



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

DECISION

North Avenue Child Day Care, LLC

ML-09-0269

Pursuant to petition filed, September 15, 2009, under DCF §227.11(10), Wisconsin Administrative Code, to review an alleged decision by the Department of Children and Families to deny a group child care license, the Office of Legal Counsel for the DCF has filed a Motion to Dismiss.

The issue for determination is whether the Department of Children and Families has taken an action thus creating an appealable issue concerning which the Division of Hearings and Appeals has authority to make a decision.

There appeared at that time and place, the following persons:

PARTIES IN INTEREST:

Petitioner:

Emmanuel Williamson
North Avenue Child Day Care, LLC
4419 West North Avenue
Milwaukee, WI 53208-1241

Respondent:

Department of Children and Families

By: Debra Bursinger
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, WI 53703

Administrative Law Judge:

David D. Fleming
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner received a probationary license to operate a group day care for up to 39 children for the period from February 1, 2009 through August 31, 2009.

2. Petitioner submitted a completed new application for renewal of its probationary group child care license to the DCF prior to July 31, 2009. Included was a check for the applicable fee.
3. The check submitted with the reapplication materials was deposited by the DCF but it was returned to the DCF because it could not be cashed due to insufficient funds.
4. The DCF sent Petitioner a letter dated September 1, 2009 that, in relevant part, stated: "Because you did not submit a complete and timely application for a continuing license, including payment of all applicable licensing fees and forfeitures, you cannot continue to operate your group child care."
5. The DCF also set Petitioner an invoice dated September 1, 2009 that indicates that the payment of the licensing fee and NSF charge was due by October 1, 2009.
6. Petitioner submitted a money order for the full fee and NSF charge to the DCF on or about September 11, 2009.
7. Petitioner filed this appeal with the Division of Hearings and Appeals on September 15, 2009.
8. The DCF has agreed to process Petitioner's application as a new application with November 16, 2009 as the application date.

DISCUSSION

The Department of Children and Families (DCF) filed this motion to dismiss contending that the Division of Hearings and Appeals is without authority to make a decision on the merits of this matter as there has been no action by the DCF with respect to Petitioner. The DCF maintains that the Petitioner allowed the probationary group day care license to expire by not submitted a check with sufficient funds with its application for a regular group child care license and that Petitioner did not have authority to continue to operate with an expired license. The DCF notes that, under law, it could not process an application for a regular license that was not complete. Furthermore, the DCF maintains that it has agreed to process a new application using November 16, 2009 as the application date and that Petitioner may appeal an adverse decision from that application process. Thus the DCF maintains that this appeal is moot.

In order for the Division of Hearings and Appeals to make a decision on the merits of a matter it must have jurisdiction to do so. The Statutes confer that authority and state that the appeal right is limited to the department's refusal or failure to issue, renew, or continue a license or by any action taken by the department under s. 48.715 [sanctions or penalties for various violations]. §48.72, *Stats.*; also see DCF §251.11(11)(a), *Wis. Adm. Code*.

Again the DCF maintains that it took no action here thus there is no appeal right.

In order to decide the DCF's motion one has begin with an analysis of the child care licensing regulation.

At the outset, it has to be noted that a regular day care license is a 2 year license and a probationary license a 6 month license. See §48.69, *Stats.* and DCF §251.11(3), *Wis. Adm. Code concerning probationary licenses* and §48.65(1), *Stats.* and DCF §251.11(4)(c), *Wis. Adm. Code concerning regular licenses*.

The Wisconsin Statutes at §48.65(1)(a), *Stats.* state, with emphasis added:

48.65 Day care centers licensed; fees. (1) No person may for compensation provide care and supervision for 4 or more children under the age of 7 for less than 24 hours a day unless that person obtains a license to operate a day care center from the department. To obtain a license under this subsection to operate a day care center, a person must meet the minimum requirements for a license established by the department under s. 48.67, meet the requirements specified in s. 48.685 and pay the license fee under sub. (3). **A license issued under this subsection is valid until revoked or suspended, but shall be reviewed every 2 years as provided in s. 48.66 (5).**

(2) This section does not include any of the following: (a) A parent, grandparent, greatgrandparent, stepparent, brother, sister, first cousin, nephew, niece, uncle, or aunt of a child, whether by blood, marriage, or legal adoption, who provides care and supervision for the child. (am) A guardian of a child who provides care and supervision for the child.

(b) A public or parochial school.

(c) A person employed to come to the home of the child's parent or guardian for less than 24 hours a day.

(d) A county, city, village, town, school district or library that provides programs primarily intended for recreational or social purposes.

(3) (a) Before the department may issue a license under sub. (1) to a day care center that provides care and supervision for 4 to 8 children, the day care center must pay to the department a biennial fee of \$60.50. Before the department may issue a license under sub. (1) to a day care center that provides care and supervision for 9 or more children, the day care center must pay to the department a biennial fee of \$30.25, plus a biennial fee of \$16.94 per child, based on the number of children that the day care center is licensed to serve. **A day care center that wishes to continue a license issued under sub. (1) shall pay the applicable fee under this paragraph by the continuation date of the license.** A new day care center shall pay the applicable fee under this paragraph no later than 30 days before the opening of the day care center.

(b) A day care center that wishes to continue a license issued under par. (a) and that fails to pay the applicable fee under par. (a) by the continuation date of the license or a new day care center that fails to pay the applicable fee under par. (a) by 30 days before the opening of the day care center shall pay an additional fee of \$5 per day for every day after the deadline that the group home fails to pay the fee.

§48.65(1)(a), Stats.

Read carefully, the language concerning continuation of a license in §48.65 refers to a regular not a probationary license as it refers to the 2 year license. A regular license is valid indefinitely unless revoked, suspended or surrendered. *DCF, §251.11(5)(a), Wis. Adm. Code.* It is reviewed every 2 years and a licensee indicates desire to continue the license by filing a license continuation application. *DCF, §251.11(5)(b)1, Wis. Adm. Code.* While the department may renew a probationary license one time for six months this is not the continuation process just discussed.

Instead the situation presented by this case was a request for renewal as a regular license and that requires the following procedure:

(3) OBTAINING A REGULAR LICENSE. (a) At least 30 days before the expiration date of a probationary license, an applicant for license renewal shall submit to the department the following materials:

1. A completed license application.

2. Any completed background information disclosure forms required under s. 48.685, Stats., including any applicable fees.

3. *The license renewal fee* under s. 48.65 (3) (a), Stats., and any forfeiture due and owing under s. 48.715 (3), Stats., or penalty under s. 48.76, Stats.
 4. Any changes to center policies, if not previously submitted.
 5. Any changes to the delegation of administrative authority if not previously submitted.
 6. Any other materials determined by the department as necessary to complete the department's licensing investigation.
- (b) If the department determines that the applicant has met the minimum requirements for a license under s. 48.67, Stats., and if the applicant has paid any applicable fees under ss. 48.65 and 48.685 (8), Stats., any forfeiture under s. 48.715 (3) (a), Stats., and any applicable penalty under s. 48.76, Stats., the department shall issue a regular license. Regular licenses shall be reviewed and continued for a 2-year period.
- DCF §251.11(4), Wis. Adm. Code, emphasis added.*

In response to the DCF argument included with its Motion to Dismiss, Petitioner submitted a copy of a letter (dated September 15, 2009) written by an attorney who briefly represented Petitioner in dealing with the DCF, though not with respect to this appeal, as to this situation that argues that the proper remedy for a NSF check for the child care program is to charge Petitioner \$5.00 per day for each day that a payment is late. The September 15, 2009 letter submitted to the department by Petitioner's attorney relies on the following portion of §48.65:

(b) A day care center that wishes to continue a license issued under par. (a) and that fails to pay the applicable fee under par. (a) by the continuation date of the license or a new day care center that fails to pay the applicable fee under par. (a) by 30 days before the opening of the day care center shall pay an additional fee of \$5 per day for every day after the deadline that the group home fails to pay the fee.

§48.65(3)(b), Stats.

This argument is not on point, as it mistakenly views this situation as a continuation of a license. The term 'continuing' is, obviously a term of everyday language but also has a special meaning in the language of day care licensing regulation. Thus the \$5 penalty provision advocated as applicable here does not apply to this set of circumstances.

Because the DCF did not have the fees submitted 30 days prior to the expiration of the probationary license, the license did lapse. This was not because of any agency action. I agree, therefore, with the DCF and cannot find that the Division of Hearings and Appeals has jurisdiction to make a decision here. There has been no departmental refusal or failure to issue, renew, or continue a license or penalty or sanction action taken by the department.

I do note other factors here but they do not change the analysis of the law noted above. First, the DCF September 1, 2009 letter is confusing because it uses the terms 'continuing license' and 'continue' in informing Petitioner that the license had expired. This was not, however, a continuing license situation and the DCF use of the term does not change that. Second, the September 1, 2009 invoice indicating that the fee and NSF charge were due by October 1, 2009 is also confusing but again does not change the above reasoning.

CONCLUSIONS OF LAW

That the Division of Hearings and Appeals does not have authority to make a decision here as there has been no departmental refusal or failure to issue, renew, or continue a license or penalty or other sanction action taken by the Department of Children and Families.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

This is a final hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in Wisconsin Statutes § 227.49. A copy of the statutes can found at your local library or courthouse.

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 this decision. The process for appeals to circuit court is in Wisconsin Statutes §§ 227.52 and 227.53.

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

David D. Fleming
Administrative Law Judge
Division of Hearings and Appeals