

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,757
)
Appeal of)

INTRODUCTION

The petitioner appeals the decisions by the Department of Social and Rehabilitation Services (SRS) revoking her registration to operate a family day care home and denying her application for a license to operate an early childhood day care program. The issues are whether the petitioner failed to comply with the Department's regulations regarding allowable numbers of children and, if so, whether the Department acted within its legal discretion in revoking her registration and denying her license application.

FINDINGS OF FACT

1. The Department initially granted the petitioner a registration certificate to operate a family day care in her home in January 2002. The limit on such a registration is six children at any time, with an additional four school-age children for four hours a day. (See *infra*.) In April 2002 the petitioner applied for a license to operate an early

childhood program, which would allow her additional numbers of children depending on how many caregivers were present.

2. In June 2002, while it was considering the petitioner's application for an early childhood program license, the Department granted the petitioner a variance on her family day care home *registration* allowing her up to ten children full time provided another caregiver was present in her home whenever there were more than six children in her care.

3. By its express terms, the variance to the petitioner's registration was to expire January 1, 2003.

4. During the period her variance was in effect the Department determined that the petitioner was over allowable numbers (of her variance) on three separate occasions. The second and third instances, which occurred in October and December 2002, resulted in the petitioner acknowledging the violations and notifying the parents of them in accordance with the Department's regulations.

5. In late December 2002 the petitioner was still in the process of furnishing information to the Department regarding her application for an early childhood program license. On December 31, 2002 the petitioner spoke by phone with the Department's chief of day care licensing. In that

conversation the licensing chief informed the petitioner that the variance on her day care home registration, which was due to expire the next day, would continue until the licensing chief issued a written decision based on his review of the petitioner's request for an extension of that variance.

6. Following that conversation the Department received complaints that the petitioner was over the numbers allowed by her waiver on January 13 and 21, 2003. On an inspection visit on February 10, 2003, which was prompted by the complaints in January, the Department cited the petitioner for being over numbers that day.

7. In a letter dated February 28, 2003, the licensing chief informed the petitioner that the Department had decided not to extend her variance due to the numbers violations that had been cited in October and December 2002 and February 2003.

8. The petitioner promptly requested a commissioner's review hearing to contest the denial of her request for the extension of her waiver.

9. While that review was pending, the Department inspected the petitioner's facility on April 24, 2003. The inspector found that the petitioner was over the numbers allowed under her registration, but within the numbers that had been allowed under her waiver. However, the petitioner

claimed that her waiver was still in effect because she had appealed the decision not to extend it. Uncertain as to the status of the petitioner's waiver, the inspector did not cite the petitioner for being over numbers on that occasion.

10. By letter dated April 30, 2003 the Department's licensing supervisor informed the petitioner that her waiver was not in effect during her appeal, and that she had *not* been in compliance with the allowable numbers of children when the Department had visited her facility on April 24, 2003. The letter also warned the petitioner: "failure to comply in the future may compel this office to review your file for possible regulatory action."

11. The commissioner's review hearing regarding the Department's denial of the petitioner's request for waiver extension was held on May 20, 2003. At that time the petitioner alleged, inter alia, that she had received "mixed messages" from the Department regarding allowable numbers and that she was being unfairly "targeted" by the Department's licensors.

12. On June 6, 2003, at an unannounced inspection of the petitioner's facility, the Department's investigator found that the petitioner was caring for eight preschool children, two over the registration limit. The petitioner told the

investigator that despite the letter she had received on April 30, 2003, and the information orally given to her at the commissioner's review hearing on May 20, 2003, the Department's Operations Manager had told her in a phone conversation "in early March" that she could continue to operate under the terms of her variance.

13. By letter dated June 18, 2003 the Commissioner of SRS informed the petitioner that her request for extension of her family day care home registration variance was denied and that her application to become a licensed early childhood program provider was also denied. It does not appear that the numbers violation cited on June 6, 2003 factored into these decisions. No action was taken on the petitioner's family day care home registration at that time.

14. Sometime in the summer of 2003 the petitioner reapplied for a license to operate an early childhood program.

15. In September 2003 the Department determined that a prohibited person was present in the petitioner's facility. In a letter dated October 15, 2003, the Department notified the petitioner that it intended to revoke her family day care registration effective November 14, 2003 and to deny any pending application for licensure. The notice cited five instances of being "over allowable numbers", October and

December 2002 and February, April, and June 2003. It also cited the "presence of a prohibited person" in September 2003.

16. The petitioner appealed this decision on November 14, 2003. Following a commissioner's review hearing on January 9, 2004, the Department informed the petitioner, by letter dated January 27, 2004, that it would not pursue the allegations regarding a prohibited person as a basis to revoke the petitioner's registration and deny her application for licensure. However, based on the numbers violations cited in the October 15, 2003 notice, the Department notified the petitioner that it was upholding the decisions to revoke her registration and deny her license application.

17. At the fair hearing in this matter, held on March 3 and April 12, 2004, the petitioner did not dispute the numbers of children found by the Department to have been present at her day care on any of the days in question. However, the petitioner attributed all the violations either to extenuating circumstances of children being left at her day care unexpectedly or her misunderstanding as to the status of her variance.

18. For the reasons set forth below, it is not necessary to determine the circumstances surrounding or the petitioner's understanding of the numbers requirement for any day an

inspection occurred other than June 6, 2003.¹ In this instance, the petitioner's testimony that she believed she was in compliance on June 6, 2003 based on her variance is entirely incredible. As noted above, she had been told unequivocally in a letter from the Department's licensing chief and orally at a commissioner's review hearing that her variance was not in effect. Both of these notices occurred well *after* the conversation the petitioner claims she had with the Department's Operations Manager, in which she alleges that she was told her variance would continue pending the outcome of her appeal. There is no credible basis to believe that on June 6, 2003, the petitioner could have been under any legitimate misapprehension as to the numbers of children that were allowable in her day care. The only reasonable conclusion from the evidence is that the petitioner was

¹ If it were, several things would weigh heavily against the petitioner's overall credibility. In response to a question by the hearing officer, the petitioner testified that despite the appearance of an incredible coincidence, she was over numbers only on the days the Department's inspectors chose to visit. This testimony was directly contradicted by a former employee of the petitioner who testified that when she worked at the petitioner's facility in Winter and Spring of 2003 the petitioner was frequently over numbers, and that the petitioner *instructed* her to falsify children's attendance records to conceal this fact from Department investigators. Although the petitioner claims she was not given sufficient opportunity at the hearing to examine this witness, and claims that this former employee is lying because she was disgruntled over her rate of pay, this employee testified only under subpoena, and she struck the hearing officer as a highly credible witness.

knowingly and deliberately flouting the regulations in this regard on that date.²

ORDER

The Department's decisions are affirmed.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation. 33 V.S.A. § 306(b)(1). Those rules and regulations are required by statute to be "designed to insure that children in . . . family day care homes are provided with wholesome growth and educational experiences, are not subjected to neglect, mistreatment or immoral surroundings." 33 V.S.A. § 3502(d). Such rules and regulations have been adopted and are found in the Department's **Regulations for Family Day Care Homes**. Furthermore, the Commissioner has the specific authority to revoke registrations "for cause after hearing". 33 V.S.A. § 306(b)(3).

² In addition to her own testimony at the hearing, the petitioner introduced several written statements and offers of proof regarding potential testimony from other witnesses. To the extent that any of these statements are relevant to the events of June 6, 2003, the hearing officer has considered them in the light most favorable to the petitioner.

The regulatory definitions specifically list "group size" as a "serious violation" of the regulations. More specifically the regulations include the following:

SECTION II - PROGRAM

NUMBERS OF CHILDREN PERMITTED IN REGISTERED FAMILY DAY CARE HOMES

THE FOLLOWING LIMITS APPLY IN REGISTERED FAMILY DAY CARE HOMES

During the School Year

Six children any age including up to two children under the age of two per caregiver. . .

Four school age children not to exceed four hours per child. . .

The Board has consistently held that if it is found that an individual has violated the above regulation, the Commissioner has the authority to determine what action to take and the "cause" needed to revoke a day care registration certificate if he deems it an appropriate remedy. See also, 3 V.S.A. § 8814, Huntington v. SRS, 139 Vt. 416 (1981). The Board will only overturn such a decision if the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion.

In this case the evidence shows that as of May 20, 2003, when it held a commissioner's review hearing on the numbers violations *that had occurred up to that time*, SRS deemed these

violations to be sufficient only to deny her request for continuation of the *variance* on her registration and to deny her application to operate a *licensed* day care facility. However, SRS did *not* at that time deem these violations serious enough to revoke her *registration*.

On June 6, 2003, *after it had held the commissioner's review hearing*, SRS *again* found the petitioner to be in violation of the numbers limit. However, SRS took no action to revoke her registration until October 15, 2003, and only after it had also determined that a prohibited person was in the facility in September 2003. Moreover, as noted above, following a second commissioner review hearing in January 2004 SRS *dropped* the prohibited person charge as a basis of its decision to revoke the petitioner's registration. In its notice of that decision, which is the decision under review in this fair hearing, the only violation cited *that was not considered at the commissioner review hearing in May 2003* was the over numbers violation on June 6, 2003. Thus, the issue at this time is whether the June 6, 2003 numbers violation was a "straw that broke the camel's back" sufficient to conclude that the Department fairly exercised its discretion in this matter.

As noted in the above findings, regardless of what her understanding of what the applicable regulations may have been before then, the clear weight of the evidence is that the petitioner was fully aware of the six-child limitation when her facility was inspected on June 6, 2003. By deliberately and defiantly being over numbers on that date the petitioner virtually invited the Department to take adverse action. In light of this, the only viable argument that the petitioner can make at this time is that the Department's *inaction* over this violation between June 6 and October 15, 2003 renders its *eventual* decision to revoke her registration on this basis an abuse of discretion.

Although there is some appeal to such an argument, it must fail in light of the purposes of the underlying statute and regulations governing day care facilities. That purpose is the protection of children. (See *supra*.) It would be contrary to those purposes if the Department were to be, in effect, penalized for its failure to vigorously and timely take otherwise-appropriate regulatory action. In this case, based on the above findings, it cannot be concluded that the Department ever condoned, or should have condoned, the petitioner's knowing and willful violation of the numbers limit on June 6, 2003. Its failure to take more timely action

on this violation may be inexplicable, but it does not necessarily render legally invalid the action that it eventually did take.

As for the Department's denial of the petitioner's application for a license to operate an early childhood program, the regulations for those facilities also include a provision defining a violation of "group size" as a "serious violation". Inasmuch as it has been found that the petitioner willfully and knowingly violated the limits on her registration certificate, it must certainly be concluded that the Department was within its discretion in also denying the petitioner's application to license her facility as an early childhood program.

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