SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2783-15T1

DEPARTMENT OF CHILDREN AND FAMILIES,

Respondent,

v.

K.S.,

Appellant.

Submitted December 21, 2017 – Decided February 27, 2018

Before Judges Rothstadt and Gooden Brown.

On appeal from the New Jersey Department of Children and Families, Case Id. No. 10519357.

Williams Law Group, LLC, attorneys for appellant (Allison C. Williams, of counsel and on the briefs; Elizabeth D. Burke, on the briefs).

Christopher S. Porrino, Attorney General of New Jersey, attorney for respondent (Andrea M. Silkowitz, Assistant Attorney General, of counsel; Lea C. DeGuilo, Deputy Attorney General, on the brief).

PER CURIAM

Appellant K.S.[1] was accused by his wife, J.S., of abusing their then five-year-old daughter, V.S., by confining her in a closet as a form of punishment. A domestic violence resource center 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 "established." The Division later modified its finding to "not established" and notified appellant in a February 10, 2016 notice. Appellant appeals from the February 10, 2016 finding, arguing the record does not support the Division's "not established" finding, he is entitled to a hearing to contest the finding, and the Division's modification of the finding proves its conclusion was capricious. We disagree and affirm.

We glean the following facts from the record. Appellant and J.S. have three daughters, V.S., born December 2009; E.S., born October 2011; and A.S., born December 2012. The family first came to the Division's attention in December 2010, when J.S. was "substantiated" for inadequate supervision for leaving V.S., then eleven months old, alone in the car for about thirty-five minutes while she went to the supermarket. J.S. was also criminally

[1] We use initials to protect the privacy interests of those involved. See R. 1:38-3(d).

prosecuted and successfully completed the Pre-Trial Intervention Program.

There were no further referrals involving the family until January 28, 2015, when J.S. applied for a temporary restraining order (TRO) against appellant, claiming he verbally berated her in front of their children and exhibited other controlling behavior. She also claimed appellant locked V.S. in a closet for "a few minutes without the light on" as punishment during a family dispute. Additionally, J.S. claimed that "[i]n the past, [appellant] has locked all the children in the closet or the basement as a form of discipline[,]" and "[t]he children have been conditioned by [appellant] to not open the door when they are confined in the closet." The court denied the TRO application, but a reporter from the Somerset Domestic Violence Resource Center referred the allegations about the children to the Division.

Upon receiving the referral, the Division conducted an investigation, which revealed ongoing marital disputes between appellant and J.S. J.S. reported the couple now slept in separate rooms, and the children alternated sleeping with each parent. J.S. stated she did not think appellant was doing anything inappropriate with their daughters, but was "more so doing it to be spiteful to her . . . ." J.S. recounted multiple incidents in which appellant confined their children in the closet as punishment for refusing

to leave her bedroom to sleep with him or, for V.S., as punishment for completing math problems incorrectly. J.S. specified that appellant "locked [V.S.] in the closet for [five] hours to do math problems for at least [three] times a week." According to J.S., "[appellant] has conditioned [V.S.] to obey him by insisting she remain in the closet until all math problems are correctly completed or denying her food until she gets all the math problems correct." J.S. described the closet as fully carpeted, with no desk, chair, or locks on the door.

During her interview with Division caseworkers, V.S. stated "when she does not listen[,] her dad puts her in the sun room or basement by herself." She also said appellant made her solve math problems, and if she made a mistake or was inattentive, he made her practice in the bedroom closet "at least [three] times a week." She said appellant "turn[ed] on the closet light so she can see[,]" but that "sometimes she [was] in the closet for a long time." V.S. stated although there was no lock on the closet door, appellant "physically close[d] the closet door" and did not allow her "to eat or leave the closet, other than [for] bathroom breaks, until she [got] all the math problems correct." She also said "she [could not] eat dinner if she [got] math problems wrong." Three-year-old E.S. corroborated V.S.' account, by stating that while

she (E.S.) was not confined in the closet, appellant "would put [V.S.] in the closet to do math problems."

Appellant "adamantly denied the allegations" and claimed J.S. "ha[d] coached the children to say these things" because he had recently asked for a divorce. Despite his denials, he showed caseworkers the closet in the family home where he had allegedly confined V.S. Caseworkers noted it was a "walk-in bedroom closet," approximately four feet long by four feet wide, clean, organized, and carpeted. They also noted the closet had a light and no locking mechanism on the door.

During the course of the investigation, J.S. provided the caseworker with "a CD recording[.]" On the recording, the caseworker heard appellant yelling at V.S. to go into the closet, while V.S. was crying and telling appellant she did not want to go into the closet. The Division also obtained a report from V.S.'s pediatrician, who was concerned that appellant was "trying to isolate her from [her] mother" and was "inflicting unusual punishment[,] such as putting her in a closet or forcing her to sit for hours doing math problems in the closet." Additionally, V.S.'s school conveyed it had received "[secondhand] reports of [appellant] locking [the] children in [a] closet at night."

The Division's investigation summary, approved April 1, 2015, concluded the allegations of physical abuse by close confinement

were "established" as to V.S. but unfounded as to her siblings. After considering the aggravating and mitigation factors, the Division determined that the mitigating factors prevailed by virtue of the fact that no new incidents had occurred since the parents separated and the Family Part was overseeing custody and visitation matters. Regarding corrective action, the Division recommended that appellant attend parenting classes. On June 9, 2015, the Division notified appellant of its "established" finding, noting that "in taking into account the aggravating and mitigating factors associated with the incident, the abuse/neglect does not warrant a finding of [s]ubstantiated."

On July 2, 2015, appellant filed a notice of appeal from the June 9, 2015 "established" finding. With his appeal, appellant submitted a statement titled "Rider I Statement of Facts[.]" In it, appellant reiterated his claims that J.S. had concocted the story of abuse in anticipation of him filing for divorce and custody of the children. He also attempted to explain the CD recording, of which he had been unaware when he initially denied the allegations during his interview with Division caseworkers. Appellant now claimed the recording depicted a dispute between him and J.S. over where the children would sleep. He asserted he told V.S. to go into the closet, not to punish her, but "to shield her

from hearing the verbal dispute, as well as [to] protect her from being dragged out of the room against her will" by J.S.

Appellant's statement also detailed family court proceedings to which the Division was not a party. Although he did not provide supporting documents, appellant alleged he filed a Verified Complaint and an Order to Show Cause "seeking . . . the return of his children" on February 4, 2015. Thereafter, following an April 8, 2015 custody hearing, the court purportedly issued a written decision noting that it listened to the recording of appellant ordering V.S. to return to the closet and found it was "inconclusive . . . whether [appellant] was intending to punish his children."

On February 10, 2016, while appellant's appeal was still pending, the Division, "upon administrative review[,]" changed its finding from "established" to "not established[,]" and notified appellant of the change. The modified investigation summary explained the new finding as follows:

> Policy defines confinement as forcing a child to remain in a closely confined area that restricts physical movement, including but not limited to locking a child in a closet or small room. Although [V.S.] was forced by [appellant] . . . to sit in a closet to complete homework for periods of time, [appellant] didn't actually lock the door, nor was there a lock on it. The child was able to leave the closet to use the bathroom. Therefore, her physical movement wasn't

> completely restricted. The child was not bound to anything [and] the environment she was put in was clean [and] safe.
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> Although the incidents were upsetting to [V.S.], there was no significant or lasting impact on the child's overall functioning [and] well-being. The pediatrician did not indicate any impact on the child's physical health as a result of [appellant's] actions. The school reported that [V.S.] continued to function well. [V.S.] did not require counseling or therapeutic services as a result.
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> There are no means to verify the amount of time [V.S.] was made to sit in the closet to do homework. Although the child reported it was "hours[,]" [] her timeframe is unclear due to her age ([five][-]years[-]old at the time).
>
> It appears that [appellant] has since remediated the issue. There are no further reports of this occurring. . . . [Appellant] completed the . . . parenting program successfully in July 2015.

Appellant filed a notice of appeal from the February 10, 2016 "not established" finding on March 10, 2016, and withdrew his appeal of the June 9, 2015 "established" finding on May 31, 2016. The order dismissing the appeal of the June 9, 2015 finding was entered on June 6, 2016. Thus, only the Division's modified finding of "not established" is before us on appeal.

First, appellant argues the record was insufficient to support the Division's finding that the child abuse or neglect allegations against him were "not established." He argues the

record "fails to establish that [V.S.] suffered any injury or impairment" or that she is "in jeopardy of suffering any future harm." As a result, appellant contends the Division's "findings are clearly arbitrary, capricious and unreasonable and . . . should be reversed." We disagree.

Our appellate review of final agency decisions is limited. In re Carter, 191 N.J. 474, 482 (2007). It 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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> [In re Herrmann, 192 N.J. 19, 28 (2007) (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

We will sustain an "administrative agency's final quasi-judicial decision . . . unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." Herrmann, 192 N.J. at 27-28. 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, 150 N.J. 355 (1987).

There are four possible findings for an abuse and neglect investigation: (1) substantiated; (2) established; (3) not established; and (4) unfounded. N.J.A.C. 3A:10-7.3(c). The Division defines these categories as follows:

> 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.
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> 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.
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> 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.
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> 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.

[N.J.A.C. 3A:10-7.3(c)(1) to (4).]

Here, the Division's investigation produced evidence indicating appellant's conduct either harmed V.S. or placed her at risk of harm by "close confinement[,]" which the Division policy manual defines as the "[u]nreasonable restriction of a child's mobility, actions[,] or physical functioning by . . . forcing the child to remain in a closely confined area, which restricts physical movement." The manual provides multiple examples of close confinement, including "[l]ocking a child in a closet or small room." Appellant does not dispute he ordered V.S. into the closet on at least one occasion. While he disputes that his intent was to punish V.S., there was ample evidence repudiating his explanation and supporting the finding that while there was no locking mechanism on the closet door, V.S. was conditioned to comply with his order to remain in the closet until the math problems were solved.

We next consider appellant's challenge to N.J.A.C. 3A:10-7.3(c)(3), which he claims violates his right to due process. Appellant argues the Division's "regulatory scheme" allows a "not established" finding to "remain in the N.J. Spirit System into perpetuity" without affording the alleged abuser "the right or opportunity to challenge the finding." He contends the scheme allows the Division to use "evidence from 'not established'

findings . . . as an aggravating factor to demonstrate a pattern of abuse or neglect by the alleged perpetrator" in a future investigation, thereby "increas[ing] the likelihood of a 'substantiated' finding without [the evidence] being tested" or subjected to "cross-examination by . . . [a]ppellant."

We defer to "[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility . . . ." Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (alteration in original) (quoting In re Appeal by Progressive Cas. Ins. Co., 307 N.J. Super. 93, 102 (App. Div. 1997)). "An agency's exercise of its statutorily delegated responsibilities is entitled to a strong presumption of reasonableness[,] and [this] court will generally defer to that agency's expertise and superior knowledge in the field." N.J. Dep't of Children & Families v. D.B., 443 N.J. Super. 431, 440 (App. Div. 2015).

Due process is not a fixed concept; it "is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972); see also Doe v. Poritz, 142 N.J. 1, 106 (1995). Therefore, "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." In re R.P., 333 N.J.

Super. 105, 113 (App. Div. 2000). Indeed, the due process requirements that "govern[] the proceedings of an agency that makes binding legal determinations directly affecting legal rights" are inapplicable to agency proceedings that are "purely investigatory in nature." In re Allegations of Physical Abuse at Blackacre Acad., 304 N.J. Super. 168, 182 (App. Div. 1997).

An alleged perpetrator of child abuse or neglect can appeal a "substantiated" finding by the Division if "there are material disputed facts." N.J.A.C. 3A:5-4.3(a)(2). Although the regulations do not provide for a hearing to appeal an "established" finding, we recently held that before "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). We concluded an "established finding is 'significant' and is accompanied by 'longstanding adverse consequences,' which, in part, match the effects attached to a substantiated finding." Id. at 396 (quoting N.J. Div. of Child Prot. & Permanency v. Y.N., 220 N.J. 165, 179 (2014)).

In contrast, a "not established" finding does not entitle a party to a hearing. See N.J.A.C. 3A:5-4.3(a)(2). "A finding by [the Division] that child abuse charges have not been

substantiated, but 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. at 117 (citation omitted); see also D.B., 443 N.J. Super. at 443-44. Although the Division retains records of "not established" findings, N.J.A.C. 3A:10-8.1(b),[2] the records are confidential, N.J.S.A. 9:6-8.10a, and the findings are not considered "aggravating factors . . . in determining if abuse or neglect should be substantiated or established[.]" N.J.A.C. 3A:10-7.5(a)(6). It is, however, a final agency decision appealable as of right to this court. R. 2:2-3(a)(2); see also D.B., 443 N.J. Super. at 442.

Appellant asserts that the possibility that the Division will use the record of the "not established" finding against him in a future investigation gives rise to his right to a hearing. In D.B., 443 N.J. Super. at 443-44, we considered this argument under the prior regulation. In rejecting the argument, we noted the findings are not public, and therefore, the party has "a lesser due process right in regards to the information kept for the use

[2] The Division retains records of "substantiated," "established," and "not established" findings. N.J.A.C. 3A:10-8.1(b). Only "unfounded" findings are expunged in their entirety unless an exception under N.J.A.C. 3A:10-8.3 applies. N.J.A.C. 3A:10-8.1(a).

of the agency and entities involved in the protection of children." Id. at 444. Unlike the appellant in V.E., appellant will not be subject to the "longstanding adverse consequences" that accompany "substantiated" and "established" findings. See V.E., 448 N.J. Super. at 396 (quoting Y.N., 220 N.J. at 179). If a future investigation results in a "substantiated" or "established" finding, appellant would then have the opportunity to challenge the factual basis of that finding in an evidentiary hearing. N.J. Div. of Youth & Family Servs. v. M.R., 314 N.J. Super. 390, 403-05 (App. Div. 1998). Otherwise, he still has the right of direct appeal, which he has exercised here. See R. 2:2-3(a)(2).

Finally, appellant urges us to reject the Division's finding as "capricious[,]" because it changed its finding from "established" to "not established" without providing "any explanation" or an "updated investigatory summary . . . ." Appellant's assertion is belied by the record. Moreover, we review final decisions. R. 2:2-3(a)(2). A final decision is one for which administrative review is not available. See D.B., 443 N.J. Super. at 442. Findings of child abuse or neglect that are "established" are subject to administrative appeal and are therefore not final decisions. Id. at 402. In contrast, "not established" findings are final agency decisions because they are not subject to administrative review, and are therefore appealable

as of right under Rule 2:2-3(a)(2). Thus, any challenge to the Division's initial "established" finding is outside the scope of this appeal. It was not a final decision, as evidenced by the Division's subsequent modification.

In sum, we conclude the agency's "not established" finding was not arbitrary, capricious, or unreasonable. On the contrary, it was amply supported by the record.

Affirmed.