SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0563-08T3

DEPARTMENT OF CHILDREN AND
FAMILIES, INSTITUTIONAL ABUSE
INVESTIGATION UNIT,

Petitioner-Respondent,

v.

V.W.,

Respondent-Appellant.

Submitted: December 9, 2009 - Decided: January 5, 2010

Before Judges Axelrad and Fisher.

On appeal from the State of New Jersey, Department of Children and Families, Docket No. AHU 07-300.

Linwood A. Jones, attorney for appellant.

Anne Milgram, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Lori J. DeCarlo, Deputy Attorney General, on the brief).

PER CURIAM

Following tragic circumstances, J.W. and her four siblings were placed by the Division of Youth and Family Services (the Division) with their maternal grandfather, R.W., and step-

grandmother, V.W.[1] This is an appeal by V.W. of the final determination of the Executive Director, Community Services, Department of Children and Families (Director or DCF) finding that V.W. committed an act of child abuse as defined by N.J.S.A. 9:6-8.21(c)(4)(b) against her then nine-year-old granddaughter, J.W., by repeatedly striking her on her arms with a jump rope. We affirm.

An investigation was triggered by the Division and referred to DCF's Institutional Abuse Investigation Unit (IAIU) pursuant to a call by a witness who observed V.W. punch J.W. in the stomach and hit her with a rope outside of the daycare center where J.W. attended an after school program. The investigator spoke with the eyewitness, the director and staff members of the daycare center, V.W., R.W., J.W. and her siblings, and reviewed letters from various character references on V.W.'s behalf. Following completion of its investigation, IAIU reached an investigatory finding of substantiated child abuse.[2] All of the

[1] For ease of reference in this opinion, we will refer to V.W. and J.W. as grandmother and granddaughter.

[2] N.J.A.C. 10:129-5.3(a) establishes two categories of findings which may be reached as a result of a child abuse or neglect investigation, either "substantiated" or "unfounded."

"Substantiated" is defined as follows:

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children were removed from the home of V.W. and R.W. and placed in foster care. IAIU notified V.W. of its finding and of her right to appeal, which she did. Accordingly, the matter was transmitted to the Office of Administrative Law (OAL).

A plenary hearing was conducted by Administrative Law Judge (ALJ) J. Howard Solomon over three days, during which DCF presented the testimony of Irek Taflinski, the IAIU investigator; Theresa McCollum, the eyewitness who reported the incident; and Brittany Lett, a daycare center counselor. V.W. testified, and also presented the testimony of T.W.-B, her adult step-daughter; Dejon Morris, a minister at Mt. Olive Baptist Church; Maryjane Karp, the Court Appointed Special Advocate (CASA) volunteer; and R.W. According to V.W., when she arrived at the daycare center, she was stopped by Lett, who told her that J.W. had hit her sister in the chest and face. V.W. claimed she made J.W. put down the jump rope and led her and her sister down the steps towards the school basement so she could

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> a finding when the available information, as evaluated by the child protective investigator, indicates by a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.A.C. 10:133-1.3 because the alleged child victim has been harmed or placed at risk of harm by a parent or guardian.
>
> [N.J.A.C. 10:129-1.3.]

chastise her out of the presence of others. V.W. admitted she raised her voice and yelled at J.W., and when her granddaughter backed away from her, she grabbed J.W. by her left arm and pulled J.W. towards her and admonished her not to walk away while she was talking to her. V.W. claimed the red mark on J.W.'s left arm was caused by the pressure V.W. exerted in pulling the girl towards her and, in the process, she accidentally may have scratched her.

On April 7, 2008, the ALJ issued an initial decision concluding that the substantiation of abuse was established by a preponderance of the competent, relevant and credible evidence. See In re Polk, 90 N.J. 550, 560 (1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). In contrast to V.W.'s version of events, the judge expressly found the testimony of Lett and McCollum to be "credible and compelling," "extremely believable and sincere," "straightforward in recounting the event" and "clear in their independent recollections" despite "some inconsistencies between them." The judge also noted among his findings of fact that: (1) V.W. responded to Lett's comments about J.W.'s inappropriate behavior by grabbing a jump rope from one of the girls and grabbing J.W. by her wrist and beating her with the rope. (2) J.W. was noticeably scared, shaking and injured. (3) J.W. sustained numerous welts to her arms, and a

welt on her left arm was bleeding. (4) The IAIU investigator noticed welts on J.W.'s arms when he interviewed the child at V.W.'s home on July 28, 2006, four days after the incident. (5) Although she initially stated that V.W. accidentally scratched her arm, J.W. then mentioned a rope, which had not been asked about by the investigator. (6) When the IAIU investigator interviewed J.W. at her foster home on September 26, 2006, she told him that V.W. had used extension cords, buckles, ropes, and her hands to hit her and her siblings. (7) In discussing the subject incident, J.W. related how her grandmother grabbed the rope and struck her several times after Lett told her that J.W. had misbehaved in school. The judge also recounted the testimony of the CASA volunteer as to J.W.'s explanation for refusing to attend the visitation sessions with her grandparents when she was in foster care, namely, that it was because of her grandmother's beatings, and that she did not want to return to V.W.'s residence.

After making credibility assessments, setting forth findings of fact and performing a legal analysis, the ALJ concluded that the IAIU had properly found substantiated abuse by V.W. within N.J.S.A. 9:6-8.21(c)(4)(b), stating:

> V.W. grabbed J.W. by the wrist, preventing her from escape and proceeded to beat her with a plastic rope severely enough to cause welts which were visible days later by the

> IAIU investigator. There was even blood emanating from one of the welts. This incident constituted cruelty and exceeded the limits of corporal punishment. N.J.S.A. 9:6-8.21c. Apparently this was not an isolated incident since J.W., through interviews, recounted how often she had been beaten by V.W.

V.W.'s attorney submitted his exceptions to the determination and DCF responded. After consideration of the initial decision, the factual record and the parties' submissions, the Director issued a final agency determination on August 5, 2008, adopting the ALJ's initial decision and affirming the finding of physical abuse as defined by the statute and case law. The Director stated:

> I concur with the ALJ that the facts in this matter place J.W. well within the definition of an abused child. J.W. was struck repeatedly with a plastic rope on the arms severely enough to cause welts, one of which was observed to bleed. V.W. was "angry" and her actions were calculated as she restrained J.W. and administered the beating. The ALJ noted that "the plain language of N.J.S.A. 9:6-8.21(c)(4)(b) does not compel the conclusion that only injuries severe enough to create substantial risk of death, serious or protracted loss or impairment of bodily function are meant to be covered. To that end, 'cruelty' to a child not only includes inflicting upon a child unnecessary severe corporal punishment or unnecessary pain and suffering. N.J.S.A. 9:6-1. There is a wide range of harmful conduct that all reasonable persons would characterize as abuse or neglect, regardless of the caregiver's intent." The ALJ accurately applied the opinion of the New

> Jersey Supreme Court in G.S. v. Department of Human Services, 157 N.J. 161, 181 (1999) to the facts noting, "Although the focus is on harm to the child, the fortuitious happenstance that the victim escaped permanent injury does not excuse the reckless conduct of the [V.W.] or lessen the risk of harm." V.W. knew, or should have known, that repeatedly hitting a child with an instrument in an out-of-control manner, with enough force as to cause injury on J.W.'s arms was neither necessary nor justified, neither reasonable nor appropriate. Such action placed J.W. at risk of an even more significant injury than she suffered.

In reaching this conclusion, the Director rejected V.W.'s challenge to the ALJ's credibility determinations and expressly found that the ALJ's factual determinations were neither arbitrary nor capricious. The Director noted that J.W. sustained a bleeding welt on her arm and that her injuries were observed by eyewitnesses and the investigator. Additionally, the Director was convinced that the "instrument used, level of force, and repetition of blows" supported the conclusion that the nine year old's "physical, mental or emotional condition was impaired, or was in imm[i]nent danger of becoming impaired" due to V.W.'s "failure to exercise a minimum degree of care in providing J.W. with proper guardianship" by unreasonably inflicting harm, including excess corporal punishment.

V.W. appealed. She renews the argument she made to the ALJ, namely, that the substantiation of physical abuse on her

part was not supported by a preponderance of the evidence. V.W. also argues that the agency's determination to remove J.W. and her siblings from her home was made by the IAIU in violation of its own rules.

Our review of a final decision of an administrative agency is limited. In re Herrmann, 192 N.J. 19, 27 (2007); In re Carter, 191 N.J. 474, 482 (2007). Absent a "clear showing" that it is arbitrary, capricious or unreasonable, or that it lacks fair support in the record, an administrative agency's final quasi-judicial decision should be sustained, regardless of whether a reviewing court would have reached a different result in the first instance. Herrmann, supra, 192 N.J. at 27-28; Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). We consider "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole, . . . with due regard also to the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros., 44 N.J. 589, 599 (1965) (internal citation and quotation marks omitted). See also Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 587 (1988). We also defer to the findings and credibility determinations of the trier of fact who has had the opportunity to observe the

witnesses and judge their credibility. In re Taylor, 158 N.J. 644, 656 (1999).

Following a review of the record in this matter and in light of the applicable law, we are satisfied the final decision of the DCF, the agency entrusted with enforcing the child protection statutes, was neither arbitrary nor capricious. The ALJ thoroughly detailed his findings of fact, credibility assessments, and conclusions of law, and the record clearly supported the agency's reliance thereon in reaching its final decision to affirm the finding that V.W. physically abused J.W. within the meaning of N.J.A.C. 9:6-8.21(c)(4)(b).

We do not address V.W.'s argument respecting removal of the children from her home as the record under review pertained solely to V.W.'s challenge to the agency's substantiated child abuse finding.[3]

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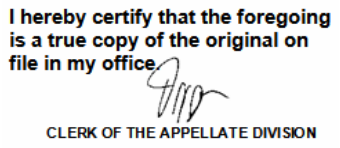
[3] The regulations allow for limited transmittal of contested cases to the OAL, including appeals of determinations by DCF that child abuse or neglect has been substantiated. N.J.A.C. 10:120A-4.3(a)(2). The DCF transmitted to the OAL the single issue of whether or not V.W. physically abused J.W. on July 24, 2006.

There is no right to an administrative review by a resource parent who disagrees with the removal of a child from his or her home when the child has been removed pending the completion of an IAIU child abuse and neglect investigation or when the resource parent or household member has a finding of substantiated abuse or neglect against him or her. N.J.A.C. 10:120A-3.1(a)(2)(iv) and (v). Based on the appellate appendix, (continued)

Affirmed.



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it appears that V.W. and R.W. participated in Child Placement Review proceedings in the Superior Court regarding J.W. and her siblings. The record does not reflect the status of those proceedings.