



STATE OF WISCONSIN
Department of Children and Families

In the Matter of

DECISION

True's Family Day Care

ML-09-0478

Pursuant to a petition filed on December 11, 2009, under Wis. Admin. Code § DCF 201.01(1)(c), to review a decision by the Department of Children and Families (the "Department") to refuse to make Wisconsin Shares payments to a child care provider, a hearing was held on April 14, 2010, at Waukesha, Wisconsin.

The issue for determination is whether the Department correctly refused to make Wisconsin Shares payments to Petitioner True Thao's day care center based upon reasonable suspicion of program violations.

PARTIES IN INTEREST:

Petitioner:

True's Family Day Care, by

Attorney Yeng Lee
Legal Recourse, LLC
3616 W. National Ave., Suite 201
Milwaukee, WI 53215-1027

Respondent:

Department of Children and Families, by

Attorney Eric Volkmann
Department of Children and Families
Office of Legal Counsel
201 East Washington Avenue, 2nd Floor
Madison, WI 53703

ADMINISTRATIVE LAW JUDGE:

Sally Pederson
Division of Hearings and Appeals

FINDINGS OF FACT

1. On May 15, 2008, the Department issued a Child Care Center License to Petitioner to operate a family child care center known as True's Family Day Care (the "Center") located at 4731 N. 47th Street, Milwaukee, WI 53218. The license authorized the care of up to 8 children at one time between the hours of 6:00 a.m. to 12:00 a.m., Monday through Friday. (Exhibit R-2)
2. When applying for a child care center license, child care providers receive copies of the administrative rules which describe the requirements related to maintaining accurate, written attendance records. On September 29, 2008, the Petitioner signed a License Application form, which acknowledged that she had received the rules promulgated by the Department and was willing to provide the Department with access to the Center's premises any time during hours of operation. (Testimony of Jason Wutt, Licensing Supervisor, Ex. R-1)
3. The Department prepared newsletters that it sent to child care providers who participated in the Wisconsin Shares program, informing the providers that they are required to keep accurate and exact attendance records, including the actual arrival and departure times for each child. (Testimony of Jim Bates, Section Chief of the Department's Program Integrity Unit of the Bureau of Early Care and Education, Ex. R-9)
4. In the fall of 2009, the Department identified certain data "red flags" regarding the operation of the Center. First, the Center exceeded the "red flag" threshold for the average sum paid per "slot" per year by receiving approximately \$15,500 per slot on an annualized basis, which was well in excess of the red flag threshold of \$11,000 per slot. In addition, the Center had authorizations for 2.5 children per slot while the threshold for this red flag is 1.5 children per slot. As a result of the "red flags," the Department began an investigation into whether Petitioner was in violation of the Wisconsin Shares program. (Testimony of Jim Bates)
5. On November 3, 2009, an investigator arrived at the Center at 10:00 a.m. He knocked on the front door and rang the door bell several times, but there was no response. The investigator looked around the yard and did not see anyone present and did not observe any toys in the front yard. (Testimony of Jack Haldeman, Ex. R-5). The investigator did not knock on the side door of the house.
6. The Petitioner testified that she and three young children were present at the Center on November 3, 2009. She testified that she heard the knock at the door but did not get to the door in time to answer it before the investigator left the door. She further testified that she did not want to leave an infant and a two-year-old and three-year-old child to answer the door for a man she did not recognize. (Testimony of True Thao)
7. On November 9, 2009, the licensing specialist who has the Center assigned to his regular caseload visited the Center. He was able to gain access to the Center, and he saw children present at the Center. (Testimony of Mark Mitchell)
8. On November 11, 2009, at 4:08 p.m., two staff members from the Department arrived at the Center to conduct a site visit. They knocked on the front door and rang the door bell, but no one answered. One of the men looked through the front window and saw that the lights were off, and he did not see any toys in the front room. They also knocked on the

side door, and no one answered. The staff members were at the Center doors for about five minutes and were in their car at the Center for about five minutes. (Testimony of John Roso, Ex. R-4).

9. With regard to the November 11, 2009 visit, the Petitioner testified that she was out of the Center, driving to pick up some children and to drop off some other children. She further testified that she keeps the children's toys in the back play room of the Center and in the backyard which can not be seen because it is fenced off from the driveway. (Testimony of True Thao)
10. The Department did not contact the Petitioner after the attempted visits on November 3 and 11, 2009 to request copies of attendance records.
11. The Center's regularly-assigned licensing specialist visited the Center again on November 22 or 23, 2009. At first Ms. Thao did not answer the door when he knocked, but she then came running out after him when he was leaving. He testified that this scenario has happened in the past when he has visited and that he has had visits during the past two years where he has had access and where he has not been able to gain access to the Center. (Testimony of Mark Mitchell)
12. Because of the data "red flags" and the inability of the investigator and staff members to gain access to the Center on November 3 and 11, 2009 when no children were seen, the Department made the decision to suspend Wisconsin Shares payments to the Petitioner's Center. On November 20, 2009, the Department issued a letter to the Petitioner stating that, effective November 21, 2009, it was suspending all Wisconsin Shares payments to the Center "based on a reasonable suspicion that you have violated provisions of the Wisconsin Shares program." (Ex. R-3a) The Petitioner appealed the Department's suspension decision to this Division.
13. After suspending Petitioner from Wisconsin Shares, the Department reviewed attendance records obtained from the Center to payment records and found discrepancies between the records. (Testimony of Jim Bates, Ex. R-6 and R-7) However, this information will not be considered by the undersigned in determining whether the Department had reasonable suspicion to suspend Petitioner from the program because the Department did not have this information as of November 20, 2009 and it was not a basis for the Department's decision to suspend the Petitioner from the program.

DISCUSSION

Wisconsin Stat. § 49.155 provides the legal basis for the Wisconsin Shares program. Under the program, the Department pays state subsidies to child care providers on behalf of low income parents and children. The Petitioner operated a child care center in which certain children under her care were eligible for and received child care subsidies through the Wisconsin Shares program.

Wisconsin Stat. § 49.155(7)(a) provides in part as follows: "The department ... may refuse to pay a child care provider for child care provided under this section if any of the following applies to the child care provider, employee or person living on the premises where child care is provided: ... 4. The department or county department reasonably suspects that the person has violated any provision under the program under this section or any rule promulgated under this section."

Wisconsin Admin. Code § DCF 250.04(2)(c) requires licensees to “[e]nsure that all information provided to the department is current and accurate.” Section DCF 250.04(6)(b) provides that the licensee “shall maintain a current, accurate written record of the daily attendance on a form prescribed by the department that includes the actual time of arrival and departure for each child for the length of time the child is enrolled in the program.”

Wisconsin Admin. Code § DCF 201.04(6)(d) and (e) requires licensees to provide access to their day care facilities during hours that their facilities are open and to cooperate with monitors who visit the facilities.

Petitioner was or should have been aware of the requirements to keep accurate daily attendance records and to provide Department staff with access to the Center during normal operating business hours.

During the fall of 2009, the Department identified two “red flag” indicators based on data about the Center that were outside of expected operating parameters. The “red flag” indicators related to the Center receiving revenue beyond the average expected per year per slot and authorizations for more children per slot than was feasible.

Based upon the “red flags,” the Department initiated an investigation of the Center. During the investigation, Department staff and an investigator were not able to gain access to the Center on November 3 and 11, 2009, and they did not see any children present when they looked through the windows. However, another licensing specialist did gain access to the Center during visits on November 9 and 22 or 23, 2009 and did see children present. The “reasonable suspicion” burden on the Department is very low and easily met. Therefore, I find that the “red flags” and the two no-access visits provided the Department with a reasonable suspicion that Petitioner may have been violating program rules.

With the basis for reasonable suspicion established, the only remaining matter for determination is whether the Department reasonably exercised its discretion in deciding that the violations warranted a payment refusal under Wis. Stat. § 49.155(7)(a)4, which provides that the Department *may* refuse to make payments of Wisconsin Shares if the Department has a reasonable suspicion the provider has violated program rules.

The ALJ concluded that the Department did not reasonably exercise its discretion in refusing payments to petitioner as of November 21, 2009. I disagree. Although it may be appropriate to consider whether the agency abused its discretion, an ALJ should not substitute his or her judgment for that of the agency decision-maker. Only if the agency decision-maker acts in an arbitrary or unreasonable way that results in an unjust result should the discretionary actions of the agency be overruled by an ALJ. Such is not the case here.

Rather, the facts establish that this is a center that bills at a high rate per slot and has a high level of authorizations per slot. Nonetheless, on two separate visits to the center, the center appeared to be closed. No one responded. The Department acted within its discretion – and responsibly – when it decided to withhold payments while further investigating petitioner’s day care operation. Doing so was consistent with the express language of Wis. Stat. § 49.155(7) (as modified by 2009 Act 28, effective July 1, 2009).

CONCLUSIONS OF LAW

The Wisconsin Department of Children and Families had a reasonable suspicion that Petitioner may have been violating child care rules, and reasonably exercised its discretion in refusing to make Wisconsin Shares payments pursuant to its authority under Wis. Stat. § 49.155(7)(a)4.

NOW, THEREFORE, it is ORDERED

That the petition be dismissed.

REQUEST FOR A REHEARING

This is a final fair 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 as “PARTIES IN INTEREST” in the proposed decision. Your request must explain what mistake the examiner 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 be 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 a 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" names in the proposed 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 July, 2010.

Ron Hunt, Division Administrator
Department of Children and Families