[J-81-2013][M.O. – McCaffery, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

G.V.,	:	No. 13 MAP 2013
	:	
Appellee	:	Appeal from the Order of the Commonwealth Court at No. 125 CD 2011 dated 7/12/12 vacating the Order of the Department of Public Welfare's Bureau of Hearings and Appeals at No. 021-10-0066 dated 12/29/10
v.	:	
	:	
	:	
DEPARTMENT OF PUBLIC WELFARE,	:	
	:	
Appellant	:	ARGUED: October 15, 2013
	:	
	:	
LANCASTER COUNTY CHILDREN AND YOUTH SERVICES, Intervenor	:	

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: April 29, 2014**

A portion of the majority's analysis appears to track R. v. DPW, 535 Pa. 440, 447, 636 A.2d 142, 145 (1994), in equating the "substantial evidence" standard of the Child Protective Services Law ("CPSL"), see 23 Pa.C.S. §6303(a), with the substantial evidence standard prevailing on appellate review under Section 704 of the Administrative Agency Law, 2 Pa.C.S. §704. See Majority Opinion, slip op. at 9. These two standards, however, are materially different, since, as the majority otherwise recognizes, the CPSL defines "substantial evidence," for purposes of that enactment, as incorporating a weighing dynamic generally reserved for fact-finding. See 23 Pa.C.S. §6303(a). Traditional appellate substantial-evidence review, on the other hand, omits all such weighing – instead, this deferential form of review entails only an examination of whether the evidence, viewed in a light most favorable to the prevailing party, is

adequate to support the administrative agency's factual findings. See, e.g., Cinram Mfg., Inc. v. WCAB (Hill), 601 Pa. 524, 535, 975 A.2d 577, 583 (2009).[1]

The majority also relies upon R. in its due process assessment under Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893 (1976). See Majority Opinion, slip op. at 10. In my view, however, the R. decision employed multiple misstatements and mischaracterizations to support an overly dismissive approach to the reputational concerns of persons whose names are entered in a child-abuse registry. For example, the opinion indicated that disclosure of clearance information to prospective employers or adoption agencies would occur only if an indicated report of abuse was issued within the twelve months prior to the time a job or adoption application was submitted. See R., 535 Pa. at 454-55, 636 A.2d at 149. This portrayal, however, reflects a patent misreading of the CPSL. While the clearance form submitted by an applicant must be current, i.e., obtained within one year of the application, see 23 Pa.C.S. §6344(b)(2), (d), its content is by no means constrained to a one-year look-back. Indeed, in certain cases, the statute contains a bright-line prohibition against hiring individuals who are

[1] Unfortunately, the Legislature's approach of redefining, for purposes of the CPSL, what otherwise serves as a term of art in the arena of administrative law has yielded a confusing array of admixture in the judicial decisions. See, e.g., J.S. v. DPW, 528 Pa. 243, 246, 596 A.2d 1114, 1115 (1991) (correctly describing traditional substantial-evidence review, then pronouncing that, "[i]n other words, the evidence must 'so preponderate in favor of a conclusion that it outweighs . . . any inconsistent evidence and reasonable inferences drawn therefrom'" (citation omitted)). Furthermore, the use of a preponderance-based standard at the investigative level to justify entry of an individual's name in the ChildLine registry prior to any judicial or quasi-judicial assessment is also problematic, as the practice is in tension with the constitutional preference for pre-deprivation process. See generally Zinermon v. Burch, 494 U.S. 113, 132, 110 S. Ct. 975, 987 (1990) (explaining that, if a state feasibly can provide a hearing before effectuating a deprivation of a protected interest, it generally must do so in order to minimize substantively unfair or mistaken deprivations); Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 901 (8th Cir. 1994) ("No matter how elaborate, an investigation does not replace a hearing.").

unable to obtain clearance, where the underlying abuse was purportedly committed within five years of the verification. See 23 Pa.C.S. §6344(c).

By way of another example, the correlation drawn in R. between an employer's refusal to extend an at-will contract and the potential disabilities facing persons subject to a false indicated report of child abuse demonstrates no sensitivity to the very different interests at stake in the latter scenario. See R., 535 Pa. at 452, 636 A.2d at 148. Indeed, I find the analogy to be strained beyond reason.

In other words, the R. Court went out of its way to minimize the liberty and reputational interests of those subject to child-abuse reports. In doing so, it set a tone which was in material tension with expressions of the Court displaying appropriate circumspection. Compare, e.g., A.Y. v. DPW, 537 Pa. 116, 124, 641 A.2d 1148, 1152 (1994) ("[A]n administrative adjudication of suspected child abuse is of the most serious nature."); J.S., 528 Pa. at 248 n.2, 596 A.2d at 1116 n.2 ("[T]his Court is quite troubled by the use of any standard less than requiring clear and convincing evidence.").

For my own part, I share the concern that there is substantial stigma associated with inclusion of one's name in a child-abuse registry. Accord Jackson v. Marshall, 454 S.E.2d 23, 27 (Va. Ct. App. 1995) ("[T]here is no more deplorable badge of infamy a person can wear than that of being a child abuser.") (quotation omitted). Further, I am less confident than the R. Court and the majority that dissemination of this information is readily capable of close containment. Accord G.V. v. DPW, 52 A.3d 434, 444 (Pa. Cmwlth. 2012) ("Even though the statute seeks to minimize disclosure of the ChildLine Registry information, its actual use by the statutorily-designated government officials, law enforcement and other entities and individuals in responding to the inquiries of employers, school districts, churches, boy and girl scouts, and other organizations creates the very real potential and probability for disclosure to groups and individuals

not specifically authorized to receive the information."). Moreover, from my point of view, the analysis should encompass other salient factors, such as the rate of reversal of indicated reports, in terms of assessing the risk of an erroneous deprivation, see, e.g., Brief for Amicus Pa. State Educ. Ass'n at 22-23 ("In the 2012 Pennsylvania Department of Public Welfare's Child Abuse Report . . ., out of the 160 appeals of 'substantiated' reports that were decided on the merits, only five were upheld while 155 were reversed. In other words, 97% of the cases decided on the merits were overturned." (footnote and citations omitted)), and the length of time which may pass before a post-deprivation adjudication may be completed, see id. at 23 n.3 ("Perhaps just as, if not more troubling is the fact that DPW reports that, in 2012, 759 or 75% of second level appeals were still pending. This suggests that most appeals are languishing while the wrongly named individual's reputation is damaged by continued publication of the person's name on the ChildLine registry.").

Taking such elements into account, I find this to be a much closer case than is reflected in the majority opinion. Nevertheless, ultimately, in light of the Commonwealth's undeniably vital interest in protecting children from abuse, giving account for the interests of those accused (including very real disabilities facing some in terms of securing employment working with children), and at least in the context of a registry scheme imbued with adequate procedural protections, I agree with the majority that the statutory preponderance-based standard meets basic due-process requirements. Accord Jamison v. Missouri Dep't of Soc. Servs., 218 S.W.3d 399, 411-12 (Mo. 2007); In re W.B.M., 690 S.E.2d 41, 52 (N.C. Ct. App. 2010). I would only

observe that the inquiry into whether the Pennsylvania statute reflects adequate process remains seriously in question.[2]

[2] Accord Jamison, 218 S.W.3d at 408-10 (requiring a pre-deprivation hearing as a prerequisite to inclusion of an accused's name in a child-abuse registry); W.B.M., 690 S.E.2d at 52 (same); K.J. v. DPW, 767 A.2d 609, 616 n.9 (Pa. Cmwlth. 2001) (Friedman, J., dissenting) ("It shocks my conscience that the Law would allow the investigating caseworker to render a de facto adjudication that is adverse to an individual's reputation without an independent adjudicator having had the opportunity to consider the investigator's evidence of child abuse in accordance with established procedures of due process."). See generally Brief for Amicus Pa. State Educ. Ass'n at 8-9 (positing that "[t]he procedure contains numerous due process irregularities such as the lack of pre-[deprivation] notice and hearing, failure to provide a prompt post-determination hearing and the commingling of investigative, prosecutorial and judicial functions when caseworkers who are inexperienced in the law investigate complaints, weigh evidence and judge whether to issue an indicated report.").