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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA09-518

STEPHANIE DUKE APPELLANT	**Opinion Delivered** DECEMBER 9, 2009
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CV 2007-16113]
JOHN SELIG, Director of the ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLEE	HONORABLE JAMES MOODY, JUDGE AFFIRMED

WAYMOND M. BROWN, Judge

On May 7, 2007, a report was made to the child-abuse hotline alleging that Stephanie Duke committed an act of child abuse against her stepdaughter, D.D. After an investigation by the Arkansas Department of Human Services (DHS), the report was found to be true, resulting in Duke's name being placed on the Child Maltreatment Registry. Subsequent appeals to the Office of Appeals and Hearings and the Pulaski County Circuit Court were unsuccessful. Duke now comes before this court, arguing that DHS's decision was not supported by substantial evidence and that the decision was arbitrary, capricious, and characterized by an abuse of discretion. We affirm.

According to the hotline report, Duke carried D.D. by her throat, making it difficult for

her to breathe.[1] Larry Melville began his investigation by interviewing D.D. at her school. D.D. reported during that interview that Duke picked her up by her throat twice: once while she was in third grade, and another time a week or two prior to her seventh birthday (July 4, 2005). Melville also interviewed Duke, who denied any wrongdoing. He ultimately concluded that the report of abuse was true, resulting in Duke's name being placed on the Child Maltreatment Registry. Duke was notified of the true finding on June 7, 2007, and she pursued her right to an appeal.

D.D. testified at the subsequent administrative hearing. According to her testimony, she was supposed to be sweeping the floor one day when her favorite television show came on the air. She was in the kitchen watching the television when Duke discovered her. Duke then picked her up by her neck, carried her to a bedroom, and spanked her. D.D. testified that it was hard for her to breathe when Duke carried her. She could not recall when the incident occurred, but she thought that it occurred when she was eight or nine (she was ten on the day of the hearing). She also stated that Duke only choked her once. D.D. explicitly denied making the allegations in order to get Duke in trouble.

Melville also testified at the hearing. He opined that D.D. was credible and that the details were plausible, not exaggerated, and consistent with what D.D. had told others. He also recalled a written statement from Duke, wherein she denied putting her hands on her children in an inappropriate matter, but explained that she had spanked the children with the

[1] There was also an allegation that Duke struck D.D. with a closed fist. That allegation was later found to be unsubstantiated, and DHS did not further pursue it.

authorization of her husband. Relying on his experience, he found Duke to be not credible.

Duke testified in her own defense. She stated that she and her husband were going through a divorce, and she opined that her husband was behind D.D.'s allegations of abuse. Duke denied picking D.D. up by her throat, though she admitted picking D.D. up by her underarms whenever D.D. threw a fit.

On November 14, 2007, the Office of Appeals and Hearings issued a decision finding that DHS met its burden of proving that Duke abused D.D. Accordingly, it found that the allegations were true and that Duke's name should remain on the Child Maltreatment Registry. Duke filed a petition for judicial review in circuit court, but the circuit court affirmed DHS's decision. This appeal followed.

In two separate headings, with three subheadings, Duke challenges the sufficiency of the evidence to support the findings. First, she argues that DHS's decision is not supported by substantial evidence. She contends that a reasonable person would not find more than a scintilla of evidence to show that she maltreated D.D. in light of the evidence controverting the allegations. Second, she claims that the finding, and the penalty imposed as a result, was arbitrary.

Our review of an administrative appeal is very limited. Review is directed toward the decision of the administrative agency, not the reviewing circuit court. *Ark. Prof'l Bail Bondsman Lic. Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 855 (2002). Administrative decisions will be upheld if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by

an abuse of discretion. *Id.* Substantial evidence is defined as valid, legal, and persuasive evidence that a reasonable mind might accept as adequate to support a conclusion, and force the mind to pass beyond conjecture. *Ark. State Police Comm'n v. Smith*, 338 Ark. 354, 994 S.W.2d 456 (1999). An administrative decision cannot be classified as unreasonable or arbitrary when it is supported by substantial evidence. *Pine Bluff for Safe Disposal v. Ark. Pollution Control & Ecology Comm'n*, 354 Ark. 563, 127 S.W.3d 509 (2003).

While Duke divides her argument into several subheadings, the issue is whether DHS's decision is supported by substantial evidence. We hold that it is. The victim in this case testified that Duke picked her up by her neck, making it difficult to breathe. The definition of abuse under the Child Maltreatment Act includes intentionally or knowingly interfering with a child's breathing, with or without physical injury. *See* Ark. Code Ann. § 12-18-103(2)(A)(vii)(*c*) (Supp. 2009). In *Arkansas Department of Human Services v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998), our supreme court held that a rape victim's testimony, standing alone, meets the substantial-evidence standard in an administrative setting. We see no reason why this rule should be different in the case of non-sexual abuse when the rule is applicable in criminal cases that do not involve sexual offenses. *See Rawls v. State*, 327 Ark. 34, 937 S.W.2d 637 (1997) (stating that a single eyewitness's testimony was sufficient in a conviction for delivery of a controlled substance).

As for Duke's arguments that D.D.'s testimony cannot be substantial in light of her inconsistent testimony and the evidence to the contrary, the decision on credibility and weight

of the evidence is within the administrative agency's discretion, and it is the prerogative of the agency to believe or disbelieve any witness and to decide what weight to accord that evidence. *See Ark. Dep't of Human Servs. v. Bixler*, 364 Ark. 292, 219 S.W.3d 125 (2005). In other words, once the administrative body found D.D. to be credible, the courts were without power to disregard that finding. Because D.D.'s testimony, by itself, is sufficient to support the finding of maltreatment, we are without the power to reverse it, even in light of evidence to the contrary. And because the decision is supported by substantial evidence, it cannot be said that the decision is arbitrary, capricious, or characterized by an abuse of discretion.

Finally, Duke argues that the penalty imposed, placement of her name on the Child Maltreatment Registry, is excessive and arbitrary. She did not make this argument before the administrative body below, precluding us from considering the issue. *See McGhee v. Ark. State Bd. of Collection Agencies*, 368 Ark. 60, 243 S.W.3d 278 (2006).

The true finding of abuse is supported by substantial evidence, and the finding is not arbitrary, capricious, or characterized by an abuse of discretion. Thus, we affirm.

Affirmed.

GLADWIN and GLOVER, JJ., concur.

GLOVER, J., concurring. Unfortunately for Stephanie Duke, here everyone did their job in compliance with the Administrative Procedure Act. *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992). Now, in lock step, we are constrained to affirm based

on the limited scope of judicial review.

Through this process, Ms. Duke has been administratively determined by DHS to have interfered with a child's breathing and, upon that determination, her name is now permanently placed on the Arkansas Child Maltreatment Central Registry.

The Administrative Procedure Act is well conceived and, for the most part, works effectively. For purposes of judicial review, our supreme court has described the considerable deference to be given administrative-agency decisions:

> We have recognized that administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues affecting their agencies, and this recognition accounts for the limited scope of judicial review of administrative action and the refusal of the court to substitute its judgment and discretion for that of the administrative agency.

Wright, 311 Ark. at 130, 842 S.W.2d at 45.

I write to suggest that an exception should be carved into DHS determinations such as this matter effecting placement on the administrative Child Maltreatment Central Registry. The exception should include *de novo* review at the circuit court level on questions of credibility and the weight to be given the evidence. The alleged child maltreatment by Ms. Duke supposedly occurred two years before it was reported. The child was nine when interviewed. On appeal from the administrative hearing, there were allegations of inconsistencies in the child's statements to the DHS interviewer as well as the DHS interviewer's testimony challenging Ms. Duke's credibility during his interview of her.

The rule, as written, remains for most parts effective for appellate review. Appellate

courts defer to the superior position of the circuit courts on questions of credibility and weight to be given the evidence. Faulting no one in the present matter, the only proof was the testimony of the DHS interviewer of the child and of Ms. Duke. Embedded in and underlying the administrative hearing were (1) a divorce action simultaneously filed by Ms. Duke's husband, the child's father, (2) a possible custody dispute looming between Ms. Duke and the child's father over another child born to them, and (3) allegations by Ms. Duke of domestic violence perpetrated immediately before the alleged incident by the child's father toward her.

In my view, such a broad appellate rule governing the gamut of administrative agencies in state government should be narrowed by specific exception to allow our circuit courts to exercise *de novo* review in child-abuse administrative determinations.

GLADWIN, J., joins in this concurrence.