

incorporated herein under the doctrine of res judicata. In summary, the Board decided in that case that the petitioner had refused access to her home by DCF officials during day care hours on three occasions (1994, 2001 and 2004) and had deprived DCF of the knowledge it needed to protect children in the petitioner's care.

3. In addition to the facts found at the conclusion of the suspension hearing, DCF also relies in this revocation action on its finding that the petitioner had children in excess of numbers allowed by the regulations during visits to her home in 2001.

4. In 1988 the petitioner became a licensed day care facility. In February of 1996, the petitioner moved to another home and changed her license to a day care home registration certificate, a level of less oversight. During the transition from licensed to registered day care facility, there was a period of time during which the petitioner was neither licensed nor registered. It came to DCF's attention that the petitioner may have been caring for children as if she were already registered (caring for children for more than two families is the threshold that triggers the need for registration.) At that time, DCF expedited the registration certificate and the chief of the unit visited the petitioner

personally to explain the regulations regarding the number of children in care. He found that the petitioner did have children from three families in her care and the petitioner was asked to sign an agreement that she would follow the numbers regulations. That agreement spelled out in detail the number of children allowed in care.

5. On July 24, 1996, a DCF employee made an unannounced visit to the petitioner's day care home in response to an inquiry she made about caring for more children. At that time it was observed that seven children were in care with one caretaker. The petitioner's second caretaker (her daughter) arrived later with another child. Thereafter, three more children arrived. The petitioner was cited at that time for having six children with one caretaker. A few days later the licensing chief visited the petitioner and again explained the number of children regulation to the petitioner. The petitioner was required to notify the parents of the citation which she did.

6. In February of 2000, the petitioner contacted DCF with regard to becoming licensed again. In response to that request, a licensing field specialist visited her home to discuss in detail the requirements of a license. He also

brought a substantial portfolio of information to the petitioner.

7. In the summer of 2000, DCF received a complaint that the petitioner's daughter was caring for up to twelve children by herself. A field visit made on August 4, 2000 made no finding of a violation. However, the petitioner was advised in writing at that time that she was restricted to six preschoolers and that a second caregiver had to be present when the number exceeded six. She was also told that she could have up to twelve children in care during the summer. In addition, a concern was also raised that the petitioner herself was not the primary provider of the care, an allegation which she denied. No attendance records were available for review on that day.

8. The petitioner filed for a license on September 15, 2000. Twelve days after the application, the specialist visited the petitioner's household. He noted at that time that she had added substantial space for children and would likely be approved for twelve children. They discussed some further improvements needed to the property. The petitioner stated that she was waiting for approvals from the zoning board and Labor and Industry before she completed paperwork needed for licensure.

9. The petitioner never completed the paperwork and never received a license to care for twelve children. The petitioner claims that she had completed the paperwork and was just waiting for DCF to pick it up from her home.

10. Pursuant to a complaint about the number of children in the petitioner's care, the specialist made an unannounced visit to the petitioner's day care home on January 25, 2001. The specialist observed eleven children in the care of the petitioner and her daughter. Eight of those children were younger than school age and three were of school age, including the petitioner's two grandchildren. Even excluding the petitioner's grandchildren who could have gone home to their father's nearby, there were seven preschoolers in care. The main concern was that the petitioner had more than six preschool age children in her care that day. The specialist reminded the petitioner that the registered day care rules allowed for only six preschool age children and a total of ten children outside the summer months. The petitioner was cited and asked to notify the parents of her children that she was found to be over numbers which she did on March 1, 2001. The petitioner also acknowledged in writing that she realized that the over number situation was a serious violation of the regulations.

11. The petitioner has variously claimed that she was confused about the number of children she could have in care that day, believing it was twelve, and that three of the children were not supposed to be there but she took them in due to a parental emergency. She also protested that her grandchildren should be able to visit her during day care hours, even if they do not live with her. The petitioner claims that she never knowingly violated the regulation on numbers.

12. The specialist and his supervisor made a follow-up visit in April of 2001. During that visit that asked to review the petitioner's attendance records but were not given the opportunity to do so

13. A July 10, 2001 letter sent to the petitioner regarding her proposed licensing request emphasized that the petitioner had to comply with all applicable regulations citing the January and April 2001 incidents with the registered program. A September 2001 letter regarding her licensing reiterated the numbers requirement for a registered home and advised the petitioner that it had no completed written application from her for a license. In 2002, the petitioner was specifically required to sign agreements that she would not have an excess number of children in her home

and that she would not impede inspections of her day care premises and records by DCF. (See Fair hearing No. 18,938)

14. No complaints were received from that time until April of 2004. In that month, DCF again received a complaint that the petitioner had children in excess of the allowed numbers. When it responded to that complaint by making an unannounced visit to the petitioner's day care, the petitioner refused to allow DCF access to the premises. The findings regarding that incident are detailed in Fair Hearing No. 18,938 regarding the suspension.

15. DCF was unable due to the petitioner's denial of access to the premises to ascertain how many children were in care that day.

16. The petitioner has signed yearly statements indicating that she has read and understands the requirements in the registered day care program.

17. The petitioner has stated as part of this hearing that she will ensure in the future that no extra children will be in her home, even on an emergency basis, and that she will fully cooperate in providing DCF access to her day care home. The petitioner presented many testimonials from parents and community groups in support of her quality child care as well as evidence of her professional interest through

her membership in child care organizations and continued training in this area.¹ Some parents mentioned that they had not observed over ten or twelve children in the home with the petitioner as sole caregiver during their visits.

ORDER

The decision of DCF revoking the petitioner's registration is upheld.

REASONS

The Commissioner of the Department for Children and Families, Child Development Division, has the authority to adopt rules and regulations governing the day care registration program, including standards to be met and conditions for revocation of the Day Care Home Certificate. 33 V.S.A § 306(b)(1). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes", effective October 7, 1996. Furthermore, the Commissioner has the specific authority to revoke registrations "for cause after hearing." 33 V.S.A. § 306(b)(3).

¹ DCF objected to some of these materials. Those objections are sustained to the extent that any one of these letters offered an opinion on the propriety of the petitioner's actions in failing to allow entry to the premises in February 2004 which has already been ruled on by the Board in Fair Hearing No. 18,938.

Among the regulations adopted by the Commissioner are the following:

DEFINITIONS

SERIOUS VIOLATION - A violation of group size, staffing requirements or any violation which immediately imperils the health, safety or well-being of children. Serious violations may also include corporal punishment, lack of supervision, physical or sexual abuse or health and safety requirements.

SECTION II - PROGRAM

- 2. A registrant may provide care in their home to six (6) children at any one time and, in addition to the six may care for up to four (4) school-age children for not more than four hours daily per child.

. . .

During the School Year:

Option A: Six children of any age including up to two children under the age of two per caregiver. These children may be replaced when their stay ends.

Four schoolchildren not to exceed four hours per child. These children may not be replaced by other school age children when their stay ends. These children may be in care on a full day basis on snow days, emergency school closings, and vacations which occur during the school year.

Children who reside in the home are not counted in the limits above, unless they are under age two.

. . .²

² Option B and C regard homes that are involved primarily in infant care. They are not applicable to the petitioner's situation.

Summer Vacation

. . .

Option D: Up to twelve children in care provided that at least six have been to kindergarten or graded school and a second caregiver is present and on duty when the number of children exceeds six. Preschoolers who reside in the residence of the Registrant are included in the twelve. No more than two children under two years of age may be in care. School age children residing in the residence of the Registrant are not counted.

SECTION VI - RELATIONSHIP BETWEEN REGISTRANT AND
DIVISION OF LICENSING AND REGULATION

6. The Registrant shall permit visits, inspections and examination of the Family Day Care Home, its records, equipment and materials at reasonable hours by representatives of the Division. The Division representatives shall make a reasonable effort to announce their presence and identify themselves prior to entering the home.

Regulations for Family Day Care
Homes (Eff. Oct. 7, 1996)

If the petitioner has violated any of the above regulations, 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. Huntington v. SRS, 139 Vt. 416 (1981) Fair Hearing No. 10,414. The Board may only overturn such a decision if the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion. See Fair Hearing Nos. 12,804, 15,027, 15,430, and 17,263.

The facts in this case clearly show the violation of two important regulations--namely those dealing with the number of children in care and permitting inspection of the day care premises. As noted in the findings above, the Board has already determined that the petitioner violated the requirements at Section VI (6) regarding inspection of the premises on at least three occasions in its prior decision on the suspension. Fair Hearing No. 18,938. The Board noted in that opinion that the inspection regulation is a keystone of the program. Day care registrants are largely left to their own under a kind of "honor system" to follow rules and are only monitored through the complaint and unannounced inspection process. Failure to allow inspection prevents DCF from confirming that rules are being followed in the home. As such, failure to follow the inspection rule is a "serious violation" which would justify a decision by DCF to revoke a day care registration certificate under the "cause" provision at 33 § V.S.A. 306(b)(3).

The Board has determined on numerous occasions that violations of rules setting maximums for the number of children in care are also serious infractions, particularly because they are specifically mentioned in the list of "serious violations" in the definition section above. Fair

Hearing Nos. 12,412 and 15,006. The petitioner cannot claim to have been uninformed about this regulation as she was notified of its provisions repeatedly during 2000 and 2001 and signed statements acknowledging that she had read and understood the rules.

The petitioner protests that the only confirmed violation of the number of children in care rule were over three years old at the time DCF took its present action. She claims that she continued to be registered following those violations and that if they were not serious enough then to revoke her registration certificate they are not serious enough now to take that action. The contention is without merit.

When DCF did not take action against the petitioner for those prior violations in 2000 and 2001, it was based on assurances from the petitioner signed in 2002 that she would not commit those offenses again and would not block attempts by DCF to verify that she had the appropriate number of children in care. Although DCF had another complaint that the petitioner had too many children in care in February of 2004, DCF could not determine the truth of that complaint because the petitioner would not allow its agents to inspect her day care premises. At that point, the petitioner had

violated the agreement she made with DCF which had caused it to forbear revoking her registration during the prior years. Once the agreement was broken, DCF was justified in moving against the petitioner's day care registration based on her prior violations of the number of children in care regulations. The petitioner cannot now use her non-cooperation to argue that no new violations were found.

It must be noted that even if it were to be found that DCF acted arbitrarily in revoking the petitioner's day care registration based on the number of children in care, the petitioner's clear violation of the inspection cooperation rule alone forms ample basis for DCF to revoke the petitioner's day care certificate because of the serious nature of that violation. As DCF has shown that it has "cause" under the statute for revoking the petitioner's day care certificate, the Board is bound to affirm its decision in this matter. 3 V.S.A. § 3091(d), Fair Hearing Rule 17.

#