

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of:)	
)	
CASSANDRA MERCER)	OAH No. 12-0686-CCA
d/b/a TUNDRA TIKES.)	OHA Case No. 11-FH-368
)	CCPO Case No. 10007584
_____)	License No. 070102

DECISION

I. Introduction

Cassandra Mercer is licensed as a child care provider by the Division of Public Assistance, Child Care Program Office (CCPO). After conducting an investigation, the CCPO issued a Report of Investigation that found seven violations. Based on that investigation the CCPO issued a Notice of Violation and imposed a \$250 fine and conversion of Ms. Mercer’s license to provisional status. Ms. Mercer requested a hearing pursuant to AS 47.32.150(b).

The hearing was held on February 1, 2012. Ms. Mercer did not appear for that hearing, and was not available at the telephone number shown in the record for contacting her. A default hearing was held during which the CCPO introduced evidence to prove the violations. Based on that evidence, some but not all of the findings of violation have been proven. Imposition of a \$250 fine and conversion of Ms. Mercer’s license remains the appropriate sanction.

II. Facts

Licensing Specialist Diana Alemán testified that she conducted an investigation of Ms. Mercer’s child care facility. Her report of that investigation was admitted as Exhibits 8a – 8h. Ms. Alemán testified that the contents of that report were based on her personal investigation, and that the report was true and accurate. Ms. Alemán conducted an unannounced site visit on April 27, 2011.¹ During her visit, Ms. Alemán requested sign in/sign out attendance records for the children. Ms. Mercer stated that those records did not exist, but that she had timeframe notes showing when children were in attendance on her computer. Ms. Mercer did not produce those records to Ms. Alemán at that time. She

¹ The factual findings are based on the investigative report unless otherwise noted.

subsequently submitted hand written notes containing some information about children in attendance on particular dates.

Ms. Alemán next asked to review all active and inactive children's files. Ms. Mercer informed her that files had been stolen the previous January. She did produce 14 current files, and said that other files were in her truck which her son was driving.

Ms. Alemán asked to see personnel files. Ms. Mercer stated that one former employee, Ms. Q, had taken her file with her when she left employment.² Ms. Mercer stated that another licensing specialist, Bob Gerwin, had a copy of the documents from that file.³ Finally, Ms. Alemán asked to see Ms. Mercer's CPR and First Aid certifications. Those documents were never produced to Ms. Alemán.

III. Discussion

A. Legal Framework

Child care licensing is governed by AS 47.32 and 7 AAC 57.010 – 990. After conducting an investigation and finding evidence of violations, the CCPO may take various enforcement actions.⁴ The licensed child care provider may request a hearing to contest the enforcement action. Two different types of hearings may be provided depending on the enforcement action at issue. Serious enforcement actions result in a hearing governed by the Administrative Procedure Act (APA, AS 44.62.330 – 630).⁵ Less serious enforcement actions result in informal hearings that may not be conducted under the APA.⁶

The less formal type of hearing was held in this case because the only enforcement actions proposed were conversion of Ms. Mercer's license to provisional status and a \$250 fine.⁷ There is no statutory or regulatory guidance as to how such hearings should be conducted other than the instruction that they not be held under the procedures used in more formal administrative hearings.

That these hearings are informal does not mean they are not subject to due process requirements. At a minimum, due process requires that the licensee be informed of the

² Ms. Mercer had previously told Ms. Alemán that she had terminated Ms. Q's employment in January.

³ According to the investigation report, when Ms. Alemán asked Mr. Gerwin for these documents, Mr. Gerwin stated that he did not have them (the documents that Ms. Mercer told Ms. Aleman that Mr. Gerwin would have).

⁴ AS 47.32.140.

⁵ AS 47.32.150(a).

⁶ AS 47.32.150(b).

⁷ See AS 47.32.140(d)(2) & (11); AS 47.32.150(b).

charges, an explanation of the evidence, and an opportunity to present his or her position.⁸ Hearsay is admissible in more formal administrative hearings if it is something a reasonable person would rely on in serious matters,⁹ and therefore may be admitted in this less formal type of hearing. Depending on the nature of the hearsay evidence, however, it might be given less weight than sworn testimony or non-hearsay documentary evidence.

There are also no rules governing the licensee's access to evidence in advance of the hearing. In this case, the CCPO had several confidential exhibits which had not been made available for review in advance of the hearing or at the hearing.¹⁰ As a general rule, a licensee should be given access to any evidence relied on by the CCPO in advance of the hearing.¹¹ The CCPO was legitimately concerned that some of the information in the confidential exhibits could not be disclosed to the public without a court order.¹² This limitation does not necessarily preclude disclosure to a licensee who has requested a hearing. To the extent there are concerns, however, CCPO may request an appropriate protective order. Such an order could provide for redacting sensitive information, or it could limit who the licensee could share the information with, or both.

In this case, none of the confidential exhibits became part of the record, and therefore they are not relied on in deciding this appeal. Some were referred to however, and the extent to which those documents were used in reaching this decision is discussed below.

B. Violations Found

The CCPO found seven different violations. It found 1) a failure to create and maintain required records; 2) lack of skills needed to work with employees and others; 3) failure to exercise sound judgment; 4) failure to provide orientation for a caregiver; 5) failure to obtain and maintain emergency information; 6) failure to have a valid cardiopulmonary resuscitation certificate; and 7) failure to maintain proper attendance records. Each alleged violation is discussed separately below.

⁸ *City of North Pole v. Zabek*, 934 P.2d 1292, 1297 (Alaska 1997).

⁹ *See* 2 AAC 64.290(a)(1).

¹⁰ *See*, CCPO's Position Statement, page 9 n. 1.

¹¹ *Cf.* 7 AAC 49.120(1) (access to documents in Fair Hearings conducted pursuant to 7 AAC 49.010).

¹² AS 47.32.180(a).

1. Failure to Create and Maintain Required Records

The CCPO's regulations require that child care providers create and maintain a number of types of records:

- (a) A child care facility shall
 - (1) create written records necessary to demonstrate compliance with the applicable requirements of AS 47.32, 7 AAC 10.1000 – 7 AAC 10.1095 and this chapter;
 - (2) retain records created under (1) of this subsection for at least three years from the date of each record's creation; and
 - (3) permit the department to review records, including personnel and evaluation records and applicable portions of board or other governing body minutes, to determine compliance with AS 47.32, 7 AAC 10.1000 – 7 AAC 10.1095 and this chapter.

* * *

- (d) A child care facility shall maintain personnel records for employees and caregivers. For employees, these records must include starting and ending dates of employment, application materials, annual and interim performance evaluations, orientation and training documentation, and personnel action memoranda of commendation or reprimand. For other caregivers, records may be limited to starting and ending dates of service, application materials, and an evaluation notation.^[13]

The CCPO alleged that Ms. Mercer violated this regulation by not having the necessary children's records and personnel records.

As for the children's records, the CCPO asserted that these records should include information about immunizations, allergies, nap times, who picks up the child, any special needs for the child, and similar information. A child care facility is required to create records necessary to show compliance with the applicable statutes and regulations.¹⁴ However, it was not explained at the hearing or in the investigative report why the types of information described above are needed to show compliance. Research fails to disclose any regulations that would suggest records containing such information must be created by the facility.¹⁵ Accordingly, this portion of the first violation is not supported by the evidence and legal authority relied on by the CCPO.¹⁶

¹³ 7 AAC 57.230.

¹⁴ 7 AAC 57.230(a)(1).

¹⁵ It may be that these records are required, but the necessary factual and legal support for that position was not established during this hearing.

¹⁶ However, the lack of some required records forms the basis for other violations discussed below.

The evidence at the hearing did, however, establish that Ms. Mercer failed to maintain the required personnel files. Those files were not produced to Ms. Alemán after she requested them. Instead, Ms. Mercer stated that Ms. Q took them with her after she was terminated. Ms. Mercer also stated that another CCPO employee had copies of those records. When Ms. Alemán followed up, however, Ms. Q stated that she had never filled out any personnel paperwork because she was working for room and board instead of wages.¹⁷ The other CCPO employee, Mr. Gerwin, stated that he did not have any of Ms. Q's personnel documents.¹⁸ While both of these statements are hearsay, they are entitled to some weight. Mr. Gerwin in particular would have no reason not to be telling the truth when asked about these personnel records. This suggests that Ms. Mercer was not telling the truth when she said that Mr. Gerwin would have these records, and she similarly may have not been telling the truth when she said that Ms. Q took the records with her when she was terminated. While this is a close question, it is more likely true than not true that Ms. Mercer did not create an employee file for Ms. Q, and therefore did not maintain that file as required by 7 AAC 57.230(d).

Accordingly, Ms. Mercer violated 7 AAC 57.230(d) by not creating and maintaining a personnel file for her employee.

2. Lack of Skills Needed to Work With Employees and Others

An administrator of a child care facility must have “the skills to work with children, family members, department staff, community agencies, and, if applicable, staff of the child care facility.”¹⁹ CCPO found that Ms. Mercer lacked the skills to work with employees, community agencies, and the Department. The support for this finding is referred to in the investigation report:

During the investigation, the Department obtained documentation pertaining to the Facility's personnel and billing practices from the Alaska background Check Program, Alaska Court System, MAXIMUS Alaska Works, Child Care Grant, Food Program, and PASS I Child Care. All the records received showed a pattern of inconsistencies. The Department found evidence to support Ms. Mercer was billing MAXIMUS Alaska Works for Ms. Q's child even though she herself did not care for the child. Documentation received during the investigation also showed Ms. Mercer was making threats and blackmailing Ms. Q for admitting to MAXIMUS Alaska Works that Ms.

¹⁷ Exhibit 8d.

¹⁸ Exhibit 8c.

¹⁹ 7 AAC 57.300(b)(3).

Mercer had not provided care for her child and had billed for the care of the child anyway.^[20]

The support for this finding comes entirely from documents that are not in the record. In order to rely on this information, it would be necessary to accept as accurate Ms. Alemán's interpretation of what the records show. The documents described are of the sort that might well be subject to more than one reasonable interpretation. Accordingly, this hearsay evidence is not sufficiently reliable to support a violation. In addition, this evidence does not address whether Ms. Mercer has the necessary skills to work with employees, community agencies, and the department. It relates more to whether she has the necessary management skills required under 7 AAC 57.300(c). However, Ms. Mercer was not charged with a violation of 7 AAC 57.300(c).

Some of this information suggests inappropriate behavior and possibly improper billing practices. While that type of conduct is not condoned, the evidence does not show that Ms. Mercer lacks the required skills. Instead it shows, if accepted as reliable evidence, that she is making intentional improper decisions. Accordingly, the evidence does not support finding a violation of 7 AAC 57.300(b)(3).

3. Failure to Exercise Sound Judgment

As an administrator and a child care provider, Ms. Mercer must exercise sound judgment.²¹ In support of this finding, the CCPO relies on the assertions of improper billing and blackmail described in section III(B)(2), above. If supported by admissible evidence, these acts would justify a finding that Ms. Mercer violated this regulation. However, as discussed above, the evidence and testimony relied on for this violation is not sufficient to establish that the violation occurred.²²

There is, however, other evidence in the record that shows a lack of sound judgment. During the investigation, Ms. Mercer stated that some of the children's files were in her truck and were unavailable because her son was driving the truck.²³ Ms. Mercer's child care facility is located close to her residence.²⁴ Storing important files in her truck instead

²⁰ Exhibit 8d.

²¹ 7 AAC 57.310(a).

²² The improper billing allegation related to billing for Ms. Q's child while Ms. Q was caring for her child and other children at the facility. Without more detail, it is not possible to determine whether this billing was improper since Ms. Mercer may have been paying Ms. Q to supervise all of the children present, including Ms. Q's own child.

²³ Exhibit 8c.

²⁴ Exhibit 8b.

of at her home or place of business shows a lack of sound judgment. The investigation also revealed that Ms. Mercer had not submitted a fingerprint card that was necessary to obtain a background check on her employee. Not completing this important task is an indication of poor judgment. Accordingly, the evidence presented at the hearing established that Ms. Mercer exercised poor judgment.

4. Failure to Provide Orientation for Caregiver

Employees of a child care provider must be given an orientation beginning on the first date of employment and completed within eight weeks.²⁵ Ms. Mercer was unable to produce any records showing that she provided this orientation to her employees. She was required to have those records.²⁶ The lack of required records is an indication that the orientation was not provided. Accordingly, this violation has also been proven.

5. Failure to Obtain and Maintain Emergency Information

Child care providers are required to obtain certain emergency information about each child, and to maintain that information on a form supplied by the CCPO.²⁷ Ms. Alemán testified that the records that were produced did not contain all of this information. In addition, Ms. Mercer was not able to produce records for all of the children that had attended her facility. Accordingly, this violation has also been proven.

6. Failure to Have a Valid CPR Certification

Child care providers must have at least one caregiver on duty who holds a current cardiopulmonary resuscitation certificate.²⁸ Ms. Mercer did not produce evidence that she holds a current certificate.²⁹ The failure to produce that evidence suggests that she does not have a certificate. Accordingly, this violation has also been proven.

7. Failure to Maintain Proper Attendance Records

A child care provider must “maintain caregiver and child attendance records that reflect the time caregivers are present and children are in care.”³⁰ The records produced by Ms. Mercer did not show the actual times the children were at the facility or the name of the

²⁵ 7 AAC 57.350(b).
²⁶ 7 AAC 57.230(a)(1).
²⁷ 7 AAC 57.400(a)(1) & (2).
²⁸ 7 AAC 57.350(e).
²⁹ Exhibit 8c.
³⁰ 7 AAC 57.500(f).

caregiver present.³¹ However, the requirement to record the “time” children were present is ambiguous. It could refer to the number of hours each child was present, or to the time of arrival and departure. Without evidence in the record as to how this regulation has been interpreted in the past, and without actually seeing Ms. Mercer’s records, it is not possible to determine whether her records comply with the requirement to record the time children are in care.

Ms. Mercer was, however, also required to record which caregiver was present when the children were in care. Her records do not provide the name of the caregiver. Accordingly, her records do not comply with this regulation, and this violation has also been proven.

C. Enforcement Action

A variety of enforcement actions are available when violations have occurred.³² The CCPO sought to impose a \$250 fine and a conversion of Ms. Mercer’s license to provisional status. The CCPO argued that it has a long standing policy of issuing a \$250 fine for “sound judgment” violations. In addition, it argued that the existence of several prior investigations that resulted in negative findings,³³ as well as the results of the current investigation, justifies converting the license to provisional status.

A fine of up to \$25,000 could be imposed for each violation.³⁴ The imposition of a \$250 fine is at the low end of the scale for permissible fines, and is consistent with the CCPO’s past practices. That fine is appropriate. Other penalties are also available ranging up to revocation of Ms. Mercer’s license.³⁵ Placing the license on provisional status is again among the least serious of the potential penalties.³⁶ Even though the evidence presented at the hearing did not support all of the alleged violations, several violations were proven. Given the number of violations, and the history of prior concerns, it is appropriate to convert Ms. Mercer’s license to provisional status.

³¹ Exhibit 8d.
³² AS 47.32.140(d) & (f).
³³ Exhibits 2 – 6.
³⁴ AS 47.32.140(f).
³⁵ AS 47.32.140(d)(6).
³⁶ AS 47.32.140(d)(2).

IV. Conclusion

Based on the proven violations discussed above, Ms. Mercer's license is converted to provisional status, and a civil fine of \$250 is imposed. The fine is payable to the State of Alaska by certified check, money order, or cash, and must be delivered to the Child Care Office within 45 days of the date of adoption this decision.

Dated this 8th day of August, 2012.

Signed

Jay Durych
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 17th day of August, 2012.

By: *Jay D. Durych* _____

Title/Agency: ALJ, OAH, DOA

[This document has been modified to conform to the technical standards for publication.]