SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3840-15T3

NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent,

v.

J.S.

Appellant.

Submitted September 14, 2017 – Decided October 4, 2017

Before Judges Currier and Geiger.

On appeal from the New Jersey Department of Children and Families, Case Id. No. 16238045.

Williams Law Group, LLC, attorney for appellant (Allison C. Williams, of counsel and on the brief; Victoria D. Miranda, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Joann M. Corsetto, Deputy Attorney General, on the brief).

PER CURIAM

Appellant J.S. was accused by his wife G.S. of physically abusing their eleven-year-old daughter B.S. by pushing her down

the stairs.[1] The police referred the child abuse allegation to the New Jersey Department of Children and Families, Division of Child Protection and Permanency (Division), which investigated and concluded that the alleged abuse was "not established." As a result, the Division did not file any proceedings or take any action. Pursuant to its regulations, however, the Division's "not established" finding and its investigation record are permanently maintained in the Division's confidential records and not subject to expungement. The regulations further provide that there is no right to an administrative appeal from a "not established" finding.

Appellant contends that he was falsely accused and that his right to due process has been denied because he was not afforded an adversarial hearing to confront his accusers and present his own evidence to clear his name. We disagree and affirm.

I.

We glean the following facts from the record. Husband J.S. and wife G.S. were experiencing marital difficulties. They have seven children, ranging in age from five to seventeen years old.

On November 22, 2015, G.S. filed a complaint against her husband pursuant to the New Jersey Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35. During their investigation of the

[1] We refer to appellant and his family members by initials to protect their identity.

domestic violence call, G.S. told the police that on November 14, 2015, J.S. pushed their eleven-year—old daughter B.S. down the stairs, causing injury to her left knee, and that a four-year-old neighbor witnessed the incident.[2] G.S. had her daughter's knee examined by a pediatrician the next day; her knee had still not healed eight days later. The police referred the abuse allegation to the Division, which investigated the incident.

The Division's investigation revealed ongoing marital disputes between J.S. and G.S. G.S. stated that J.S. had anger issues and was emotionally abusive. G.S. further recounted multiple incidents, including that J.S. had previously thrown their 16-year-old daughter into a wall, walked in on her while she was showering, and tore their children's shirts while dragging them up the stairs of their home. G.S. alleged that their sixteen-year-old daughter was living with friends because she refused to come home while her father was present. G.S. also reported that J.S. was prescribed an unknown psychiatric medication.

Caseworkers had no concerns with the state of the home or the children. B.S. reported she was fearful of her father when he is

[2] A domestic violence temporary restraining order was issued against J.S., but G.S. later voluntarily dismissed it when they entered into a civil restraining order, which restricted his access to the marital home and limited his parenting time to supervised visits.

in a bad mood, which she said was often. Both B.S. and her brothers corroborated that J.S. had pushed or thrown B.S. during the incident. J.S. denied pushing his daughter down the stairs, claiming she fell because she lost her footing.

J.S. raises the following points on appeal: (1) the scope of review; (2) the Division's finding of "not established" should be deemed arbitrary, capricious, and unreasonable because the record is insufficient to find the children were harmed or placed at risk of harm; and (3) his right to due process was violated when the Division deprived him of the right to challenge the investigatory finding through the administrative process.

II.

Under the Division's revised regulations, there are four possible outcomes of an abuse and neglect investigation: (1) substantiated; (2) established; (3) not established; and (4) unfounded. N.J.A.C. 3A:10-7.3(c). Those findings are defined as follows:

> (c) For each allegation, the Department representative shall make a finding that an allegation is "substantiated," "established," "not established," or "unfounded."
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> > 1. An allegation shall be "substantiated" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21 and either the

investigation indicates the existence of any of the circumstances in N.J.A.C. 3A:10-7.4 or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 3A:10-7.5.

2. An allegation shall be "established" if the preponderance of the evidence indicates that a child is an "abused or neglected child" as defined in N.J.S.A. 9:6-8.21, but the act or acts committed or omitted do not warrant a finding of "substantiated" as defined in (c)1 above.

3. An allegation shall be "not established" if there is not a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, but evidence indicates that the child was harmed or was placed at risk of harm.

4. An allegation shall be "unfounded" if there is not a preponderance of the evidence indicating that a child is an abused or neglected child as defined in N.J.S.A. 9:6-8.21, and the evidence indicates that a child was not harmed or placed at risk of harm.

(d) A finding of either established or substantiated shall constitute a determination by the Department that a child is an abused or neglected child pursuant to N.J.S.A. 9:6-8.21. A finding of either not established or unfounded shall constitute a determination by the Department that a child is not an abused or neglected child pursuant to N.J.S.A. 9:6-8.21.

[N.J.A.C. 3A:10-7.3(c)-(d).]

The Division's investigation produced evidence indicating that the children were harmed or placed at risk of harm by J.S.'s conduct. The Division concluded, however, that the allegations of abuse were "not established" because a preponderance of the evidence gathered during its investigation did not support a finding that J.S. abused or neglected the children as defined by N.J.S.A. 9:6-8.21. See ibid.

In order to find the allegations "unfounded," the evidence must "indicate[] that a child was not harmed or placed at risk of harm." N.J.A.C. 3A:10-7.3(c)(4). The Division reasonably concluded that such a finding would be inappropriate here.

Under the regulations, a finding of "substantiated" allows the alleged abuser to demand a hearing. While the regulations do not provide for a hearing if the finding is "established," we recently held that "when the Division finds parental conduct establishes abuse or neglect of a child, subjecting the individual to the ramifications of disclosure set forth in various identified statutes, a party who seeks to challenge that finding shall be entitled to an administrative hearing." N.J. Div. of Child Prot. & Permanency v. V.E., 448 N.J. Super. 374, 402 (App. Div. 2017). The holding was based on the "lengthy list of institutions,

governmental entities, and persons to whom the Division may release information contained in the registry regarding any finding of abuse or neglect [a]s set forth in N.J.S.A. 9:6-8.10a(b)(1) to (23), -8.10a(c) to (g)." Id. at 392.

A finding of "not established" does not entitle a party to a hearing, see N.J.A.C. 3A:5-4.3(a)(2), but is deemed a final agency decision appealable as of right to the Appellate Division. R. 2:2-3(a)(2). "A finding by [the Department] that child abuse charges have not been substantiated, but that there is some indication a child was harmed or placed at risk of harm, is purely investigatory in nature . . . with none of the procedural protections of an adjudicatory proceeding." In re R.P., 333 N.J. Super. 105, 117 (App. Div. 2000) (citation omitted); see also Dep't of Children & Families v. D.B., 443 N.J. Super. 431, 443-44 (App. Div. 2015).

N.J.A.C. 3A:10-8.1(b) requires the Division to "retain each record which contains a substantiated, established, or not established report." Only records relating to an unfounded finding are required to be expunged in their entirety, unless an exception applies under N.J.A.C. 3A:10-8.3. N.J.A.C. 3A:10-8.1(a). Although retained, the "not established" finding remains a confidential record. N.J.S.A. 9:6-8.10a.

Expungement of the records and finding would leave caseworkers without historical reference in the event that any of J.S.'s children or someone else in his care are subjected to abuse or risk of harm in the future. The Division contends that the information obtained during the current investigation would be crucial to properly assessing the family and determining needs in the event it receives a referral in the future.

III.

We first address appellant's challenge to the Division's "not established" finding. "The scope of appellate review of a final agency decision is limited[.]" In re Carter, 191 N.J. 474, 482 (2007). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). The party challenging the administrative action bears the burden of showing the agency's action was arbitrary, capricious or unreasonable. Barone v. Dep't of Human Servs., Div. of Med. Asst. & Health Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd 107 N.J. 355 (1987).

Our appellate review involves three channels of inquiry:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Herrmann, supra, 192 N.J. at 28 (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

"An agency's exercise of its statutorily delegated responsibilities is entitled to a strong presumption of reasonableness and our court will generally defer to that agency's expertise and superior knowledge in the field." D.B., supra, 443 N.J. Super. at 440.

J.S. contends that the "not established" finding should be vacated and changed to "unfounded" because it is not supported by sufficient evidence. We disagree. The Division's investigation revealed evidence of physical abuse, including corroboration of the allegations by the victims and several witnesses, and by visible injury to B.S.'s knee. The "not established" finding is supported by substantial evidence in the record, and is neither arbitrary, capricious, nor unreasonable. J.S's claim that the "not established" finding should be vacated and changed to "unfounded" lacks merit.

IV.

We next consider appellant's challenges to N.J.A.C. 3A:10-7(c)(3). Appellant argues that N.J.A.C. 3A:10-7(c)(3) vests too much discretion in Division caseworkers because it lacks a clear legal standard. He further claims that the regulation authorizes Division caseworkers to engage in a completely subjective analysis, allowing them to render a "not established" finding based upon minimal evidence.

The Division counters that the regulation was duly promulgated in accordance with N.J.S.A. 9:3A-7(g), N.J.S.A. 9:6-8.15, and N.J.S.A. 9:6-8.72, and that it represents an appropriate exercise of agency authority. The Division denies that the record contains false and prejudicial information and asserts that it is properly retained pursuant to the enabling statutes.

Initially, we observe that the regulation falls within the scope of the Division's "implementing and enforcing responsibility" and, therefore, its interpretation "is ordinarily entitled to our deference." Wnuck v. N.J. D.M.V., 337 N.J. Super. 52, 56 (App. Div. 2001) (quoting In re Appeal by Progressive Cas. Ins. Co., 307 N.J. Super. 93, 102 (App. Div. 1997)). We are not, however, "bound by the agency's legal opinions." Levine v. N.J. D.M.V., 338 N.J. Super. 28, 32 (App. Div. 2001) (citing G.S. v. Dept. of Human Servs., Div. of Youth & Family, 64 N.J. 161, 170

(1999); Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

We note further that the regulation does not grant caseworkers unbridled discretion that is untethered to a defined legal standard. On the contrary, there are two components to a finding of "not established." First, the caseworker must determine the child is not "an abused or neglected child as defined in N.J.S.A. 9:6-8.21." N.J.A.C. 3A:10-7.3(c)(3). Second, the evidence must indicate that a child "was harmed or was placed at risk of harm." Ibid. While a finding that "some evidence" exists is not an exacting standard, the case law provides adequate guidance as to what constitutes harm or the risk of harm. See, e.g., Dep't of Child. & Fam., Div. of Child Prot. and Permanency v. E.D.-O., 223 N.J. 166, 179 (2015).

J.S. also argues that the investigation records should be destroyed when a "not established" finding is reached. We disagree. "As the case law clearly states, the interest of retaining information about alleged claims of abuse, where some cause for concern is demonstrated, is within the mandate given to the Department to protect children from abuse." D.B., supra, 443 N.J. Super. at 444. Only records retained for "substantiated" allegations are made public. Ibid. Thus J.S. has "a lesser due

process right in regard to information kept for the use of the agency and entities involved in the protection of children." Ibid.

The confidential retention of the investigation records and "not established" finding appropriately addresses the Division's need to access that information in the event of future referrals involving the same alleged abuser.

V.

Finally, we consider whether J.S. is entitled to a hearing to contest the "not established" finding. J.S. contends the finding casts the target under suspicion, and prompts the Division to permanently retain the record for future reliance and use even if the evidence is limited. He asserts it "is fundamentally unfair" to allow the Division to rely, in future matters, upon evidence that might not survive judicial scrutiny. However, J.S. has the right of direct appeal, as he has exercised here. See id. at 442 ("When administrative review is not available, such findings are a final decision appealable as of right to the Appellate Division.") (citing R. 2:2-3(a)(2)).

Although a person's interest in protecting his reputation from governmental actions triggers the right to due process, due process is not a fixed concept. Doe v. Poritz, 142 N.J. 1, 105-06 (1995). Instead, "due process is flexible and calls for such procedural protections as the particular situation demands."

Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972). "Thus, even if a person has a constitutionally protected interest, it does not automatically follow that the person must be afforded an opportunity for an adjudicatory hearing." R.P., supra, 333 N.J. Super. at 113.

"It is now firmly established that the 'due process' requirements which govern the proceedings of an agency that makes binding legal determinations directly affecting legal rights do not apply to agency proceedings which are purely investigatory in nature." In re Allegations of Physical Abuse at Blackacre Acad. on 2/10/93, 304 N.J. Super. 168, 182 (App. Div. 1997); see also Hannah v. Larche, 363 U.S. 420, 442, 80 S. Ct. 1502, 1514-15, 4 L. Ed. 2d 1307, 1321 (1960) ("when governmental action does not partake of an adjudication, as, for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used").

We have previously considered the issue of whether due process requires that a party be permitted an administrative appeal from a finding of "not established," or, under the prior regulation, "not substantiated." See D.B., supra, 443 N.J. Super. at 443. We have consistently concluded that "[a] finding by [the Division] that child abuse charges have not been substantiated, but that there is some indication a child was harmed or placed at risk of

harm, is purely investigatory in nature, with none of the procedural protections of an adjudicatory proceeding." N.J. Dep't of Children & Families, Inst'l Abuse Investigation Unit v. S.P., 402 N.J. Super. 255, 270 (App. Div. 2008) (emphasis added); see also, D.B., supra, 443 N.J. Super. at 443-44; R.P., supra, 333 N.J. Super. at 117.

The interest J.S. claims gives rise to the right to a hearing is his interest against the Division's retention of the records and their possible use in the investigation of a future referral. In D.B., we rejected the argument "that N.J.A.C. 10:129-8.1 [now N.J.A.C. 3A:10-8.1], which allows the [Division] to retain unproven accusations forever, is a violation of N.J.S.A. 9:6-8.40a." D.B., supra, 443 N.J. Super. at 444.

Our decision in V.E., finding that a party against whom an "established" finding has been made is entitled to an administrative hearing, does not compel a different conclusion. V.E., supra, 448 N.J. Super. at 402. The defendant in V.E. argued that because an "established" finding made her subject to the same adverse consequences of disclosure suffered by persons after a "substantiated" finding is made, due process required that she be afforded the right to contest the determination in an adjudicatory hearing. Id. at 390. We reasoned:

> [A]n established finding is a conclusion abuse or neglect occurred . . . . Disclosure of an established finding is authorized by N.J.S.A. 9:6-8.10a(b) and other statutes, imposing upon the rights of a perpetrator. Thus, the result of an established finding is "significant" and is accompanied by "longstanding adverse consequences," which, in part, match the effects attached to a substantiated finding.
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> [Id. at 395-96 (citations omitted).]

We concluded that, on the record before us, "necessary procedural safeguards must be employed to allow [the defendant] the right to challenge disputed adjudicative facts." Id. at 401. In reaching that conclusion, we explicitly distinguished D.B., observing that "significant ramifications of disclosure are attached to an established finding." Id. at 397.

J.S. has not argued there are disclosure ramifications to the "not established" finding that imperil any claimed right. The administrative proceeding was purely investigatory in nature, and the records retained "shall be kept confidential and may be disclosed only under circumstances expressly authorized by subsections b., c., d., e., f., and g." of N.J.S.A. 9:6-8.10a. N.J.S.A. 9:6-8.10a(a). Even if, as J.S. contends, there is erroneous information contained in those records, the circumstances here do not provide a basis for an administrative appeal. Pursuant to N.J.A.C. 3A:10-7.5(a)(6), only instances of past abuse or neglect can be used as an aggravating factor to

support a finding of abuse or neglect in the future. Further, in the event that a substantiated finding of abuse or neglect is made in the future, J.S. may challenge the factual basis for that finding in an evidentiary hearing. N.J. Div. of Youth & Family Servs. v. M.R., 314 N.J. Super. 390, 403-04 (App. Div. 1998). For these reasons, J.S. was not entitled to an adversarial hearing to contest the facts underlying the "not established" finding.

The remaining issues lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.