

Petitioner:

Betty Parks
2800 Rosemary Drive
Winston Salem, NC 27105

For Respondent:

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

APPLICABLE STATUTES AND RULES

N.C.G.S. §§ 110-88, 110-90(5), 110-91, 110-98, 110-102.2(5)

Child Care Rules 10A NCAC 09 .0302, .1716(b), .1718, .1720-.1722, .2206 and .2702

ISSUES

Whether the Respondent otherwise substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, or failed to act as required by law or rule when it revoked the two star child care license issued to Betty M. Parks to operate Betty's Day Care (ID # 34000806).

EXHIBITS ADMITTED INTO EVIDENCE

Respondent's Exhibits 1-7, 9-13 were admitted. The Court took official notice of the relevant statutes and rules included in Respondent's Exhibit 14. Petitioner's Exhibits 1-2 were admitted.

POST HEARING SUBMISSION

The undersigned also received and considered a package of letters and other documents, which were submitted by Petitioner on or about May 23, 2012, and identified as Petitioner's Post Hearing Exhibit A. According to Petitioner in telephonic correspondence on or about June 12, 2012, a copy of the packet was also sent to Assistant Attorney Echols, for which Petitioner has the receipt of mailing.

In compliance with the instructions of the undersigned, a proposed decision was received from both Petitioner and Respondent.

FINDINGS OF FACT

The Findings of Fact are made after careful consideration of the sworn testimony, whether visual and/or audio, of the witnesses presented at the hearing and the entire record in this proceeding, the undersigned makes the following findings of fact. In making the findings of fact, the undersigned has weighed all the evidence, and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony and the admitted evidence, or the lack thereof, the undersigned makes the following:

Parties/Witnesses

1. The parties stipulated on the record that each was properly notified of the hearing date.
2. 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.*
3. Pursuant to N.C.G.S. § 110-85, the Division has a mandate to ensure that children in child care facilities are in physically safe and healthy environments where the developmental needs of the children are met.
4. Child care is highly regulated in North Carolina.
5. Given that minor children were involved in the subject allegations and investigation of this case, the undersigned will refer to any minor children and their parent(s) by initials only.

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

6. Audrey Davis is a child care consultant with the Division. Ms. Davis has worked for the Division for eight (8) years. Prior to her current position, Ms. Davis worked as a director of a non-profit child development center in Winston-Salem. She has also been a pre-school teacher for ten (10) years, a Head Start Lead teacher for one (1) year, and a child development coordinator. Ms. Davis earned a Bachelor of Science degree in Psychology at Winston-Salem State University. Ms. Davis' responsibilities as a child care consultant for the Division include licensing new facilities; monitoring existing facilities; conducting annual compliance visits, and providing technical assistance to providers. Ms. Davis monitors facilities in parts of Forsyth County and in Elkin (Surry County). Ms. Davis was the consultant for Betty's Day Care when the Division took this administrative action.

7. Barbie Anderson is a licensing supervisor with the Division. Ms. Anderson has worked for the Division for fourteen and one half (14 ½) years. Previously, Ms. Anderson worked as child care consultant for one and one half (1 ½) years. Before coming to the Division, Ms. Anderson also taught Early Childhood courses at Wilkes Community College, served as a Child care Center Director in Wilkes County for four (4) years and directed the Child care Center at Yates Baptist Church in Durham for ten (10) years. Ms. Anderson holds a Bachelor of Science degree in Early Childhood Education from Appalachian State University. Ms. Anderson's responsibilities as a licensing supervisor for the Division include managing a team of seven (7) consultants and one (1) lead consultant in eight (8) Western North Carolina counties. She is responsible for supervising her team members' performance and oversees administrative actions.

8. Tamara Barnes is the Regulatory Services Section Chief for the Division. Ms. Barnes has worked for the Division for nineteen (19) years. Ms. Barnes served the Division as Licensing Enforcement Program Manager for nine (9) years; Abuse & Neglect Supervisor for two (2) years; and Abuse & Neglect Consultant five (5) years. Ms. Barnes previously worked as a child care director in for-profit and religious sponsored centers for twelve (12) years; worked at Head Start Resource Referral; and served as a grant manager for Durham Resource Referral. Chief Barnes holds a bachelor's degree in psychology and early childhood from the University of North Carolina at Chapel Hill. Ms. Barnes responsibilities as Regulatory Services Section Chief include approving the issuance of administrative actions and overseeing the licensing enforcement staff, as well as consultants, managers, and supervisors who work across the state.

Background

9. Chief Barnes testified that approximately 8,200 facilities are licensed by the State of North Carolina and that in the past fiscal year, the Division has taken action to revoke the licenses of nineteen (19) facilities.

10. Consultant Davis testified that unless a violation is reported to the Division, Division consultants generally visit each child care facility once or twice each year.

11. The Division relies upon the truthfulness of licensed child care providers, as it does not have the staff to observe the operations of each child care facility on a frequent basis.

12. On April 14, 2011, Consultant Davis conducted an Annual Compliance Visit at Betty's Day Care. (R. Ex. 2)

13. Petitioner is licensed to care for a maximum of five preschool children at any time. (R. Ex. 1) When Consultant Davis arrived on April 14, 2011, seven (7) preschool children were in Petitioner's care. (R. Ex. 2, 13)

14. At the time of the visit, Carl Lowe, Petitioner's husband, was more than ten (10) months late for his three-year criminal record check. (R. Ex. 2, 13)

15. Upon review of Petitioner's records, Consultant Davis found that several pieces of information required to be on file for each child upon enrollment, or by the first day they attend, were missing. (R. Ex. 2, 13) Health and emergency information had not been completed, signed by a parent, and placed in the file for each child, (*Id.*); doctor and hospital preferences were missing for three (3) children; and authorizations to seek medical care in their parents' absence were not on file for three (3) children. (*Id.*) In addition, health information for children enrolled more than one (1) year had not been updated annually. (R. Ex. 2, 13)

16. Two (2) children's files did not contain signed and dated statements attesting that a copy of Betty's Day Care's discipline policy had been given to and discussed with a parent of each child prior to the first time the child attended the family child care home ("FCCH") in violation of N.C.G.S. § 110-91(10). (R. Ex. 2, 13)

17. Five (5) children's files did not contain signed statements that a parent of each child had been given a summary of North Carolina Child Care Law prior to the child's enrollment as required by N.C.G.S. § 110-102. (R. Ex. 2, 13)

18. Petitioner failed to lock medications away pursuant to 10A NCAC 09 .1720(2)(3). (*Id.*)

19. Petitioner's refusal to refrigerate or lock away medications as required by 10A NCAC 09 .1720(a)(3) shows that she understood the requirement but refused to abide by it. (R. Ex. 12)

20. Petitioner corrected the capacity violation by having the parents of two (2) children pick them up during the visit. (R. Ex. 2)

21. During the visit, Petitioner called the Division and requested the forms her husband needed to complete the criminal record check requirement. (R. Ex. 2)

22. In her compliance letter mailed to the Division on April 25, 2012, Petitioner falsely stated, "Everything is complete" and "[a]ll have been corrected". (R. Ex. 4)

23. Consultant Davis informed Petitioner that she must correct the violations cited and send a compliance letter describing how she corrected each violation to Consultant Davis by April 28, 2011. (R. Ex. 2)

24. Consultant Davis conducted a follow up visit on April 26, 2011, during which Petitioner informed Consultant Davis that she had mailed a compliance letter on April 25, 2011, verifying that all violations cited on April 14, 2011, had been corrected. (R. Ex. 3)

25. During her April 26, 2011 visit, Consultant Davis reviewed the files and found that none of the items missing from the children's files on April 14, 2011, had been added to any of the files. (R. Ex. 3)

26. After visiting Betty's Day Care on April 26, 2011, Consultant Davis received and reviewed Petitioner's compliance letter, which specifically addressed the five (5) violations that were not corrected during the April 14, 2011 visit. (R. Ex. 4)

27. In the compliance letter, Petitioner asserted that the pages containing the health and emergency information were double-sided and that Consultant Davis simply overlooked the information. (R. Ex. 4) Petitioner stated that no health and emergency forms were missing from the children's files on April 14, 2011. (*Id.*) Petitioner further asserted that signed verifications of parents' receipt of the disciplinary policy were included in the files.

28. On April 28, 2011, Consultant Davis conducted a second follow up visit to verify Petitioner's correction of the seven (7) violations cited on April 14, 2011. (R. Ex. 5)

29. Consultant Davis testified that she reviewed the files that were missing information again, but found neither that any of the missing information had been added to any files, nor observed any double-sided forms in the file. (*Id.*)

30. The April 28, 2011, visit summary states that Consultant Davis reviewed the files, did not find any emergency information on the back of any forms, and did not find signed sheets verifying receipt of the discipline policy by parents added to any files. (R. Ex. 5)

31. During the visit, Petitioner told Consultant Davis that she had given emergency information forms to the parents of children whose files lacked medical information to complete and was waiting for the parents to return the completed forms. (R. Ex. 5)

32. Petitioner's claim that the required medical information and authorizations were in the children's files and that Consultant Davis simply overlooked the forms is not credible.

33. On April 28, 2012, Consultant Davis cited a violation for Petitioner's failure to adequately supervise the children in her care in violation of 10A NCAC 09 .1718(a)(7)(A), as Petitioner was unable to see and hear children who were in the den, while she prepared lunch in the kitchen. (R. Ex. 5, 13)

34. Consultant Davis also cited a violation for Petitioner's failure to lock hazardous cleaning supplies or other poisonous items away or place them out of the children's reach in violation of 10A NCAC 09 .1720(a)(4). (R. Ex. 5) Petitioner kept hand sanitizer and Lysol on a low open shelf in the area where children were playing during Consultant Davis' visit. (*Id.*)

35. Consultant Davis testified that she reviewed each visit summary with Petitioner at the end of every visit and that Petitioner signed every visit summary. (R. Ex. 2-3, 5-6, 10)

36. Petitioner testified that Petitioner signed every visit summary at the end of Consultant Davis' visits.

37. Consultant Davis testified that Petitioner did not point out any double-sided pages containing health and emergency information to Consultant Davis during any of her three (3) April visits.

38. Petitioner did not challenge any statements in any visit summary that information was missing from the files before she received the Proposed Administrative Action to revoke her license, dated July 28, 2011.

39. Petitioner's May 26, 2012 claim that she did not understand which forms were needed to correct the April 14, 2011, violations is not credible.

40. Each visit summary contains an italicized statement just above the provider's signature line, which reads: "All information in this report has been reviewed with me today. I understand that it is my responsibility to maintain compliance with applicable NC Child Care Requirements at all times." (R. Ex. 2-3, 5-6, 10)

41. In her response to Respondent's July 28, 2011 Notice of Proposed Administrative Action, Petitioner asserts that, "[m]y books on all policies were handed to each parent, and [each parent] read and signed on each book". (R. Ex. 12, p. 7)

42. When Supervisor Anderson and Consultant Davis visited Betty's Day Care on May 12, 2011, copies of summaries of child care law were observed in the children's files, but no statements had been signed by the parents verifying that they had received copies of the summary were found in the files. (R. Ex. 6, 13)

43. In her response to the Respondent's July 28, 2011 Notice of Proposed Administrative Action, Petitioner admits that hand sanitizer was left on an open shelf with a safety top on it. (R. Ex. 12) She further asserts that she keeps all hazardous cleaning products in her bathroom cabinets, but she goes to the bathroom with the kids.

Statutory Authority

44. Respondent has the authority to revoke a child care license when any "violation of . . . the statutes or rules has been willful, continual, or hazardous to health or safety." 10A NCAC 09.2206. N.C.G.S. § 110-90(5).

45. Pursuant to N.C.G.S. § 110-91(14), any effort to provide false information to the Division is considered evidence of a violation of this Article by the operator or sponsor of the child care facility and constitutes cause for revocation of a license to operate a child care facility.

46. Pursuant to N.C.G.S. § 110-98, it is unlawful to provide child care in violation of child care statutes.

47. When child care facilities fail to comply with child care requirements, the Division may permanently revoke a license. N.C.G.S. § 110-102.2(5).

48. Petitioner's violations of failure to obtain medical treatment authorizations and information; supervision requirements; capacity requirements; untimely criminal background checks; and Petitioner's refusal to lock medications away and keep hazardous cleaning supplies or poisonous items out of the children's reach were willful, continual, or hazardous to health or safety under 10A NCAC 09 .2206(a).

49. Petitioner has the burden of proving that Respondent otherwise substantially prejudiced Petitioner's rights and exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure; or failed to act as required by law or rule when it revoked Petitioner's two star child care license.

CONCLUSIONS OF LAW

The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case pursuant to N.C. Gen. Stat. § 150B-23 *et seq.* All necessary parties have been joined and have received proper notice of the hearing in this matter. To the extent that the Findings of Fact contain Conclusions of Law, or that the Conclusions of Law are Findings of Fact, they should be so considered without regard to the given labels.

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

2. At all times relevant to this matter, Petitioner's facility was subject to the child care licensure laws and rules of the State of North Carolina.

3. At all times relevant to this matter, Petitioner's facility operated pursuant to a license issued by the Respondent.

4. Petitioner's claim that the required disciplinary policy information was included in the children's files is not credible.

5. In deciding to keep hazardous cleaning products in the bathroom cabinets— in violation of 10A NCAC 09 .1720(a)(4)— because she goes to the bathroom with the children, Petitioner substituted her judgment for the judgment of the Child Care Commission. (R. Ex. 12)

6. Respondent properly exercised its authority to revoke Petitioner's license because her falsification of information to the Division constituted cause for revocation of her license pursuant to N.C.G.S. § 110-91(14).

7. Respondent properly exercised its authority to revoke Petitioner's license because the violations of the lack of medical treatment authorizations and information; supervision requirements; capacity requirements; untimely criminal background checks; and Petitioner's refusal to lock medications away and keep hazardous cleaning supplies or poisonous items out of the children's reach were willful, continual, or hazardous to health or safety under 10A NCAC 09 .2206.

8. Respondent did not otherwise substantially prejudice Petitioner's rights by revoking Petitioner's two star child care license.

9. 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 two star child care license.

10. Respondent did not exceed its authority or jurisdiction by revoking Petitioner's two star child care license.

11. Respondent did not act erroneously by revoking Petitioner's two star child care license.

12. Respondent did not fail to use proper procedure by revoking Petitioner's two star child care license.

13. Respondent did not fail to act as required by law or rule by revoking Petitioner's two star child care license.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The Respondent's decision to revoke Petitioner's two star child care license is **AFFIRMED.**

NOTICE

The Agency that will make the final decision in this contested case is the North Carolina Department of Health and Human Services, Division of Child Development.

The Agency is required to give each party an opportunity to file exceptions to the decision and to present written arguments to those in the Agency who will make the final decision. N.C. Gen. Stat. § 150-36(a). The Agency is required by N.C. Gen. Stat. § 150B-36(b) to serve a copy of the final decision on all parties and to furnish a copy to the parties' attorneys of record and to the Office of Administrative Hearings.

In accordance with N.C. Gen. Stat. § 150B-36 the Agency shall adopt each finding of fact contained in the Administrative Law Judge's decision unless the finding is clearly contrary to the preponderance of the admissible evidence. For each finding of fact not adopted by the agency, the agency shall set forth separately and in detail the reasons for not adopting the finding of fact

and the evidence in the record relied upon by the agency in not adopting the finding of fact. For each new finding of fact made by the agency that is not contained in the Administrative Law Judge's decision, the agency shall set forth separately, and in detail, the evidence in the record relied upon by the agency in making the finding of fact.

SO ORDERED this 20th day of June, 2012

J. Randall May, Administrative Law Judge