

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3570-21

DEPARTMENT OF CHILDREN
AND FAMILIES, DIVISION OF
CHILD PROTECTION AND
PERMANENCY,

Petitioner-Respondent,

v.

G.F.,

Respondent-Appellant.

Argued June 6, 2023 – Decided August 7, 2023

Before Judges Gilson and Rose.

On appeal from the New Jersey Department of Children and Families, Division of Child Protection and Permanency, Docket No. AHU 19-0736.

Clara S. Licata, Designated Counsel, argued the cause for appellant (Joseph E. Krakora, Public Defender, attorney; Richard A. Foster, Deputy Public Defender, of counsel; Clara S. Licata, on the briefs).

Jessica Ort, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General,

attorney; Sara M. Gregory, Assistant Attorney General,
of counsel; Jessica Ort, on the brief).

PER CURIAM

G.F. (Gene) appeals from a June 7, 2022 final agency decision of the Department of Children and Families (Department), Division of Child Protection and Permanency (Division), affirming the Administrative Law Judge's (ALJ) initial decision that found Gene abused or neglected his sixteen-year-old biological daughter, E.F. (Erin), and modifying the finding from "established" to "substantiated."¹ N.J.A.C. 3A:10-7.3(c)(1) and (2). Based on our review of the record and the applicable law, we conclude the Department's substantiated finding is supported by substantial credible evidence and is not otherwise arbitrary, capricious, or unreasonable. Accordingly, we affirm.

I.

On June 21, 2019, the Division received a referral, alleging that Gene had unsupervised contact with Erin in violation of his parole order that expressly prohibited contact with minors. The Division investigated and, in a September 30, 2019 letter, the Department notified Gene "that abuse was substantiated for

¹ We use initials to protect the child's confidentiality, and pseudonyms for ease of reference. See R. 1:38-3(a); see also R. 1:38-(d)(12).

[r]isk of [s]exual [a]buse with regard to [Erin]." Gene appealed the Department's finding, and a hearing was held before an ALJ as a contested case.

During the October 29, 2021 hearing, the Department presented the testimony of Brandie Williams who investigated the referral, and Gene's parole officer, Marcelo Araya. The Department also moved into evidence certain documents pertaining to the investigation. Gene testified on his own behalf. The ALJ framed the two issues before him as whether the Department "prove[d] by a preponderance of the credible evidence that": (1) "E[rin] me[t] the definition of an abused or neglected child pursuant to N.J.S.A. 9:6-8.21(c)(4)(b)"; and (2) "the allegation of abuse had been 'substantiated' under the four tier system delineated in N.J.A.C. 3A:10-7.3(c)."

Following the hearing, the ALJ issued an initial decision finding the following undisputed facts. In 2016, Gene was arrested for sexually assaulting his stepdaughter, L.G. (Lia), when she was between the ages of nine and seventeen. After he pled guilty, Gene was sentenced to a prison term of five years and released on parole from the Adult Diagnostic and Treatment Center in April 2018. Gene was placed on parole supervision for life (PSL) with certain conditions.

Because Gene was convicted of an offense against a minor, those conditions included: (1) "refrain[ing] from initiating, establishing or maintaining contact with any minor"; and (2) "refrain[ing] from attempting to initiate, establish or maintain contact with any minor." Certain exceptions applied. Relevant here, Gene acknowledged: "When the minor is in the physical presence of and is being actively supervised by his or her parent or legal guardian (I may not be the parent or legal guardian)."

In June 2019, Araya arrested Gene for violating four parole conditions, including contacting a minor. Gene's parole was subsequently revoked, and he was sentenced to a prison term of twelve months. Among other violations, the parole board found Gene "ha[d] unsupervised contact with [Erin] on multiple occasions."

The ALJ summarized the witnesses' testimony. Williams interviewed Erin and her mother, E.R. (Ellie).² Erin "admitted that she had unsupervised contact with G[ene] 'whenever she wanted to.'" The meetings were "'mostly unsupervised.'" Ellie "denied knowledge that G[ene] was not supposed to see his daughter unsupervised and confirmed that there had been contacts between G[ene] and E[rin]."

On cross-examination, Williams acknowledged that the

² We glean from the record that Ellie is the biological mother of Lia.

meetings were "always" held in public. Williams noticed no signs of sexual abuse or "grooming."

Araya explained Gene's parole conditions and violations. When Araya made an unannounced home visit on June 19, 2019, he noticed Gene had two cellphones, indicating "a possible violation of social media restrictions." Araya's " cursory review" confirmed his suspicions, and Gene "admitted to using WhatsApp and Snapchat." Araya also observed that Gene "was communicating with his daughter," who was then sixteen years old. Gene thereafter acknowledged that "for more than a year," he had been speaking with Erin and "ha[d] unsupervised meetings."

Gene testified that he did not immediately contact Erin after he was released from prison. Ellie, "[h]is ex-wife[,]" had moved and changed her phone number." Gene and Ellie reconnected through a mutual acquaintance in June 2018. In response to Gene's inquiry, Ellie had not "received anything that prevented him from seeing E[rin]." Gene also claimed while he was incarcerated, he was told he could contact Erin, provided she was "his own child and there were no restraining orders." Initially, Ellie attended the meetings between Gene and Erin; thereafter "E[llie] agreed to let him see E[rin] alone, as long as it was in a public place."

On cross-examination, Gene acknowledged he had "signed the parole conditions and he was aware that a violation could send him back to prison." Although Gene knew he was prohibited from "unsupervised contact with a minor," he claimed Ellie "misinterpreted that condition because it didn't specify that his own child was included."

After reciting the applicable legal principles, the ALJ found the Department demonstrated Erin was an abused or neglected child under N.J.S.A. 9:6-8.21(c)(4)(b). Noting Gene sexually assaulted "E[rin's] minor half-sister," Lia, the ALJ found "[g]iven that familial relationship" Gene's unsupervised meetings with Erin created a "'substantial risk' of harm to his minor daughter." The ALJ elaborated:

In analyzing both the witness testimony as well as the documentary evidence, there are no real substantive disputes and the emphasis on whether G[ene] knowingly violated his parole condition was largely misplaced. In truth, even G[ene] didn't "really" dispute that he was aware that he had read his parole conditions and that he was not permitted to have unsupervised contact with E[rin]. Any inference in his testimony that he was permitted to see her unsupervised was not credible and those half-assertions were quickly abandoned in the face of questioning. More importantly, G[ene] did not dispute that he met with E[rin] in the absence of any other adult supervision.

While the testimony of [the Department]'s witnesses was not entirely clear on how these visits had actually harmed E[rin], the fact remains that the evidence overwhelmingly demonstrated that a convicted sex offender[,] whose victim was not only a female minor, but also a family member, was knowingly having unsupervised physical contact with a different female minor family member despite it being a parole violation. In other words, there were striking similarities between [Lia] and E[rin] and no dispute that these meetings occurred.

Turning to the classification of the abuse, the ALJ found the Department failed to demonstrate the abuse was "substantiated." Assessing the applicable aggravating and mitigating factors set forth in N.J.A.C. 3A:10-7.5, the ALJ found mitigating factor four "(the limited, minor, or negligible physical, psychological, or emotional impact of the abuse or neglect on the child)" outweighed aggravating factor two "(G[ene]'s failure to comply with court orders or clearly established or agree-upon conditions designed to ensure the child's safety plan or case plan)." Although the ALJ found portions of Gene's testimony were not "particularly credible," the judge was persuaded, on balance, the aggravating and mitigating factors warranted an "established" finding.

The Department filed exceptions to the ALJ's determination but limited its argument to the assertion that the judge erred by changing the "substantiated" finding to "established." Gene filed a response to the Department's exceptions,

contending the ALJ appropriately balanced the aggravating and mitigating factors. Although he maintained his unsupervised visits with Erin caused her no actual harm, Gene did not file exceptions to the ALJ's decision. Instead, Gene urged the Assistant Commissioner to adopt the ALJ's recommendations.

In its final agency decision, the Department rejected the ALJ's order and affirmed the substantiated finding of risk of harm for child sexual abuse against Gene. The Assistant Commissioner's well-reasoned decision reflects a thorough review of the record and governing law. After summarizing the ALJ's factual findings, the Assistant Commissioner similarly found:

The basic facts of this case are that G[ene] is a convicted sex offender who violated his PSL order by having multiple unsupervised visits with a minor despite multiple reminders throughout the year following his release from prison in April 2018. It was not until G[ene]'s parole officer caught him with two phones in his possession during an unannounced home visit on June 19, 2019, when G[ene] actually admitted to having unsupervised contact with a minor.

Although she agreed with the ALJ's determination that Gene had abused or neglected Erin under N.J.S.A. 9:6-8.21(c)(4)(b), and that aggravating factor two and mitigating factor four applied, the Assistant Commissioner disagreed with the ALJ's balancing of those factors. The Assistant Commissioner elaborated:

G[ene] knew and chose to violate the PSL order by having multiple unsupervised contact with a minor. He remained deceptive throughout his reporting to his parole officer. This is what made his actions so egregious. It was a flagrant disregard for the order that was designed to ensure protection for the minor children, which is the very same goal that the Division shares.

This appeal followed.

On appeal, Gene contends, in essence, that the Department's decision was not supported by the record evidence and, as such, was arbitrary and capricious. Although Gene did not challenge the ALJ's finding that he abused or neglected Erin before the Department, he now claims he did not knowingly violate the parole order and, as such, he did not abuse or neglect Erin under N.J.S.A. 9:6-8.21(c)(4). Alternatively, Gene argues the Department erroneously rejected the ALJ's balancing of the aggravating and mitigating factors. Gene therefore urges us to reverse the Department's substantiated finding. We are unpersuaded.

II.

Our scope of our review of a final agency decision is limited. N.J. Dep't of Child. & Fams. v. E.L., 454 N.J. Super. 10, 21-22 (App. Div. 2018); see also In re Stallworth, 208 N.J. 182, 194 (2011). "[A]n appellant carries a substantial burden of persuasion, and the agency's determination carries a presumption of

reasonableness." Dep't of Child. & Fams. v. C.H., 414 N.J. Super. 472, 479-80 (App. Div. 2010). "We extend substantial deference to an 'agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible' based on the agency's expertise." N.J. Dep't of Child. & Fams. v. R.R., 454 N.J. Super. 37, 43 (App. Div. 2018) (quoting In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 489 (2004)); see also G.S. v. Dep't of Human Servs., 157 N.J. 161, 170 (1999) ("Reviewing courts should give considerable weight to any agency's interpretation of a statute the agency is charged with enforcing.").

When a head of an administrative body rejects or modifies any findings of fact or conclusions of law made by an ALJ, it must clearly its reasons for doing so. C.H., 414 N.J. Super. at 480 (quoting N.J.S.A. 52:14B-10(c)). We are not bound by the agency's "strictly legal determinations." R.R., 454 N.J. Super. at 43. See also Dep't of Child. & Fams. v. T.B., 207 N.J. 294, 302 (2011).

We first consider Gene's contention that the facts of this matter do not support the Department's abuse or neglect finding. An abused or neglected child is one under eighteen years of age

whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his [or her] parent or guardian . . . to exercise a minimum degree of care

. . . by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof . . . 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).]

As used in the statute, a minimum degree of care is "conduct that is grossly or wantonly negligent, but not necessarily intentional." G.S., 157 N.J. at 178. A parent "fails to exercise a minimum degree of care when [the parent] is aware of the dangers inherent in a situation and fails [to] adequately supervise the child or recklessly creates a risk of serious injury to that child." Id. at 181. Substantial and imminent danger or substantial risk of harm to the child must be demonstrated, but actual harm to the child is not necessary. N.J. Dep't of Child. & Fams., Div. of Youth & Fam. Servs. v. A.L., 213 N.J. 1, 22-23 (2013). "Whether the parent has exercised the requisite degree of care is to be analyzed in light of the dangers and risks associated with the particular situation at issue." N.J. Dep't of Youth & Fam. Servs. v. J.L., 410 N.J. Super. 159, 168 (App. Div. 2009); see also G.S., 157 N.J. at 181-82.

Having considered the record in view of these principles, we reject Gene's contentions that he did not "knowingly" violate the terms of his parole order and that the parole violation, alone, "placed E[rin] in imminent danger of substantial risk of harm." As recounted above, the ALJ found Gene knew he was prohibited

from contacting Erin. Because Gene had been convicted of sexually assaulting Lia, the ALJ further found there existed a substantial risk of harm from Gene's unsupervised meetings with Erin. The Assistant Commissioner's decision, which accepted and adopted the ALJ's credibility determinations and factual findings, was amply supported by the substantial credible evidence in the record.

We turn to Gene's alternative argument that the Assistant Commissioner erroneously rejected the ALJ's established finding and reinstated the Department's substantiated finding. Gene further argues the Assistant Commissioner's "re[]balancing" of the aggravating and mitigating factors constituted an "unwarranted legal conclusion that is not binding on this court." We reject these contentions.

The regulations governing child abuse and neglect investigations require the Department to make one of four possible findings: "unfounded," "not established," "established," and "substantiated." N.J.A.C. 3A:10-7.3(c); see also R.R., 454 N.J. Super. at 40. At issue on this appeal is the distinction between an established and substantiated finding.

An allegation is "established" when "the preponderance of the evidence indicates that a child is an 'abused or neglected child' . . . but the act or acts committed or omitted do not warrant a finding of 'substantiated.'" N.J.A.C.

3A:10-7.3(c)(2). An allegation is "substantiated" when "the preponderance of the evidence indicates that a child is an 'abused or neglected child' . . . 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." N.J.A.C. 3A:10-7.3(c)(1).

In the present case, the ALJ and Assistant Commissioner correctly concluded the factors set forth in N.J.A.C. 3A:10-7.4 were inapplicable and, as such, they analyzed the seven aggravating and four mitigating factors set forth in N.J.A.C. 3A:10-7.5. Both the ALJ and Assistant Commissioner found aggravating factor two and mitigating factor four applied, but they differed in the weight ascribed to those factors.

Pursuant to N.J.S.A. 52:14B-10(c), the Assistant Commissioner as designee of the agency head, was empowered to reject or modify the ALJ's decision, provided her reasons were clearly stated. See C.H., 414 N.J. Super. at 480. The Assistant Commissioner's findings were "supported by sufficient credible evidence on the record as a whole." R. 2:11-3(e)(1)(D). Under the circumstances presented in this case, we discern no reasons to disturb the agency's decision.

To the extent not addressed, Gene's remaining contentions lack sufficient merit to warrant discussion in a written opinion R. 2:11-3(e)(1)(E).

Affirmed.

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



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