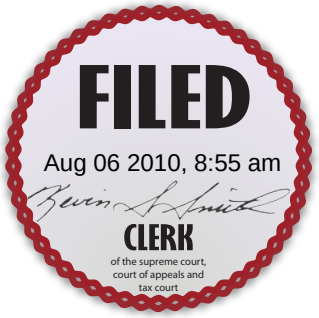

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IN THE
COURT OF APPEALS OF INDIANA

ANGEL BRASTER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 02A05-1002-PL-121
	)	
INDIANA DEPARTMENT OF CHILD SERVICES,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable David J. Avery, Judge
Cause No. 02D01-0902-PL-48

August 6, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Angel Braster appeals a trial court order upholding a finding of the Department of Child Services ("DCS"), which substantiated that Braster had abused a child in her care. We affirm.

Issue

Braster raises five issues, which we combine and restate as whether the DCS hearing conducted by an administrative law judge ("ALJ") was procedurally fair.

Facts

On June 11, 2008, Braster was caring for three-year-old A.F. and her eight-year-old sister E.F. at Braster's daycare facility in Fort Wayne. After Ray French[1] picked up the children for the evening, E.F. told French that Braster had hit A.F. with a stick that day because A.F. had wet her pants. French and A.F.'s mother, G.I., observed red welts on the back of A.F.'s legs. French and G.I. went back to the daycare and spoke with Braster, who admitted striking A.F. because she had wet her pants.

A Fort Wayne police officer visited A.F.'s home that evening, observed the welts and took pictures of them, and filed an incident report that was sent to the Allen County office of DCS. DCS family case manager Tricia Grams conducted interviews related to the investigation, and E.F. pointed to a window blind rod and told Grams that it looked like what Braster had used to strike A.F. The welts on A.F.'s legs were consistent with having been caused by a window blind rod. On June 24, 2008, Grams took more pictures

[1] French does not appear to be the children's father, but is a friend of the family.

of A.F.'s legs, and the welts were still visible on them. On June 26, 2008, DCS officially substantiated that A.F. had been abused and/or neglected by Braster.

Braster requested administrative review of this determination, which was conducted on September 10, 2008, by the director of the Allen County DCS office. After the director affirmed the substantiation, Braster requested an administrative appeal, which was conducted before an ALJ on November 21, 2008. At the beginning of the appeal hearing, Braster's attorney stipulated to the admission of several exhibits, including investigatory reports and photographs of A.F.'s legs. French and Grams testified on behalf of the DCS. Collectively, their testimony related, among other things, statements by Braster, A.F., E.F., and G.I. Braster did not object at any point during French's or Grams's testimony. The ALJ also conducted some questioning of witnesses during the hearing, to which Braster did not object.

On January 5, 2009, the ALJ issued an order affirming the substantiation of child abuse. Braster filed a petition for judicial review with the trial court, which held a hearing in the matter on November 20, 2009. On January 5, 2010, the trial court affirmed the ALJ's ruling. Braster now appeals.

Analysis

This case has arisen under the parameters of Indiana Code Chapter 31-33-26, which governs the creation and maintenance of a child protection index in Indiana to collect substantiated reports of child abuse and neglect received by the DCS. See Ind. Code § 31-33-26-2. The parties seem to agree that the general standards of review

regarding administrative proceedings apply here. When a court reviews a decision from an administrative agency, it may neither try the case de novo nor substitute its judgment for that of the agency. Development Servs. Alternatives, Inc. v. Indiana Family & Soc. Servs. Admin., 915 N.E.2d 169, 176 (Ind. Ct. App. 2009) (citing I.C. § 4-21.5-5-11), trans. denied. Courts may not reweigh the evidence and we give deference to the expertise of the administrative body. Id. We will reverse an agency's decision only if it is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (2) contrary to a constitutional right, power, privilege, or immunity;
>
> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (4) without observance of procedure required by law; or
>
> (5) unsupported by substantial evidence.

I.C. § 4-21.5-5-14(d). A party claiming agency action was invalid bears the burden of demonstrating the invalidity. Development Servs. Alternatives, 915 N.E.2d at 176.

The overarching theme of Braster's brief is that she was denied due process of law with respect to the November 21, 2008 administrative appeal hearing held before the ALJ. The Due Process Clause of the United States Constitution prohibits any state action that deprives a person of life, liberty, or property without a fair proceeding. Flowers v. Flowers, 799 N.E.2d 1183, 1187 (Ind. Ct. App. 2003). DCS contends that Braster was

not entitled to due process protections because the report substantiating that she abused A.F. did not deprive her of life, liberty, or property. Braster contends that the abuse finding threatens her livelihood as a daycare provider and, thus, it deprived her of a property interest. We will assume for the sake of argument that Braster was entitled to some level of due process protection at the November 21, 2008 hearing. With that in mind, we observe that "[p]rocedural safeguards should be at the highest level workable under the circumstances in proceedings before administrative bodies." Roberts v. County of Allen, 773 N.E.2d 850, 853 (Ind. Ct. App. 2002), trans. denied. The practicalities and peculiarities of each particular case are taken into account in determining whether constitutional requirements of due process have been met. Id. at 853-54.

On appeal, Braster makes a number of arguments challenging testimony by French and Grams that related out-of-court statements made by A.F., E.F., and G.I., claiming that they constituted inadmissible hearsay. She also appears to challenge as hearsay the admission of reports compiled during the investigation of this case. The general rule, however, is that hearsay is properly admitted in an administrative hearing. McHugh v. Review Bd. of Indiana Dep't of Workforce Dev., 842 N.E.2d 436, 441 (Ind. Ct. App. 2006). It is true that the admission of hearsay is not without limitation. The Indiana Administrative Orders and Procedures Act ("IAOPA") provides, "If not objected to, the hearsay evidence may form the basis for an order. However, if the evidence is properly objected to and does not fall within a recognized exception to the hearsay rule, the resulting order may not be based solely upon the hearsay evidence." I.C. § 4-21.5-3-

26(a). There also is a statute specific to administrative hearings regarding the child protection index, which states, "During an administrative hearing under this section, the administrative hearing officer shall consider hearsay evidence to be competent evidence and may not exclude hearsay based on the technical rules of evidence. However, a determination may not be based solely on evidence that is hearsay." I.C. § 31-33-26-9(c).

Here, Braster never made any objection to French's or Grams's testimony relating hearsay statements by A.F., E.F., and G.I. She also, in fact, stipulated to the admission of the investigative reports. Under the general rule embodied in IAOPA, there was no limitation upon the use to which the ALJ could utilize the hearsay statements and reports because of Braster's failure to object; such evidence could have formed the sole basis of the ALJ's decision. The child protection index statute, admittedly, does not contain language parallel to IAOPA regarding the effect of a party's failure to object to hearsay evidence. Still, it is well-settled beyond any dispute that a party's failure to object to evidence during a proceeding waives any later claim of error in the admission of that evidence. See, e.g., Raess v. Doescher, 883 N.E.2d 790, 796-97 (Ind. 2008). Braster cannot now attack the admission into evidence of the reports and the hearsay statements by A.F., E.F., and G.I. She also fails to develop a cogent argument as to how the admission of this evidence, without objection, constituted a due process violation.

Even if we were to assume that the ALJ's order could not be based solely upon the reports and the hearsay statements of A.F., E.F., and G.I., the fact remains that his order was not based solely upon that evidence. There was non-hearsay evidence that when

French picked A.F. up from Braster's daycare on June 11, 2008, she had mysterious welts on the back of her legs, which were documented by photographs and consistent with having been caused with a window blind rod. Furthermore, French in his testimony related that Braster had admitted striking A.F. because she had wet her pants, although Braster apparently had attempted to minimize the force with which she had struck the child. Braster's statement as related by French was not hearsay under the rules of evidence, because she was a party-opponent. See Ind. Evidence Rule 801(d)(2)(A). Thus, the ALJ's decision was not based solely upon hearsay evidence.

Braster also contends the ALJ was not impartial because he engaged in questioning of witnesses; she focuses in particular upon the ALJ's questioning of Grams. In the context of an administrative proceeding, due process requires that a hearing be conducted before an impartial decisionmaker. In re Change to Established Water Level of Lake of Woods in Marshall County, 822 N.E.2d 1032, 1041 (Ind. Ct. App. 2005), trans. denied. Agency decisions may not be swayed by preconceived biases and prejudices. Id. However, in the absence of a demonstration of actual bias, courts will not interfere with the administrative process. Id. Instead, we presume that an administrative body will act properly and without bias or prejudice. Id.

In the context of criminal trials, where the importance of an impartial decisionmaker obviously is of the upmost importance, we have stated:

> Although a trial judge may not assume an adversarial role in any proceeding, the judge may intervene in the fact-finding process and question witnesses in order to promote clarity or

> dispel obscurity. The purpose of allowing the judge to question witnesses is to permit the court to develop the truth or obtain facts which may have been overlooked by the parties. To make a showing of reversible error, the defendant must show that the trial judge's questioning of witnesses was harmful and prejudicial to his case.

Griffin v. State, 698 N.E.2d 1261, 1265 (Ind. Ct. App. 1998) (citations omitted), trans. denied. Latitude for a judge to question witnesses is greater when a case is not being tried before a jury. Id. Applying this standard here, and after reviewing the ALJ's questioning of Grams, we cannot discern how the ALJ's questioning prejudiced Braster. The questioning did not evince any preconceived bias on the ALJ's part, but appears merely to have been done "in order to promote clarity or dispel obscurity." See id. There was no harm in such questioning and no violation of Braster's due process rights. We also cannot conclude that the limited questioning was equivalent to the ALJ performing "prosecutorial functions," which is prohibited of ALJs presiding over DCS cases by 470 Indiana Administrative Code 1-4-4(a)(2). We will not reverse the ALJ's determination on this basis.

Conclusion

The admission of hearsay evidence without objection and the ALJ's questioning of witnesses does not warrant reversal of the ALJ's order affirming the DCS's substantiation that Braster abused A.F. We affirm the trial court's upholding of the ALJ's order.

Affirmed.

FRIEDLANDER, J., and CRONE, J., concur.