

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0247-21

DEPARTMENT OF CHILDREN
AND FAMILIES,

Petitioner-Respondent,

v.

E.G.,

Respondent-Appellant.

Submitted November 7, 2022 – Decided December 5, 2022

Before Judges Mayer and Enright.

On appeal from the New Jersey Department of Children and Families, Docket No. 19-0196.

Joseph E. Krakora, Public Defender, attorney for appellant (Phuong V. Dao, Designated Counsel, on the briefs).

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Alicia Y. Bergman, Deputy Attorney General, on the brief).

PER CURIAM

Appellant E.G. (Ellen)¹ challenges the August 6, 2021 final agency decision of the Assistant Commissioner of respondent Department of Children and Families (DCF), finding Ellen was properly substantiated for neglect of a student, M.C. (May). We affirm.

We derive the following facts from the record of the hearing before an Administrative Law Judge (ALJ). In September 2018, Ellen was hired as a teacher's aide at a local after-school program in Jersey City. She and another teacher's aide, J.R. (Jane), were assigned to assist a first-grade class with their homework. Ellen supervised approximately nine of the twenty-three students and Jane watched over the rest. May, then six years old, was a member of Jane's group.

On October 5, 2018, after the children completed their homework, Ellen and Jane escorted them to a public park directly across the street from the school. Both aides understood they were responsible for watching all the children while at the park. Ellen's husband and her two-year-old son were also at the park at the same time. According to Ellen's testimony, when she saw a strange woman talking to her son, she asked the woman to stop.

¹ We use initials and pseudonyms to protect the privacy of the minor child and the parties involved. R. 1:38-3(d)(12).

Jane testified that once the class was due to be dismissed for the day, she and Ellen lined up the children so they could return to the school. Jane stated that with the class roster in hand, she conducted a headcount of the students, including May, who was at the back of the line, and led them back to the school. Jane testified she was at the front of the line and Ellen was at the back of the line as the children proceeded back to the school. According to Ellen, May and the same woman who had been talking to her son earlier were standing four to five feet behind her when the children were in line to leave the park.

Jane testified that upon returning to the school, May's brother was waiting at the security desk for the child. Jane noticed May was missing and asked Ellen where the child was. Ellen responded that May was released to her mother. Jane testified she panicked at that moment because she knew May's mother was at work. Jane also testified that Ellen released May to a stranger, and although she did not know precisely when that occurred, Jane stated it was after she counted the students while they were in line to return to the school.

According to Jane's testimony, she and other staff from the school ran outside to look for May and minutes later, found the child down the street with the same unidentified woman. As school staff pursued the woman on foot, they

alerted the police. Officers were able to quickly apprehend the woman and return May to the school.

The suspect was subsequently charged with kidnapping and attempting to lure a child. Also, because of this incident, May was treated at a local medical center and diagnosed with adjustment disorder with anxiety.

In February 2019, following an investigation by the Hudson County Prosecutor's Office and the Institutional Abuse Investigation Unit (IAIU), Ellen was substantiated for neglect based on her inadequate supervision of May during the incident. The IAIU determined that on October 5, Ellen took no precautionary measures to verify the identity of the woman who pulled May away from the rest of the class.

Additionally, the IAIU concluded Ellen placed May at substantial risk of harm because, although Ellen was aware of and had received training about the after-school program's dismissal policy, she did not follow it. That policy required that students in the program only be released to a parent or other authorized person listed on the school's dismissal form, and only after the parent or designated person signed the child out at the school security desk.

In substantiating Ellen for neglect, the IAIU found the following aggravating factors under N.J.A.C. 3A:10-7.5(a): (1) this was an institutional

abuse case; (2) Ellen failed to comply with the program's dismissal procedures; (3) May's tender age; and (4) the emotional impact on May. The fact that Ellen's transgression was an isolated incident was deemed a mitigating factor under N.J.A.C. 3A:10-7.5(b)(3). On balance, the IAIU determined the aggravating factors outweighed the lone mitigating factor.

Ellen appealed the findings of the IAIU, and the matter was transferred to the Office of Administrative Law (OAL). On November 16 and 17, 2020, the (ALJ) heard testimony from the after-school program's Director of Operations and Site Coordinator, the DCF investigator, and Jane, all of whom appeared on behalf of DCF. Ellen also testified. Additionally, DCF presented documentary evidence at the hearing, including a surveillance video of the October 5 incident.

When Jane took the witness stand, she testified that although Ellen claimed she did not know May because the child was not in her assigned classroom group, she and Ellen only split responsibility for the children in the classroom. But they shared responsibility for supervising the full class of twenty-three students when they went to the park. Jane also confirmed that on the date of the incident, Ellen never asked Jane if May was signed out.

The Director of the after-school program testified Ellen was aware of the program's dismissal and supervision policies because she was trained about the

policies and received a handbook about her responsibilities during orientation. Also, the Director stated the program's "number one thing is dismissal, so that is something that is absolutely . . . gone over [with] the new hires." Additionally, the Director confirmed parents must report to security to receive their child and "[n]o parent can pick up a child from the park." She explained that once security notifies staff, via "walkie-talkie or the intercom to dismiss the child," a member of the staff can release the child to the parent or authorized person, but the person retrieving the child first must "come into the building [and] . . . check with security." When the Director was asked why Ellen was terminated from her employment at the program, the Director responded that Ellen failed to "adher[e] to the dismissal policy" and to properly supervise the child.

The DCF investigator, Marion Anderson, testified she investigated the October 5 incident following a referral from the Hudson County Prosecutor's Office in November 2018. According to Anderson, when she first interviewed Ellen, Ellen admitted she was at the park supervising her class on October 5. After the class was escorted to the park, Ellen saw a strange woman speaking and playing with Ellen's son, who also was at the park at that time with Ellen's husband. Ellen told Anderson she asked her husband to take her son "away from the lady" and the woman complied.

Anderson also stated that during the interview, Ellen recalled seeing the same woman speaking with May on October 5, but Ellen did not say anything to the woman or intervene because May "wasn't in [her] group." Ellen also informed Anderson she thought the woman was May's mother. However, Ellen then reported she did not know what May's parents looked like. According to Anderson's testimony, Ellen further revealed that on the day of the incident, she and Jane walked the students back toward the school as the woman continued to walk away with May at the back of the line.

Additionally, Anderson testified that she interviewed Ellen a second time. During the second interview, Ellen acknowledged that when she and Jane would supervise the children at the park, they both watched all the children together, meaning the students were not split into separate groups. Further, Anderson stated she asked Ellen why she did not say anything to the woman who walked out of the park with May, and Ellen again responded that May was "not in her group."

When Ellen testified, she stated October 5, 2018 was the first day she went to the park with the children. Although she denied having received training or orientation about the after-school program, she admitted she was aware of the dismissal policy and knew anyone picking up a child from the program first had

to report to security. Further, she testified she did not know who all the children in her group were and did not believe Jane counted the children before heading back to the school building on October 5 because Jane would have noticed a child was missing.

On June 22, 2021, the ALJ issued a seventeen-page opinion, denying Ellen's appeal and sustaining the finding of substantiated neglect. The ALJ credited the testimony of the three DCF witnesses and observed that Jane's testimony was corroborated by the surveillance video of the incident, as well as other DCF witnesses. Conversely, the ALJ found Ellen's "testimony . . . was not credible." The ALJ stated Ellen had "the greatest interest in the outcome of this proceeding, and her testimony contradicted information obtained during the investigation and statements made to the other witnesses, who I did deem credible. I afforded little weight to her testimony."

Next, the ALJ found that on October 5, 2018, Ellen and Jane "were responsible for all of the children in their first-grade class, including [May,]" when they went to the park. The ALJ added:

As a teacher's aide assigned to [May's] class, [Ellen] was a guardian responsible for [May's] well-being While she may not have intentionally release[d the child] to a person who [Ellen] knew to be a stranger to [May], she did fail to exercise a minimum degree of care when she permitted [the child] to leave with the

lady without making any attempt whatsoever to verify who the lady was and whether she was even authorized to pick up [May]. [Ellen] never asked [May] to verify that the lady was her mother or another authorized person to pick her up. [Ellen] never asked the lady who she was or whether she had signed out [May]. [Ellen] never verified with [Jane] or security whether the lady was authorized to pick up [May], nor did she follow the program's policy and protocol regarding supervision and dismissal, which does not permit children to be released to the parent, or other authorized person, in the park. [Ellen] had a duty to ensure that all of the children in her first-grade class were safe and only released to an authorized person, regardless [of] whether [Ellen] was personally assigned to [May] while she was completing her homework in the classroom. Moreover, a reasonable person would be even more vigilant with the children – especially six-year-olds, who are even more vulnerable given their tender age – in a public setting, such as a park, to ensure that the children do not wander off or are abducted. . . . [Ellen] saw [May] with the lady and just assumed that she was [May's] mother or another person authorized to pick her up. She did nothing to ensure that the lady was authorized to pick up [May] and she simply allowed this stranger to walk away with the child without asking a single question. I CONCLUDE that . . . DCF met its burden of proof, by the preponderance of the evidence, that [Ellen] failed to exercise a minimum degree of care while supervising [May] and . . . placed [May's] physical, mental and emotional condition at substantial risk of harm. Consequently, I CONCLUDE that [Ellen's] actions constitute inadequate supervision, and neglect pursuant to N.J.S.A 9:6-8.21.

Next, the ALJ noted the "IAIU did not determine . . . there were any required circumstances that mandated a substantiated finding of abuse or neglect pursuant to [the regulations]" but after "weigh[ing] the aggravating and mitigating factors," "the aggravating factors outweighed the mitigating factors" so that "a substantiated finding of neglect was appropriate."

After independently assessing the facts presented during the hearing, the ALJ further concluded "the aggravating factors here outweigh the statutory mitigating factors since [Ellen's] actions constituted institutional neglect and because the child was of a tender age." Moreover, the ALJ determined "[n]o mitigating factors were established at the hearing, and even if this was determined to be an isolated incident, the aggravating factors still outweigh the mitigating ones."

On August 6, 2021, the Assistant Commissioner issued a final decision, finding the ALJ's "well-reasoned, detailed" opinion "support[ed] her findings," and given her factual and credibility determinations, he concurred with the ALJ that the IAIU proved "by the preponderance of the credible evidence that [Ellen] committed acts of neglect pursuant to N.J.S.A. 9:6-8.21(c)(4)(b), and in accordance with N.J.A.C. 3A:10-7.3(c)(1), N.J.A.C. 3A:10-7.5(a)(1) and N.J.A.C. 3A:10-7.5(a)(3), a finding of substantiated [was] warranted."

The Assistant Commissioner also found the ALJ "properly concluded that the applicable aggravating factors outweighed any possible mitigating factors." Thus, he directed that Ellen's "name . . . be indicated as substantiated, and . . . be subject to disclosure upon a child abuse records information check."

On appeal, Ellen urges us to reverse the final agency decision, contending it was arbitrary, capricious, and unreasonable, and not supported by the evidence in the record. She contends she could not have failed to exercise the minimum degree of care with May on October 5, 2018 because she did not know May was part of her group and did not have a roster with the names of the students she was supposed to supervise at the park. Ellen also argues Jane's testimony was not credible and was "inconsistent with the surveillance videos." These contentions are unavailing.

Our scope of review of a final agency decision is circumscribed. Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). When reviewing an agency decision, we examine (1) whether the agency action violated "express or implied legislative policies," (2) whether there is substantial evidence in the record to support the agency's decision, and (3) whether in applying the law to the facts, the agency reached a conclusion "that could not

reasonably have been made on a showing of the relevant factors." Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018).

Where an agency's decision satisfies these criteria, we accord substantial deference to its fact-finding and legal conclusions, recognizing "the agency's 'expertise and superior knowledge of a particular field.'" Circus Liquors, Inc. v. Governing Body of Middletown Twp., 199 N.J. 1, 10 (2009) (quoting Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992)). We do not "substitute [our] own judgment for the agency's." Ibid. (quoting In re Carter, 191 N.J. 474, 483 (2007)). The party challenging the final administrative action has the burden to demonstrate grounds for reversal. Lavezzi v. State, 219 N.J. 163, 171 (2014) (citing In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013)).

"It is settled that '[a]n administrative agency's interpretation of statutes and regulations within its implementing and enforcing responsibility is ordinarily entitled to our deference.'" Wnuck v. N.J. Div. of Motor Vehicles, 337 N.J. Super. 52, 56 (App. Div. 2001) (citations omitted). "Although we recognize that deference is generally given to an administrative agency charged with interpretation of the law, we are not bound by the agency's legal opinions." Levine v. State, Dep't of Transp., 338 N.J. Super. 28, 32 (App. Div. 2001) (citations omitted).

An "abused or neglected child" is defined under N.J.S.A. 9:6-8.21(c) in pertinent part as a child under age eighteen:

whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of [the child's] parent or guardian . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, . . . or by any other acts of a similarly serious nature requiring the aid of the court[.]

[N.J.S.A. 9:6-8.21(c)(4).]

"Parent or guardian" as defined by N.J.S.A. 9:6-8.21(a) includes "a teacher, employee, or volunteer . . . of an institution who is responsible for the child's welfare and any other staff person of an institution regardless of whether or not the person is responsible for the care or supervision of the child."

Only conduct that is "grossly or wantonly negligent" constitutes failure to "exercise a minimum degree of care" under N.J.S.A. 9:6-8.21(c)(4). G.S. v. Dep't of Hum. Servs., 157 N.J. 161, 178 (1999); L.A. v. N.J. Div. of Youth & Fam. Servs., 217 N.J. 311, 332 (2014). The standard "implies that a person has acted with reckless disregard for the safety of others." G.S., 157 N.J. at 179. Whether a defendant's conduct is grossly negligent and, therefore, constitutes abuse or neglect under N.J.S.A. 9:6-8.21(c)(4)(b), is a question of law, which

we review de novo. See Dep't of Child. & Families v. T.B., 207 N.J. 294, 308 (2011).

Under regulations associated with Title Nine, allegations that a child has been abused or neglected can either be "substantiated," "established," "not established," or "unfounded." N.J.A.C. 3A:10-7.3(c); see also N.J. Dep't of Child. & Families v. R.R., 454 N.J. Super. 37, 40 (App. Div. 2018).

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 outlined under N.J.A.C. 3A:10-7.4² or substantiation is warranted based on consideration of the aggravating and mitigating factors listed in N.J.A.C. 3A:10-7.5.³ Pursuant to N.J.A.C. 3A:10:7.3(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."

² Such circumstances include the deprivation of "necessary care which either caused serious harm or created a substantial risk of serious harm." N.J.A.C. 3A:10-7.4(a)(6).

³ Such aggravating factors include "institutional abuse or neglect"; "the tender age . . . of the child"; and "any significant or lasting physical, psychological, or emotional harm on the child." N.J.A.C. 3A:10-7.5(a)(1), (3) and (4).

Notably, only findings that are substantiated are to be disclosed by DCF "for a Child Abuse Record Information (CARI) check." N.J.A.C. 3A:10-7.7(a).

Mindful of these standards and regulations, and aware the ALJ had the benefit of hearing directly from Ellen and other witnesses to assess their credibility, and also had the advantage of reviewing the exhibits presented to her, we are satisfied there is ample credible evidence in the record to warrant the finding that Ellen's acts and omissions on October 5, 2018 rose to the level of gross negligence and support a finding of substantiated neglect under N.J.S.A. 9:6-8.21(c)(4)(b).

In sum, we are persuaded the agency decision is neither arbitrary, capricious, nor unreasonable, and we affirm DCF's determination substantially for the reasons outlined by the Commissioner in his August 6, 2021 opinion.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION