

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Berks County Children and Youth Services, :
 :
 Petitioner :
 :
 v. : No. 1453 C.D. 2009
 : Submitted: March 12, 2010
 Department of Public Welfare, :
 Respondent :
 :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
 HONORABLE P. KEVIN BROBSON, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY SENIOR JUDGE FLAHERTY

FILED: July 23, 2010

Berks County Children and Youth Services (CYS) petitions for review from a decision of the Department of Public Welfare (DPW) which upheld the March 2, 2009 order of the Bureau of Hearings and Appeals (Bureau) expunging R.M.'s name from the Child Line Registry, pursuant to the Child Protective Services Law (Law), 23 Pa. C.S. §§6301-6386. We affirm.

On July 6, 1996, CYS investigated a report of suspected sexual abuse committed by R.M. on L.K., who was twelve years old at the time of the incident. On that date, L.K. was visiting her father, R.M. According to CYS, while L.K. was at R.M.'s residence, R.M. exposed himself to L.K. and

touched himself. In addition, R.M. asked L.K. to touch him. L.K. called her mother (Mother) and asked her to come pick her up. Mother contacted the police and then drove to R.M.'s residence.

As a result of the incident on July 6, 1996, R.M. was charged with indecent exposure and endangering the welfare of a child. CYS further alleges that throughout its investigation, L.K. made consistent and credible statements to the caseworker and a collateral source regarding the actions of R.M. on that date. After concluding the investigation, CYS determined that there was substantial competent evidence to file an indicated report listing R.M. as the perpetrator. CYS then alleges that subsequent thereto, the criminal charges were reduced and R.M. pled guilty to harassment.

As a result of the incident, Mother filed a petition for protection from abuse (PFA) on July 8, 1996. A temporary PFA was entered and at the hearing on July 16, 1996, a final order was entered to prevent R.M. from having any contact with Mother, L.K. or L.K's siblings for a period of one year.

On August 14, 1996, ChildLine allegedly mailed notice of the indicated report to R.M. Ten years later, CYS destroyed L.K.'s file when L.K. turned 23 on November 13, 2006. On February 16, 2007, more than ten years after the 45 day appeal period had lapsed and 95 days after L.K. turned 23, R.M. appealed the indicated status. The appeal was dismissed as untimely by the DPW on March 21, 2008. R.M. filed a petition for reconsideration on April 1, 2008.

On August 14, 2008, reconsideration was granted and the case was remanded for a hearing. After the hearing, the Administrative Law

Judge (ALJ) issued an order on October 8, 2008, granting R.M. a hearing *nunc pro tunc*. On January 12, 2009, a hearing was held before the ALJ and he made the following relevant findings of fact:

1. Subject child, L.K. is a female child born on November 13, 1983 to R.M. and C.K. (Exhibit C-3, C-4).
2. The alleged perpetrator, R.M., is a male adult born on September 20, 1959. (Exhibit C-3, C-4).
3. R.M. is L.K.'s biological father. (Exhibit C-3, C-4).
4. After a divorce (of their common law marriage), R.M. and C.K. were in a child custody dispute. (NT 51, 56-57, 68-69).
5. L.K. lived with her grandmother in Texas. (NT 56).
6. On July 7, 1996, L.K. and her brother were visiting R.M. (NT 50, 68).
7. During the visit, R.M. was having occasional drinks and having some verbal sparring with L.K. (NT 51).
8. L.K. called C.K. and said she was uncomfortable around R.M. (NT 52).
9. At no time during the visit did R.M. show his penis to L.K. and masturbate. (NT 51).
10. At the time of the alleged incident, R.M. had his pajama pants on. (NT 52). During the visit, R.M. did not ask L.K. to rub his private parts or ask to hump her butt. (NT 52).

11. R.M. never touched L.K. sexually or said anything of a sexual nature to her that he was alleged to have done. (NT 59).

12. After L.K. called her mother, L.K.'s mother called the police. (NT 53).

13. The police and C.K. arrived at R.M.'s residence and placed L.K. in C.K.'s vehicle with her grandmother. L.K. did not talk to the police. (NT 53, 59, 66).

14. L.K. did not remember talking to Ms. Neider. (NT 53-54, 66).

15. On July 7, 1996, the CYS received an oral report of abuse for which it investigated. (Exhibits C-3, C-4).

16. Ms. Neider was assigned the responsibility of investigating the incident. (NT 18; Exhibits C-3, C-4).

17. Ms. Neider found that "[t]he alleged perpetrator exposed his penis to child and masturbated in front of child. Alleged perpetrator asked child to 'rub his private' and asked if he could 'hump her butt.'"

18. Ms. Neider found that the "[c]hild made consistent and credible statements to caseworker and collateral source." Ms. Neider further indicated that the mother and grandmother arrived at the perpetrator's home and found the perpetrator in his underwear with an erection. Ms. Neider found that "[o]ne can only conclude the perpetrator committed these acts for his own sexual arousal/gratification." (NT 19, 25; Exhibits C-3, C-4).

19. Ms. Neider did not know who the collateral source was from the CY-48. (NT 48; Exhibits C-3, C-4).

20. Ms. Neider spoke to L.K. sometime in July 1996. Ms. Neider vaguely remembers talking to her but not the specific question and answer. (NT 27-28, 31-32).

21. Ms. Neider spoke to L.K.'s grandmother sometime in July 1996. Ms. Neider vaguely remembers talking to her but not the specific question and answer. (NT 28, 31-32).

22. Ms. Neider did not know which version of the CY-48 was being held by Child-Line. (NT 37; Exhibits C-3, C-4).

23. As to the allegations of abuse, the testimony of L.K. was credible.

24. As to the allegations of abuse, R.M. was credible.

ALJ Adjudication, Findings of Fact, 1-24 at 2-4. The ALJ determined that CYS failed to prove that the indicated report was accurate. The record reflected discrepancies, in that there were two CY-48 forms and the caseworker did not know which one was being maintained by the DPW. Further, both L.K. and R.M. testified and denied that the abuse actually occurred.

On March 2, 2009, the Bureau adopted the recommendation of the ALJ in its entirety, sustained the appeal and ordered R.M.'s record be expunged. On March 23, 2009, CYS filed a petition for reconsideration. On June 30, 2009, the DPW upheld the Bureau's order of March 2, 2009, expunging R.M.'s record for reasons stated by the Bureau. The DPW

further found that CYS's request for reconsideration was filed a week late. CYS now petitions this court for review.¹

CYS contends that the DPW improperly allowed the expungement hearing to proceed when R.M. failed to file a timely appeal. CYS further contends that the DPW erred in failing to address the issue of whether R.M.'s status should be changed from indicated to founded based on R.M.'s criminal conviction arising from the same factual circumstances as the agency's Child Protective Services (CPS) investigation.

Section 6341 of the Law, entitled Amendment or expunction of information, states in pertinent part as follows:

(a) General rule.- At any time:

(1) The secretary may amend or expunge any record under this chapter upon good cause shown and notice to the appropriate subjects of the report.

(2) Any person named as a perpetrator, and any school employee named, in an indicated report of child abuse may, within 45 days of being notified of the status of the report, request the secretary to amend or expunge an indicated report on the grounds that it is inaccurate or it is being maintained in a manner inconsistent with this chapter.

23 Pa. C.S. §6341.

R.M. contends that the delay in filing the request for expungement was caused by the CYS's error in not properly informing him

¹ Our review is limited to determining whether constitutional rights have been violated, whether an error of law has been committed and whether the findings of fact are supported by substantial evidence. B.E. v. Department of Public Welfare, 654 A.2d 290 (Pa. Cmwlth. 1995).

of his appeal rights and that he properly established entitlement to an appeal *nunc pro tunc* because of a breakdown in the administrative process, as demonstrated in the ALJ's order of October 8, 2008.

The ALJ's order of October 8, 2008, stated in pertinent part as follows:

7. Exhibit CYS-5, which was the initial letter notifying the Appellant of the indicated report, stated that "If this request is denied, perpetrators may have a right to a hearing." The same statement was found to be administrative error and a basis for a hearing *nunc pro tunc*. See *C.S. v. Com., Dept. of Public Welfare*, 879 A.2d 1274 (Pa. Cmwlth. 2005).

8. The notice provided to the Appellant did not properly inform him of his absolute right to a hearing as required by 23 PA. CONS. STAT. ANN. (sic) §6338(a).

9. In addition, the Appellant indicated that he never received Exhibit C-5.

10. Exhibit C-5 also does not contain the mailing date. The date typed on the letter, especially without evidence that it was mailed on that date, is no substitute for a clearly designated mailing date. See *Julia Ribaldo Senior Servs. v. Dep't of Pub. Welfare*, 915 A.2d 700 (Pa. Cmwlth. 2007).

11. The County failed, in rebuttal to the Appellant's testimony that he never received Exhibit C-5, to have anybody from ChildLine, the agency responsible for mailing Exhibit CYS-5, testify that Exhibit CYS-5 was mailed and that it was not returned as undeliverable.

12. The Appellant demonstrated that a hearing *nunc pro tunc* should be granted.

13. A hearing on the merits will be scheduled in this matter.

ALJ Order, October 8, 2008, at 1-2. R.M. can demand a hearing under Section 6341(a)(2) only if he can demonstrate the basis for a *nunc pro tunc* appeal. An appeal *nunc pro tunc* will be allowed only where the petitioner's delay was caused by extraordinary circumstances involving fraud, a breakdown in the administrative process, or non-negligent circumstances related to the petitioner, his counsel or a third party. C.S. v. Department of Public Welfare, 879 A.2d 1274, 1279 (Pa. Cmwlth. 2005). "Whether a delay is one day or six years late, however, does not change the analysis with respect to a *nunc pro tunc* appeal." Id. at 1280.

In C.S., this court determined that the C.S.'s notice did not satisfy the standards in Section 6338(a) for notice, as "he was not informed of his absolute right to a hearing." Id. C.S. received advice that he "may" receive a hearing. However, Section 6341(c) mandates that an alleged perpetrator who has made a request for a hearing will receive one, and at this hearing, the agency bears the burden of proving child abuse by the alleged perpetrator. Otherwise, citizens' jobs may be taken from them on the basis of an investigation alone. Our court in C.S. determined that the equivocal notice did not satisfy the requirements of 23 Pa. C.S. §6338(a) and that such was a breakdown in the administrative process entitling C.S. to file a *nunc pro tunc* request for expungement under 23 Pa. C.S. §6341(a)(2). Id.

In the present controversy, the ALJ determined that R.M. may not have received notice and that even if he did, such notice failed to advise

R.M. of his absolute right to a hearing. The CYS letter notifying R.M. of the indicated report, stated that “[i]f this request is denied, perpetrators may have a right to a hearing.” This equivocal notice did not satisfy the requirements of 23 Pa. C.S. §6338(a) in C.S. or in the present controversy. The ALJ did not err in determining that there was a breakdown in the administrative process, thus entitling R.M. to file a *nunc pro tunc* request for expungement under 23 Pa. C.S. §6341(a)(2).

Next, the CYS contends that the DPW erred in failing to address the issue of whether R.M.’s status should be changed from indicated to founded based on R.M.’s criminal conviction arising from the same factual circumstances as the CYS’s CPS investigation, constituting reversible error.

The county agency bears the burden of proving in an expungement hearing that the actions of the perpetrator constitute child abuse within the meaning of the statute. The county’s evidence must outweigh any contrary evidence. B.J.K. v. Department of Public Welfare, 772 A.2d 127 (Pa. Cmwlth. 2001). Our court will not review the actions of government bodies or administrative tribunals involving the exercise of discretion in the absence of bad faith, fraud, capricious action or abuse of power. Slawek v. State Board of Medical Education and Licensure, 526 Pa. 316, 586 A.2d 362 (1991).

An “indicated report” of child abuse is defined as “[a] child abuse report made pursuant to this chapter if an investigation by the county agency or the Department of Public Welfare determines that substantial evidence of the alleged abuse exists based on any of the following: (1)

Available medical evidence. (2) The child protective service investigation. (3) An admission of the acts of abuse by the perpetrator.” 23 Pa. C.S. §6303.

A “founded report” of child abuse is defined as “[a] child abuse report made pursuant to this chapter if there has been any judicial adjudication based on a finding that a child who is a subject of the report has been abused, including the entry of a plea of guilty or nolo contendere or a finding of guilt to a criminal charge involving the same factual circumstances involved in the allegation of child abuse.” 23 Pa. C.S. §6303.

CYS argues that as R.M. pled guilty to harassment charges that arose out of the same factual circumstances as the charges of indecent exposure and endangering the welfare of a child, the indicated status should be amended to founded.

A review of the record reveals that on May 4, 2007, the Court of Common Pleas of Berks County ordered that all records be destroyed and expunged regarding R.M.’s arrest and charges relating to the incident on July 6, 1996, due to R.M.’s acquittal of all criminal charges. (Record at A-2). There was no judicial adjudication relating to child abuse in the record. The DPW found R.M. and L.K. credible in their testimony that the alleged abuse never occurred. The DPW did not err.

Accordingly, we must affirm the decision of the DPW.

JIM FLAHERTY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Berks County Children and	:	
Youth Services,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1453 C.D. 2009
	:	
Department of Public Welfare,	:	
	:	
Respondent	:	
	:	

ORDER

AND NOW, this 23rd day of July, 2010, the order of the Department of Public Welfare in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge