

3. Prior to September of 2003, the petitioner employed a part-time staff person when she had more than six children. She was licensed for sixteen children but felt that was too many for the preschool and wanted to keep it to a smaller number. She found that hiring a staff member with only ten children was not economically feasible.

4. The petitioner applied for a variance from the staff-ratio requirements beginning in the fall school year of 2003. She explained the above situation to the child care licensors and was granted a six month variance based on financial hardship. The petitioner was told in a letter dated September 2, 2003 that after six months she would have to come into compliance with the staff-ratio numbers or request an extension of the variance.

5. After six months, the petitioner was still not in compliance with the numbers required in the regulations and requested an extension of the variance. That extension was granted on February 26, 2004 in a letter which advised the petitioner that "there are no assurances that a second variance extension request will be granted if you reapply."

6. On August 2, 2004, the petitioner applied for a second extension of the variance. At this time the request was reviewed by a committee at DCF and a determination was

made that the variance extension would be denied because the petitioner "has been given adequate time to adjust and come into compliance." The petitioner was notified in a letter dated October 8, 2004 that she was considered to have no unique or exceptional circumstances to justify extension of the variance and that she needed to reduce the number of children in her care or employ staff.

7. The petitioner appealed that decision saying that she was under the impression that she could continue to receive renewal variances so long as the same circumstances existed in her program. She acknowledges that she was never told that she would continue to automatically get a variance upon request by anyone at DCF.

8. DCF says that the original variance was granted in order to give the petitioner a "grace period" to come into compliance with the regulations. There was apparently never a finding that the petitioner's circumstances were unique and unusual at that time. It was never intended to grant the petitioner a permanent variance from staff ratio requirements.

ORDER

The decision of DCF denying the variance is affirmed.

REASONS

Regulations in the "Family Child Care Licensing" program allow for variances as follow:

(15) The Commissioner, or designee, upon request in an individual case and in his/her discretion may grant a variance to a regulation. A variance may be granted when in unique and exceptional circumstances literal application of a regulation will result in unnecessary hardship and the intent of the regulation can be achieved through other means.

Family Child Care Licensing Regulations,
February 12, 2001, Sec. VI

The petitioner does not dispute that the regulation at Section I. E. 3. a. of this same regulation manual require her to have a second staff person "present and on duty when the number of children receiving child care exceeds six." The Commissioner made a decision in the fall of 2003 to give the petitioner a variance from this regulation based on the economic hardship to her of hiring an additional assistant. The Commissioner recognized at that time that the petitioner's situation was not unique or unusual but determined to give her the variance as a "grace period" to allow her to come into compliance with the staffing ratios without having to close down her business. Although the petitioner understood that she had to ask for a renewal every six months and that the renewal was not guaranteed, she did

not understand that the variance was meant as a period during which she was expected to come into compliance with the staff ratio regulations.

The issue for the Board is whether the Commissioner's refusal to extend the variance any further is an arbitrary decision. If the Commissioner's ground for granting the variance to begin with had been that the petitioner's situation was unique and unusual and that situation had not changed, then it could be found that the new decision is arbitrary. However, the Commissioner appears to have gone outside of the language in the variance provision during the prior requests to grant a "temporary" variance due to financial hardship alone. There was no finding of an unusual or unique circumstance not experienced by other providers in the prior variance requests.

The finding on this new application for a variance that there is no unique and unusual situation does not conflict with a former finding since no such finding was made before. No evidence was offered by the petitioner that she is indeed in any situation that is different from anyone else running a child care facility—namely, a financially difficult situation due to the low income generated by this occupation and the relatively high cost of paying assistants. Neither was there

any evidence presented that the Commissioner has failed to consider some vital information. Given these facts, it cannot be said that the Commissioner has acted arbitrarily in refusing to extend the variance. This is particularly so since staff to child ratios are considered a vital safety provision of the child care regulations. See Fair Hearing Nos. 12,412, 15,006 and 15,430.

It is remarkable that the Commissioner would have agreed to grant a variance of these regulations to the petitioner in the past and demonstrates a high level of confidence in the petitioner's abilities. It is unfortunate that a lack of communication between DCF and the petitioner created an expectation in her that she would be allowed to continue with an excess number of children indefinitely, but that is no ground for the Board to reverse the Commissioner's decision. As the Commissioner did not abuse his discretion in making this decision, it must be upheld by the Board.

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