



STATE OF WISCONSIN
Department of Children and Families

In the Matter of

Becky Valentine, d.b.a. Little Bear Day Care

DECISION

ML-08-0269

ML-09-0027

PRELIMINARY RECITALS

On September 17, 2008, and January 30, 2009, Becky Valentine, the owner of Little Bear Day Care, requested a hearing on the Department's decision to revoke her family childcare license. The parties stipulated to the facts on May 18, 2009. The Department submitted a brief on June 18, 2009, and the petitioner submitted a reply brief on July 2, 2009.

The issue for determination is whether the Department correctly seeks to revoke the petitioner's family childcare license.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

Becky Valentine
Little Bear Day Care
1824 Weston Street
La Crosse, WI 54601

By: Silke O'Donnell
AFSCME-CCPT
8033 Excelsior Drive
Madison, WI 53717

Department of Children and Families
Office of Legal Counsel
201 East Washington Avenue
Madison, WI 53708

By: Debra Bursinger, Attorney

FINDINGS OF FACT

1. Becky Valentine has been licensed by the Department to operate Little Bear Day Care at her home in La Crosse, Wisconsin.
2. On January 15, 2009, Western Dairyland Community Action Agency, acting as an agent for the Wisconsin Child and Adult Care Food Program, notified the petitioner that it intended to terminate her from the program for cause because she submitted claims and received payments for meals on behalf of children who did not actually attend Little Bear Day Care.

3. On March 2, 2009, Child Care Centers of Marshfield, Inc., the Review Committee officer and an agent for the Child and Adult Care Food Program, upheld the termination of the petitioner from the program.
4. On March 3, 2009, the Wisconsin Department of Public Instruction issued a Report of Disqualification from Participation in the food program to the petitioner in regard to the meal program at her day care.
5. On January 23, 2009, the Department of Children and Families notified the petitioner that it intended to revoke her Family Child Care license because she submitted false claims for reimbursement for meals.
6. On August 20, 2008, the child of J.L.O. was scheduled to attend Little Bear Day Care at 5:00 p.m.
7. On August 20, 2008, at 3:00 p.m. J.L.O.'s boss requested that she come to work early. J.L.O. called the day care and asked if she could bring the child in before 5:00 p.m. The petitioner's son answered because his mother was on an outing with the rest of the children. He told her that she could bring the child in.
8. The petitioner's son regularly babysat J.L.O.'s child during times when he was not attending day care.
9. The petitioner's son cared for J.L.O.'s for 15 minutes.
10. The petitioner was not aware that her son allowed J.L.O.'s child to come in early.
11. The Department assessed a \$100 forfeiture against the petitioner after her son watched J.L.O.'s child.

DISCUSSION

The Department seeks to revoke the petitioner's child care license for receiving reimbursement from the Wisconsin Child and Adult Care Food Program for children who were not attending her day care on the days for which claims were made. It also seeks to fine the petitioner \$100 because her 16-year-old son cared for a child without her present.

Day care revocation.

The Department may revoke a day care center license if the "licensee or a person under the supervision of the licensee has committed a substantial violation, as determined by the department, of a rule promulgated under s. 48.658(4)(a) or 48.67, a provision of licensure under s. 48.70 (1), or an order under this section." Wis. Stat. § 48.715(4)(b). Section 48.658(4)(a) applies to inspecting child safety alarms, § 48.67 grants the Department authority to enact "rules establishing minimum requirements for the issuance of licenses," and § 48.70(1) applies what information must be included in the license itself. Only § 48.67 is pertinent to this matter. The rules enacted pursuant to the section are found in Wis. Adm. Code, Ch. DCF 250. The purpose of that chapter is to "protect the health, safety and welfare of children being cared for in family child care centers."

The Wisconsin administrative code states that the Department can revoke a license if the operator "[v]iolated any provision of this chapter or ch. 48, Stats., or fails to meet the minimum requirements of this chapter" or is "not fit and qualified." Wis. Adm. Code, § DCF 250.11(8)(a)7 and (b). This chapter requires a licensee to "[c]omply with all laws governing the facility and its operation." Wis. Adm. Code, § DCF 250.04(2)(a). Being fit and qualified means that they display "the capacity to successfully nurture and care for children." Wis. Adm. Code, § DCF 250.03(11). When determining whether a person is fit and qualified, the agency may consider the "[e]xercise of unsound judgment" and a "history of civil or criminal offenses or any other action that demonstrates an inability to manage the activities of a center." Wis. Adm. Code, § DCF 250.03(11)(c).

The petitioner was terminated from the Wisconsin Child and Adult Care Food Program in March 2009 for submitting claims for meals provided to children who were not in her care. The stipulation and the food program's decision to uphold the termination are sufficient evidence for me to find that the petitioner did violate the rules of this program.

The Department must exercise its discretion in determining whether a license can be revoked. A hearing officer or court cannot substitute its judgment for that of the agency charged with making the decision. *Brookfield v. Milwaukee Sewerage District*, 171 Wis. 2d 400, 421-424, 491 N.W.2d 484 (1992). But if the Department erroneously exercises its discretion by acting arbitrarily or unreasonably, then its decision will be reversed. *Mullen v. Coolong*, 153 Wis. 2d 401, 406, 451 N.W.2d 412 (1989). "The exercise of discretion must depend on facts that are of record or that are reasonably derived by inference from the record and the basis of the exercise of discretion should be set forth." *Howard v. Duersten*, 81 Wis. 2d 30, 305 (1977).

The petitioner contends that childcare law provides no basis for revoking a childcare license because of a violation of the food program. I disagree. Children must be fed, and how one does so affects the operation of day care center. When a day care uses the Wisconsin Child and Adult Care Food Program to feed its children, that program's rules at least partially govern the operation of the facility. This means that her failure to follow the food program's rules violates the requirement that she comply with all laws governing the operation of her facility, which is a revocable offense. In addition, the food program violations call into question the soundness of her judgment and her ability to manage the activities of her center, both of which, as noted earlier, pertain to whether she is fit and qualified to hold a license.

Nothing in the statutes or regulations requires automatically revoking a day care license for this type of violation. Any error in administering the food program goes to the heart of that program, but providing food is only one part of running a day care. This means that what might be considered a minor bookkeeping error in the overall operation of a daycare could be a serious offense when applied to just the food program. Whether a violation of the food program justifies the revocation of a day care license depends upon the underlying facts and context of that violation. There is no bright line concerning when a violation of the food program is egregious enough to justify revoking a license—the Department has a great deal of discretion—the fact that the Department has discretion does not relieve it of its duty to properly exercise that discretion.

The stipulation of facts indicate that petitioner was terminated from the food program because she submitted false claims. The food program indicated that she was "seriously deficient" in submission of the claims for reimbursement and in tracking the attendance of children at her center. Submission of false information to a government agency in the operation of a child care center is a substantial violation of DCF rules. Further, maintaining truthful, accurate attendance records is critical to the sound operation of a child care center. In reviewing the record in this matter, I find that the Department acted within its discretion in revoking the license.

Child left with minor

No person under 18 may be left in sole charge of the children in the day care, Wis. Adm. Code, § DCF 250.05(3)(f). The Department fined the petitioner \$100 when her 16-year-old son cared for a 3 ½-year-old child for 15 minutes. The petitioner and all of the children were on a field trip at the time The child's mother got called into work asked to bring the child in early. The petitioner's son, the child's regular babysitter during hours when the day care was closed, agreed to allow the child to come early because he was unaware of the rule.

Forfeitures can be between \$10 and \$1,000 per day and are based upon "the size and type of facility or agency and the seriousness of the violation." Wis. Stat. § 48.715(3)(a)1. I do not know how large the petitioner's day care was, but this violation was not serious. When the petitioner's son cared for the child, the petitioner was unaware in advance that it occurred. No other children were present. The child's mother was aware that the petitioner's son would care for the child and was comfortable with this situation because he regularly did so. Although this is still a technical violation of the law, in reality the situation was little different than any other time that the petitioner's son babysat the child—and the legislature has seen no need to regulate that type of child care. Nevertheless, the Department does have discretion on levying fines, and I cannot substitute my judgment for its. One hundred dollars is still only

one-tenth of the maximum daily fine. I cannot find that the Department did not reasonably exercise its discretion in levying a \$100 fine.

CONCLUSIONS OF LAW

1. The Department reasonably exercised its discretion when it revoked the petitioner's day care license after she was removed from the Wisconsin Child and Adult Care Food Program.
2. There was no unreasonable exercise of discretion by the Department in levying a \$100 fine against petitioner for violating Wis. Adm. Code, § DCF 250.05(3)(f).

NOW, THEREFORE, it is

ORDERED

1. That the petition is dismissed

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one.)

For purposes of appeal to circuit court, the Respondent in this matter is the Department of Children and Families. Appeals must be served on the Office of the Secretary of that Department, either personally or by certified mail. The address of the Department is: 201 East Washington Avenue, 2nd Floor, Madison, Wisconsin, 53703. The Appeal must also be served on the other "PARTIES IN INTEREST" named in the proposed decision. The process for appeals to circuit court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of
Madison, Wisconsin, this _____ day
of _____, 2010.

Ron Hunt, Division Administrator
Department of Children and Families