

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES**

APPEAL OF: Berks County Residential Center
BHA ID No.: 9999
BHA Docket No.: 061-16-0003

ADJUDICATION

Opening

This is an administrative adjudication for Berks County Residential Center (Appellant) for an appeal it filed against the decision by the Department of Human Services (Department), Bureau of Human Services Licensing (BHSL), to revoke the Appellant's license to operate a child residential and day treatment facility. On November 7, 2016, an administrative hearing was held at the Bureau of Hearings and Appeals, in Reading, Pennsylvania. The witnesses were sworn by the Administrative Law Judge (ALJ) and testified under oath. On November 21, 2016, the transcript was received. The parties were given until January 5, 2017 to file briefs and January 20, 2017 for reply briefs. On January 5, 2017, both the Department and the Appellant filed their briefs. On January 20, 2017, both the Department and the Appellant filed their reply briefs. The hearing record was closed on January 20, 2017.

An *amicus* brief was filed jointly by counsel from Villanova University and Temple University Schools of Law. The *amicus* brief was filed on January 5, 2017.

On February 17, 2016, by Order of the Bureau of Hearings and Appeals (BHA), the above captioned appeal was consolidated with Appellant's appeal docket number 061-15-0025. The appeal docketed 061-15-0025 involved a denial of an increase in capacity request made by the Appellant. At hearing, the undersigned severed the two appeals to address the issue of license revocation only, as the Department denied the increase in capacity due to the Appellant having the license revoked.

ALJ David A. Dudley, Esq., presided at the hearing and adjudicated this appeal.

Appearances

For the Department:

Daniel Fellin, Esquire

For the Appellant:

Matthew J. Connell, Esquire

Tricia M. Ambrose, Esquire

Witnesses**For the Department:**

Robert Robinson, Director of Licensing Administration, BHSL
Jacqueline Rowe, Bureau Director, BHSL

For the Appellant:

Diane Edwards, Executive Director, Berks County Residential Center
Andrew Miller, former Child Residential Licensing Manager, BHSL

Exhibits**For the Department:**

- C-1 Appeal request; certificates of compliance for Berks County Residential Center 1999-2016; waiver approval dated November 21, 2013; letter dated October 22, 2015; renewal application for 2016-2017; license approval letter and license dated November 9, 2015; letter dated November 10, 2015; letter rescinding license dated November 17, 2015; notice of revocation and non-renewal of license dated January 27, 2016; letter noting no inspection violations dated December 8, 2015 (71 pages)
- C-2 MAPPER screens (four pages)

For the Appellant:

- A-1 Certificate of compliance for Berks County Residential Center for 2001
- A-2 Certificate of compliance for Berks County Residential Center for 2002
- A-3 Certificate of compliance for Berks County Residential Center for 2003
- A-4 Certificate of compliance for Berks County Residential Center for 2004
- A-5 Certificate of compliance for Berks County Residential Center for 2005
- A-6 Certificate of compliance for Berks County Residential Center for 2006
- A-7 Certificate of compliance for Berks County Residential Center for 2007
- A-8 Certificate of compliance for Berks County Residential Center for 2008
- A-9 Certificate of compliance for Berks County Residential Center for 2009
- A-10 Certificate of compliance for Berks County Residential Center for 2010
- A-11 Certificate of compliance for Berks County Residential Center for 2011
- A-12 Certificate of compliance for Berks County Residential Center for 2012
- A-13 Certificate of compliance for Berks County Residential Center for 2013
- A-14 Certificate of compliance for Berks County Residential Center for 2014
- A-15 Certificate of compliance for Berks County Residential Center for 2015
- A-16 Excerpts from BCRC policy and procedures (11 pages)
- A-17 2012 application for certificate of occupancy (29 pages)
- A-18 August 7, 2015 email correspondence
- A-19 2013 application for certificate of occupancy (32 pages)
- A-20 Licensing inspection summary (LIS) dated June 7-8, 2011 (two pages)
- A-21 LIS dated June 20, 2012 (three pages)
- A-22 October 2013 request for waiver (seven pages)
- A-23 November 21, 2013 letter granting waiver request

- A-24 Revised license due to waiver dated November 21 2013
- A-25 September 2013-April 2014 email chain (seven pages)
- A-26 February 2014 email chain
- A-27 June 2014-July 2015 email chain (11 pages)
- A-28 April 2015 email chain
- A-29 April 22, 2015 email chain (two pages)
- A-30 June 2015 email chain (two pages)
- A-31 July-August 2015 email chain (eight pages)
- A-32 June 30, 2014 email chain (three pages)
- A-33 July 14-15, 2014 email chain
- A-34 Letter dated October 22, 2015
- A-35 License approval letter and license dated November 9, 2015 (two pages)
- A-36 Letter dated November 10, 2015
- A-37 Appeal request (83 pages)
- A-38 Notice of revocation and non-renewal of license with attachments (seven pages)
- A-39 United States Immigration and Customs Enforcement (ICE) and Berks County service agreement DROIGSA-10-0003 (105 pages)
- A-40 March 30, 2010 ICE and Berks County service agreement (18 pages)
- A-41 ICE and Berks County service agreement DROIGSA-10-0003 statement of work (32 pages)
- A-42 July 2, 2013 ICE and Berks County service agreement amendment DROIGSA-10-0003-P00003 (two pages)
- A-43 July 28, 2014 ICE and Berks County service agreement amendment DROIGSA-10-0003-P00003 (19 pages)
- A-44 ICE family residential standards manual (360 pages)
- A-45 June 5, 2012 email
- A-46 September 27, 2013 email
- A-47 March 27, 2015 email chain; response letter (five pages)
- A-48 May 18, 2015 email
- A-49 April 28, 2015 email chain (two pages)
- A-50 April 2015 email chain (three pages)
- A-51 May 26, 2015 email from Theodore Dallas
- A-52 May-June 2015 email chain between Theodore Dallas and Department of Homeland Security (three pages)
- A-53 July 17, 2015 email chain
- A-54 July 28, 2015 email chain
- A-55 October 22, 2015 email chain (seven pages)
- A-56 October 22, 2015 email chain (two pages)

For the ALJ:

- ALJ-1 Department's response to appeal request (seven pages)
- ALJ-2 Appellant's brief in support of subpoena requests (20 pages)
- ALJ-3 Department's response brief regarding Appellant's application for subpoenas (22 pages)

Issue

Whether the Department correctly refused to renew and revoked the Appellant's certificate of compliance (license) on January 27, 2016.

Findings of Fact

1. The Appellant, Berks County Residential Center (BCRC), operates as a residential facility at 1040 Berks Road, Leesport, PA 19533. (Exhibit A-16, N.T. 88-89)
2. BCRC is a non-profit facility operated by the County of Berks through its Commissioners. (Exhibits A-17 and A-37)
3. In 2001, the County of Berks signed an inter-governmental service agreement with the federal government, specifically Immigration and Customs Enforcement (ICE), to operate BCRC as a family immigration program. (Exhibit A-39)
4. BCRC houses undocumented immigrant families, placed there by ICE, until a decision is rendered on asylum or other ICE-enforced immigration laws. (Exhibit A-37, N.T. 190)
5. BCRC is one of only three such facilities in the country. The other two are located in the State of Texas. (Exhibit A-37)
6. At some point in 2001, the Department mandated that BCRC be licensed by the Commonwealth to operate under the guidelines of 55 Pa. Code §3800. (Exhibit A-1, N.T. 109-112, 163-164)
7. BCRC completed the application process, was inspected, and was granted a certificate of compliance (license) by the Department in 2001. (Exhibit A-1)
8. From 2001 through 2015, the Department completed at least yearly inspections of BCRC, and renewed its license each and every year. (Exhibits A-1 through A-15, N.T. 100, 144-145)
9. During this time frame, in 2013, BCRC moved operations from a previous address to the current location. The new location had to be inspected by the Department, and a new license was issued in February of 2013. (Exhibit A-24, N.T. 91)
10. Also in 2013, BCRC requested a waiver from the Department to increase the number of occupants per bedroom from four to six, to better accommodate family units within the facility. The Department approved this waiver in November of 2013. (Exhibits A-22 and A-23)

11. In 2014, BCRC requested a modification to its certificate of compliance to increase capacity from 96 residents to 192, advising the Department that the plan was to renovate an unused fourth floor of the facility. The Department advised BCRC that the fourth floor would have to be "move-in ready" before the Department would approve the expansion and capacity increase. (Exhibits A-27, A-32, and A-33, N.T. 140-142, 167, 182)
12. BCRC completed the renovations. Once complete, BCRC applied for the license expansion request. In July of 2015, the Department inspected the facility and found no violations. (N.T. 141-146)
13. The Department did not approve BCRC's expansion request. However, BCRC was notified by DHS staff that the request was approved, and the approval status was demonstrated on the Department's website. (Exhibit A-31, N.T. 35, 174-175)
14. On October 22, 2015, the Secretary of the Department sent a letter to BCRC, informing them that the request to increase capacity had been "postponed," alleging that BCRC had changed its operations to serve "refugee immigrant families" and therefore "no longer operates as the type of facility for which it was originally licensed, a child residential facility." (Exhibit A-34)
15. This October 22, 2015 letter did not state how BCRC had changed its operations from 2001 to October of 2015. (Exhibit A-34)
16. On November 9, 2015, BCRC submitted its application for renewal of the certificate of compliance. BCRC's request was granted, and a license to operate for 2016-2017 was granted that day. (Exhibit A-35)
17. On November 17, 2015, the Director of BHSL notified BCRC that the certificate of compliance issued on November 9, 2015 was done so in error, and was thereby rescinded.¹ (Exhibit A-37)
18. On January 27, 2016, the Department notified BCRC that DHS was not renewing the Appellant's certificate of compliance, and was revoking the 2016 license.² (Exhibit A-38)
19. On February 4, 2016, BCRC filed an appeal. (Exhibit A-37)

¹ The undersigned notes that the Department stated that this November 9, 2015 granting of BCRC's license was done through the LIBRA process, the goal of which is to eliminate gaps in licensure of facilities by issuing renewal certificates of compliance without waiting for inspections to be scheduled and conducted. (N.T. 34-35) This may be true, but the hearing record is void of any inspection violations causing the rescission of BCRC's 2016-2017 license. Simply put, the Department yanked BCRC's license without any violations in direct contrast with the mandates for which the LIBRA process stands.

² The undersigned notes that, as stated previously, the January 27, 2016 notice also denied the increase in capacity request due to the decision to revoke BCRC's certificate of compliance. (Exhibit A-37)

20. BCRC housed family units from the initial day it was licensed until the date of revocation, and up to the date of hearing. (N.T. 121-122)
21. At no point was the Department unaware that BCRC operated as a family immigration program facility. (Exhibits A-37 and ALJ-1, N.T. 166)
22. There is no regulatory prohibition, including 55 Pa. Code §3800, against adults living in licensed child residential facilities. (Exhibit A-26, N.T. 40, 104, 138, 164-165)
23. The testimony of all witnesses was credible.

Discussion

The Department's Position

The Department argues that it properly revoked the Appellant's certificate of compliance because BCRC is not a child residential facility, and therefore not eligible for a certificate of compliance. The Department argues that BCRC is not eligible for a license through estoppel because the Appellant has failed to meet its burden in demonstrating all elements of an estoppel claim. The Department argues that its decision was not arbitrary and capricious.

Appellant's Position

The Appellant argues that the Department failed to meet its burden of substantial evidence. The Appellant argues that the Department is estopped from revoking BCRC's certificate of compliance. The Appellant argues that the Department's decision was arbitrary and capricious. The Appellant argues that the Department violated BCRC's due process rights through lack of specificity of notice. Finally, the Appellant argues that the Department's decision was based on outside pressures on the Department, and not any statutory violations on the part of BCRC.

Applicable Law

This matter arises under the Department's authority to register group family day care homes and child day care centers. Public Welfare Code, Act of June 13, 1967, P.L. 31, No. 21, *amended* December 5, 1980, P.L. 1112, No. 193, § 2, effective January 1, 1981.

In exercising its authority under Articles IX and X of the Code, the Department has promulgated regulations for the facilities it regulates to obtain certificates of compliance. 55 Pa. Code §§ 20.2(a), 20.21(a)-(b).

According to 62 P.S. § 1026(b), the Department shall refuse to issue a license or shall revoke a license for any of the following reasons:

- (1) Violation of or noncompliance with the provisions of the act or department regulations.
- (2) Fraud or deceit in obtaining or attempting to obtain a license.
- (3) Lending, borrowing, or using the license of another caregiver, or in any way knowingly aiding or abetting the improper granting of a license.
- (4) Gross incompetence, negligence, or misconduct in operating the facility.
- (5) Mistreating or abusing children cared for in the facility.

The regulation at 55 Pa. Code § 20.71 provide the following guidelines for the denial of a certificate of compliance, in pertinent part:

- (a) The Department may deny, refuse to renew or revoke a certificate of compliance for any of the following reasons:
 - (1) Failure to comply with this chapter
 - (2) Noncompliance with the Department's program licensure or approval regulations.
 - (3) Failure to submit an acceptable plan to correct noncompliance items.
 - (4) Failure to comply with the acceptable plan to correct noncompliance items.
 - (5) Mistreatment or abuse of clients being cared for in the facility or receiving service from the agency.
 - (6) Gross incompetence, negligence or misconduct in operating the facility or agency.
 - (7) Fraud or deceit in obtaining or attempting to obtain a certificate of compliance.
 - (8) Lending, borrowing or using the certificate of another operator, or in any way knowingly aiding the improper issuance of a certificate of registration.
- (b) The Department will review and may deny, refuse to renew or revoke a certificate of compliance if a legal entity, owner, operator or staff person:
 - (1) Has been convicted of a felony.
 - (2) Has been convicted of a crime involving child abuse, child neglect, moral turpitude or physical violence.
 - (3) Has serious mental illness which creates a risk to the clients, which shall be determined and documented by a licensed physician or licensed psychologist.
 - (4) Has evidenced drug or alcohol addiction within the past year, which shall be determined and documented by a licensed physician.
 - (5) Has been named as a perpetrator in an indicated or founded report of child abuse in accordance with the Child Protective Services Law.

Equitable estoppel is a doctrine which prevents a party from gaining advantage over a second party when the second party has relied upon misleading information supplied by the first party to the injury or detriment of the second party. Misleading information may be supplied intentionally, negligently, or by remaining silent. Commonwealth Court held the doctrine of equitable estoppel may be asserted against

a Commonwealth or government agency in Foster v. Westmoreland Casualty Co., 145 Pa. Commw. 638, 604 A.2d 1131 (1992). Citing the Pennsylvania Supreme Court in Chester Extended Care Center v. Com., Dept of Public Welfare, 526 Pa. 350, 586 A.2d 379 (1991) the court identified the elements for establishing equitable estoppel against a Commonwealth agency as (1) misleading words, conduct, or silence by the party against whom the estoppel is asserted, (2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel, and (3) the lack of a duty to inquire on the party asserting the estoppel. Commonwealth Court restated the elements for applying estoppel in Strunk v. Zoning Hearing Board of Upper Milford Township, Pa. Commw. 684 A.2d 682 (1996) as (1) intentional or negligent misrepresentation of some material fact, (2) which was made with knowledge or reason to know that the other party would rely upon it, and (3) inducement of the other party to act to his or her detriment because of justifiable reliance upon the misrepresentation.

To determine whether an agency's decisions are "in accordance with the law," appellate review of the agency's conclusions is designed "to ensure that they are adequately supported by competent factual findings, are free from arbitrary or capricious decision making, and, to the extent relevant, represent a proper exercise of the agency's discretion." Fraternal Order of Police, Conference of Pennsylvania Liquor Control Board Lodges v. Pennsylvania Labor Relations Board, 735 A.2d 96, 99 (Pa. 1999).

Our precedent states as a rule that administrative action is "arbitrary and capricious where it is unsupportable on any rational basis because there is no evidence upon which the action may be logically based." Lynch v. Urban Redevelopment Authority of Pittsburgh, 496 A.2d 1331, 1335 (Pa. Cmwlth. 1985).

The Department may deny or revoke a license for even one, single violation of its regulations. Pine Haven Residential Care Home v. Dep't of Public Welfare, 512 A.2d 59 (Pa. Cmwlth. 1986).

The Department does not need to establish that the licensee willfully violated the group day care home regulations; rather, pursuant to 62 P.S. § 1026(b), the Department must establish one of the following: the licensee failed to comply with the Department's regulations, the licensee failed to comply with acceptable plans of correction, or the licensee committed gross incompetence, negligence or misconduct in operating the facility. McFarland v. Dept. of Public Welfare, 551 A.2d 364, 367 n. 6 (Pa. Cmwlth. 1988).

ALJ'S Opinion

Prior to beginning an analysis of the merits of the appeal, a couple of administrative issues within the hearing record must be addressed.

First, as part of its pre-hearing filing, the Appellant requested several subpoenas and *duces tecum* subpoenas that were denied by the undersigned. This denial was

objected to by the Appellant and placed on the record at hearing, to be addressed at this time. I stand by the decision made to deny said subpoenas.

The issue regarding the subpoenas *duces tecum* has since been resolved. The Appellant file a Right to Know request with the Department to provide said information to it prior to hearing. The Department denied the request. That decision went through the appeal process to the Pennsylvania Supreme Court, and the denial from the Department was upheld. Therefore, any requests for documents that were denied through the RTKL request were properly denied by the undersigned.

The undersigned did not sign the subpoenas regarding the multiple licensing inspectors because the outcomes of said inspections were not in question. The Department agreed that from 2001 through 2015, inspections of the BCRC found no violations as to result in any type of licensing sanction. Additionally, the Department agreed that the proposed revocation at issue on appeal had nothing to do with violations found during any current inspections. (Exhibit ALJ-1) As such, having those prior inspectors testify to that information would be both repetitive and irrelevant.

The undersigned did not sign the subpoenas for Theodore Dallas and Matthew Jones due to their title and status within the Commonwealth. Mr. Dallas is the Secretary of DHS. Mr. Jones was the Director of BHSL at the time of the appeal. It is typical to refuse such subpoenas to protect such high-ranking officials from the intrusion of testifying in cases like these, especially if such testimony can be elicited from lower ranking officials than these.³ KC Equities v. Department of Public Welfare, 95 A.3d 918 (Pa. Cmwlth. 2014)

Second, as stated previously, an *amicus* brief was filed jointly by counsel from Villanova University and Temple University Schools of Law. An *amicus curiae* is not a party and cannot raise issues that have not been preserved by the parties. If the *amici's* arguments rely on facts and raised issues that were not part of the record or set forth by the parties, the Court cannot consider them. Commonwealth v Cotto, 753 A.2d 217 (Pa 2000) See also Temple University Hospital Inc. v. Healthcare Mgmt Alternatives Inc., 832 A.2d 501 (Pa Super 2003)

The *amicus* brief raises numerous issues and arguments that were not raised by the Department during the course of this license revocation litigation and rely on facts and issues not part of the record. More specifically, attached to the brief are 50 pages of proposed exhibits which have never been introduced into the hearing record. As

³ The undersigned notes that the Appellant filed an addendum to its exhibit list four business days prior to hearing, adding approximately 10-12 exhibits which make up the last of the listed exhibits on record. These exhibits demonstrate the integral part both Secretary Dallas and former Director Jones played in trying to get BCRC shut down. However, these exhibits were provided to the undersigned well after the decision not to sign the subpoenas for said high-ranking officials. Prior to receiving those exhibits, the only involvement of Mr. Dallas and Mr. Jones demonstrated by the Appellant was signatory authority. If those exhibits had been provided earlier than four days before the hearing, my decision may have been different.

such, our Supreme Court has stated that the undersigned cannot consider said issues in making this determination.⁴

As stated previously, the issue on appeal is whether the Department correctly refused to renew and revoked the Appellant's certificate of compliance (license) on January 27, 2016. BCRC is a non-profit residential facility operated by the County of Berks through its Commissioners. More specifically, BCRC, through a contractual relationship with the federal government, houses undocumented immigrant families, placed there by ICE, until a decision is rendered on asylum or other ICE-enforced immigration laws. At some point in 2001, the Department mandated that BCRC be licensed by the Commonwealth to operate under the guidelines of 55 Pa. Code §3800. From 2001 through 2015, the Department completed at least yearly inspections of BCRC, and renewed its license each and every year. BCRC has housed family units from the initial day it was licensed until the date of revocation, and up to the date of hearing. At no point was the Department unaware that BCRC operated as a family immigration program facility. When BCRC applied for its 2016-2017 certificate of compliance, the Department granted it and then revoked it a week later. The Department then notified BCRC that BCRC's license was not being renewed and was being revoked.

The facts involved in this appeal are not at issue. As such, we will analyze the parties' arguments.

BCRC first argues that the Department did not demonstrate that its action was supported by substantial evidence. Pursuant to both 62 P.S. § 1026(b) and 55 Pa. Code § 20.71, the Department may revoke a certificate of compliance for many different reasons. Here, BCRC's 2016-2017 license was issued by the Department on November 9, 2015. The Director of Licensing Administration testified that BCRC's license was granted based on the "license issued based on renewal application" (LIBRA) system. Pursuant to LIBRA, facilities in good standing which apply for renewal are automatically given their new certificate of compliance. The Department will then inspect the facility, and if any violations are found, has the option of issuing a provisional license or revoking the certificate of compliance. (N.T. 34-35)

With regard to BCRC, the 2016-2017 certificate of compliance was granted by the Department. No inspection was completed of BCRC after the 2016-2017 license was granted. No regulatory violations were found or reported at BCRC following the issuance of this certificate of compliance. Despite this, the Department revoked BCRC's 2016-2017 certificate of compliance. The Department failed to follow its own LIBRA mandates. As such, the Department revoked BCRC's certificate of compliance without any basis to do so under 62 P.S. § 1026(b) and 55 Pa. Code § 20.71. The

⁴ The undersigned notes that the *amici's* argument in the brief is one of unlawful confinement of the individuals within the facility. As stated previously, these individuals are placed at BCRC by ICE pursuant to an inter-governmental contract. The federal government, in enforcement of federal immigration law and regulations, is required to detain aliens subject to removal proceedings. This Court clearly lacks jurisdiction to review ICE's discretionary determinations regarding such detainees.

Department failed to demonstrate substantial (or any) evidence that the decision to revoke BCRC's license was correct.

BCRC also argues that the Department is estopped from revoking its certificate of compliance. The notice of decision states that BCRC's license was revoked because "it is no longer operating as the type of facility for which it was originally licensed and continues to be licensed." (Exhibit A-38) Equitable estoppel is a doctrine which prevents a party from gaining advantage over a second party when the second party has relied upon misleading information supplied by the first party to the injury or detriment of the second party. Misleading information may be supplied intentionally, negligently, or by remaining silent. In Foster v. Westmoreland Casualty Co., Commonwealth Court held that the doctrine of equitable estoppel may be asserted against a Commonwealth or government agency. Citing the Pennsylvania Supreme Court in Chester Extended Care Center v. Com., Dept of Public Welfare, the Court identified the elements for establishing equitable estoppel against a Commonwealth agency as (1) misleading words, conduct, or silence by the party against whom the estoppel is asserted, (2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel, and (3) the lack of a duty to inquire on the party asserting the estoppel. Commonwealth Court restated the elements for applying estoppel in Strunk v. Zoning Hearing Board of Upper Milford Township, as (1) intentional or negligent misrepresentation of some material fact, (2) which was made with knowledge or reason to know that the other party would rely upon it, and (3) inducement of the other party to act to his or her detriment because of justifiable reliance upon the misrepresentation.

There is no dispute that the Department was completely aware that BCRC was operating as a family immigration program facility during the entire existence of its operation. Additionally, BCRC housed family units from the initial day it was licensed until the date of revocation, and up to the date of hearing. Department employees routinely communicated with BCRC regarding the operation of the facility, and never previously advised BCRC that the facility was not operating within the regulations for which it was licensed. In fact, Department officials notified the BCRC that the facility was operating in compliance with regulations. (N.T. 104)

BCRC also communicated directly with the Department about the request for expansion. At no time was BCRC notified that it was operating outside of compliance. In fact, Department employees delineated specifically to BCRC the process it must follow in order to increase capacity. The Department advised BCRC that the fourth floor would have to be "move-in ready" before the Department would approve the expansion and capacity increase. (Exhibits A-27, A-32, and A-33, N.T. 140-142, 167, 182) Based on the Department's affirmative statements, and the fact that BCRC had been granted licensure for the past (at the time) 14 years, BCRC detrimentally relied on the actions of the Department to renovate the facility to allow for expansion. Over a million dollars were spent, and 17 additional employees hired by Berks County, which never would have been authorized if the Department would have questioned BCRC's ability to operate the facility as it had for the past several years. (N.T. 145-151)

BCRC did not have a duty to inquire as to whether the facility comported with the mandates within the 3800 regulations. The Department mandated that BCRC be licensed by the Commonwealth to operate under the guidelines of 55 Pa. Code §3800. From 2001 through 2015, the Department completed at least yearly inspections of BCRC, and renewed its license each and every year. It was reasonable for BCRC to rely on 15 years of licensure renewals to conclude that it was operating pursuant to the regulations. As such, the Appellant has demonstrated all three elements to establish equitable estoppel against a Commonwealth agency cited in either Chester or Strunk. The Department is estopped from revoking BCRC's certificate of compliance.

BCRC next argues that the actions of the Department were arbitrary and capricious. A governmental agency action, finding, or conclusion cannot be arbitrary, capricious, abuse discretion, or otherwise fail to comply with law. 5 U.S.C. §706(2)(A). Commonwealth Court has delineated that precedent states as a rule that administrative action is "arbitrary and capricious where it is unsupportable on any rational basis because there is no evidence upon which the action may be logically based." Lynch v. Urban Redevelopment Authority of Pittsburgh. Here, the only basis offered by the Department for the revocation, as stated previously, is that BCRC "is no longer operating as the type of facility for which it was originally licensed and continues to be licensed." (Exhibit A-38) This rationale is completely untrue. Again, these two facts cannot be stressed enough: 1) There is no dispute that the Department was completely aware that BCRC was operating as a family immigration program facility during the entire existence of its operation, and 2) BCRC housed family units from the initial day it was licensed until the date of revocation, and up to the date of hearing. The Department's notice is unsupportable on any rational basis. As such, the Department's actions in revocation of BCRC's license were arbitrary and capricious.

BCRC next argues that the Department violated its due process rights through lack of specificity of notice. While the reasoning behind the revocation of BCRC's certificate of compliance may not be sound, as was analyzed previously, it cannot be argued that the Department failed to provide a reason for said revocation. The January 27, 2016 notice states that BCRC's license was being revoked because "it is no longer operating as the type of facility for which it was originally licensed and continues to be licensed." (Exhibit A-38) That was the rationale for the Department's decision. Additionally, BCRC was granted a forum to be heard in front of a neutral fact finder in a court of proper jurisdiction. Taken as a whole, the mandates of procedural due process have been met. The Department did not violate the due process rights of BCRC.

Finally, BCRC argues that the Department's decision was based on outside pressures on the Department, and not any statutory violations on the part of BCRC. Beginning in 2015, the Governor's Office and DHS began receiving significant correspondence and requests to close down BCRC. (Exhibits A-47, A-49, and A-50) Secretary Dallas even contacted Homeland Security looking for help to "find a way to resolve this situation." (Exhibit A-51) DHS was notified that advocates and attorneys of residents of BCRC were requesting an investigation by the Pennsylvania Office of Attorney General with the goal of closing BCRC. (Exhibit A-47) Secretary Dallas even

stated, on May 26, 2015, that the Department had no basis under State law to revoke the BCRC's certificate of compliance. (Exhibit A-51) Yet Secretary Dallas mandated that the expansion application not be acted upon, despite his knowledge that there was no basis for either refusing to issue a certificate of compliance or for not approving the expansion. (Exhibits A-34 and A-53)

The Department's argument has changed throughout this process. Originally, the Department argued that BCRC's license should be revoked because it was no longer operating as it had originally been licensed. Clearly that was not the case. So the Department then argued that BCRC was housing adults with children in violation of the 3800 regulations. However, there is no regulatory prohibition, including 55 Pa. Code §3800, against adults living in licensed child residential facilities. (Exhibit A-26, N.T. 40, 104, 138, 164-165) With this admission, the Department's argument changed again. The Department now argues that BCRC is not a child residential facility, and therefore not eligible for a certificate of compliance. This is a circular argument. If BCRC is not a child residential facility (as it states on its certificates of compliance), the Department was incorrect to mandate licensure as such for the past 15 years. And if BCRC is not in need of a license, the Department cannot revoke something which it has no authority to grant in the first place.

The last sentence is a good segue into discussion about remedy. It is unclear in the hearing record, and muddled even more by the changing arguments of the Department, whether BCRC is a facility for which licensure is required. BCRC is operated through an inter-governmental contract between the federal government and Berks County. The Commonwealth of Pennsylvania is not a party to the agreement. Supremacy clause issues aside, BCRC operates under the mandates of its contract with ICE and pursuant to federal immigration laws and regulations. The hearing record demonstrates that the contract with ICE requires some type of Commonwealth licensure for BCRC to operate. But the record is not clear on how the facility is to be licensed.

Conclusion

The Department did not provide substantial evidence that the decision to revoke and non-renew BCRC's license was correct. The Department is estopped from revoking BCRC's license, and the Department acted arbitrarily and capriciously, responding to outside pressures in making this decision instead of regulatory violations. Therefore, the notice of decision dated January 27, 2016 was not correct, and the Department must rescind the action. However, as the hearing record is unclear whether BCRC is a type of facility that is required to be licensed by the Commonwealth of Pennsylvania, this Order will be limited to rescinding the action. For all of the foregoing reasons, I recommend that the appeal of the Appellant be sustained.

**COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES
BUREAU OF HEARINGS AND APPEALS**

APPEAL OF: Berks County Residential Center
BHA ID No.: 9999
BHA Docket No.: 061-16-0003

ORDER

AND NOW, this 20th day of April, 2017, after careful review and consideration of the Recommendation of the Administrative Law Judge, it is hereby **ORDERED** that the Recommendation be adopted in its entirety.

Either party to this proceeding has fifteen (15) calendar days from the date of this decision to request reconsideration by the Secretary of the Department. (In food stamp cases, only the appellant may seek reconsideration.) To seek reconsideration, you must fully complete the enclosed application/petition for reconsideration. The application/petition shall be addressed to the Secretary, but delivered to the Director, Bureau of Hearings and Appeals, P.O. Box 2675, Harrisburg, Pennsylvania, 17105-2675, and must be postmarked within fifteen (15) calendar days from the date of this Order. This action does not stop the time within which an appeal must be filed to Commonwealth Court.

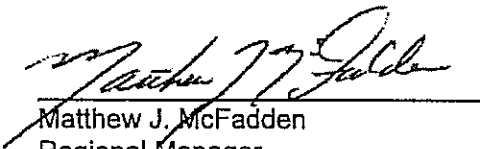
The appropriate party(ies), where permitted, may take issue with this Adjudication, and Order, and may appeal to the Commonwealth Court of Pennsylvania, within thirty (30) days from the date of this order. This appeal must be filed with the Clerk of Commonwealth Court of Pennsylvania, 601 Commonwealth Avenue, Suite 2100, P. O. Box 69185, Harrisburg, PA 17106-9185.

If you file an appeal with the Commonwealth Court, a copy of the appeal must be served on the government unit which made the determination in accordance with Pa. R.A.P. 1514. In this case, service must be made to: Department of Human Services, Bureau of Hearings and Appeals, 2330 Vartan Way, 2nd Floor, Harrisburg, Pennsylvania 17110-9721, **AND** Department of Human Services, Office of General Counsel, 3rd Floor West, Health and Welfare Building, Harrisburg, PA 17120.

Bureau of Hearings and Appeals

April 20, 2017

Final Order and Mailing Date


Matthew J. McFadden

Regional Manager

Bureau of Hearings and Appeals

cc: Berks County Residential Center, Appellant
Matthew J. Connell, Esq., for Appellant
Daniel Fellin, Esq., DHS – OGC
Jacqueline Rowe, Director, Bureau of Human Services Licensing
File


COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF HUMAN SERVICES
BUREAU OF HEARINGS AND APPEALS

APPEAL OF: Berks County Residential Center
BHA ID No.: 9999
BHA Docket No.: 061-16-0003

RECOMMENDATION

It is hereby Recommended that the appeal of Appellant be **SUSTAINED**. Within ten (10) days of the date of this Order, the Department is Ordered to rescind the action taken on January 27, 2016.

April 20, 2017
Date


David Dudley, Esquire
Administrative Law Judge