ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CA 07-86

CAROLYN WHITMORE and CAROLYN CHILD CARE APPELLANTS	NOVEMBER 7, 2007
V.	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, THIRD DIVISION, [NO. CV 05-11109]
	HONORABLE JAMES MAXWELL MOODY, JR., JUDGE
ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES APPELLEE	AFFIRMED

Appellant Carolyn Whitmore appeals the revocation of her probationary license to run a daycare. Appellee, the Arkansas Department of Health and Human Services (DHHS), obtained an emergency revocation of her license in June 2005, followed by a full hearing on the matter. The administrative proceeding resulted in affirmation of the revocation. On appeal to the Pulaski County Circuit Court, it remanded for findings of fact. Those findings were made, stating the reasons for revocation. Thereafter the circuit court upheld the revocation as supported by substantial evidence and not violative of due process. The circuit court ordered appellant responsible for the cost of the record. This appeal followed.

Appellant argues (1) that it was error to assess appellant the cost of preparing the record ($580); (2) that the administrative proceedings violated the statutory administrative

procedures and violated due process in failing to determine as a matter of fact whether the daycare was open for business on the day in question; and (3) that the proceedings violated due process where the administrative process is pursued by and heard before State employees, exemplified by the rejection of her videotape from consideration in evidence. We disagree with her arguments and affirm.

Review of administrative agency decisions, by both the circuit court and appellate courts, is limited in scope. *Arkansas Dep't of Corr. v. Bailey*, ___ Ark. ___, ___ S.W.3d ___, (Jan. 25, 2007). The standard of review to be used by both the circuit court and the appellate court is whether there is substantial evidence to support the agency's findings. *Id.* Thus, the review by appellate courts is directed not to the decision of the circuit court, but rather to the decision of the administrative agency. *Id.* The circuit court or appellate court may reverse the agency decision if it concludes:

> (h) [T]he substantial rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (1) In violation of constitutional or statutory provisions; (2) In excess of the agency's statutory authority; (3) Made upon unlawful procedure; (4) Affected by other error or law; (5) Not supported by substantial evidence of record; or (6) Arbitrary, capricious, or characterized by abuse of discretion.

Ark. Code Ann. § 25-15-212(h) (Repl. 2002). An administrative agency's interpretation of its own regulation will not be overturned unless it is clearly wrong. *Dukes v. Norris*, ___ Ark. ___, ___ S.W.3d ___ (May 3, 2007). Administrative agencies, due to their specialization, experience, and greater flexibility of procedure, are better equipped than courts to analyze legal issues dealing with their agencies. *Id.*

It should be noted that a party appearing before an administrative agency is entitled to due process in the proceedings. *See C.C.B. v. Arkansas Dep't of Human Servs*., 368 Ark. 540, __ S.W.3d __ (2007). A fair trial by a fair tribunal is a basic requirement of due process. *Id*. However, an appellant, in attacking an administrative procedure on the basis of a denial of due process, has the burden of proving its invalidity. *Id*.

The first point concerns the recovery of costs associated with the record prepared for review. Pursuant to statute, the agency (here DHHS) is responsible for preparation of the record for review, but if the agency prevails, then the appealing party "shall" bear those costs. In this instance, the circuit court, after remand for specific findings of fact, reviewed the agency's decision to revoke appellant's license. The agency decision was upheld, and pursuant to Ark. Code Ann. § 25-15-212(d)(2), appellant was made responsible for the cost of the record. Appellant contends that this was error. We disagree.

Arkansas Code Annotated section 25-15-212(d) provides that:

> (1) Within thirty (30) days after service of the petition or within such further time as the court may allow but not exceeding an aggregate of ninety (90) days, the agency shall transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review.
>
> (2) The cost of the preparation of the record shall be borne by the agency. However, the cost of the record shall be recovered from the appealing party if the agency is the prevailing party.

Appellant argues that because there was a preparation of the record in the initial appeal that resulted in a remand, then there was no additional cost incurred when she did not prevail after remand. In short, appellant argues that it was improper to have her pay the cost on the second

round of her appeal on the identical record. While there might be an equitable argument to be made on this issue, there is no discretion vested in the circuit court on this subject by use of the term "shall" in the statute. Therefore, appellant's argument for reversal on this point is not well taken. *See*, *e.g.*, *Hankins v. Ark. Dep't of Fin. & Admin.*, 330 Ark. 492, 954 S.W.2d 259 (1997) (holding that because DF&A paid for a transcript and was the prevailing party, the circuit court did not err in ordering Hankins to reimburse the agency, even though DF&A failed to provide a complete record for review on appeal). We affirm this point.

Next, appellant argues that the primary issue was whether the child care facility was open on the day of the inspection on June 29, 2005. This specific question, appellant argues, was not answered by the administrative agency, and thus the administrative action cannot stand. We disagree.

The testimony and evidence leading to the suspension of appellant's license is necessary to give context to this argument. Appellant was given a one-year probationary license in February 2005, to run a daycare in her sister's home in Little Rock, Arkansas, with the limitation that she care for no more than five children at any given time. On June 29, 2005, a licensing specialist, Pamela Parker, made an unannounced visit to the daycare. As she approached, Parker observed four children being driven away by Ms. Covington (the owner of the home). The children were unbuckled in a van. Once inside the facility, Parker observed ten children ranging from age nine to eight months in the facility. No adult was present to oversee the children. Parker stayed for approximately one hour before appellant arrived. Parker noted that there were more children than permissible, and appellant made

efforts to find placements for the additional children. Parker asked for required documents on the children in her care; appellant was able to produce documentation for only four. The staff at the licensing agency entered an emergency revocation of appellant's license.

Appellant appealed to the Child Care Appeal Review Panel, wherein testimony was taken and letters from parents were submitted, but appellant did not introduce a videotape showing the inside of her facility. Appellant and her witnesses testified that the daycare was technically closed that day for a birthday party. Appellant was permitted to submit letters from some parents reflecting that sentiment. Parker testified that appellant never mentioned a birthday party in her visit that day, nor did any of the children, and that there was no evidence of a birthday party such as decorations or supplies typically associated with a birthday party. The agency presented evidence that a voucher program was billed for services rendered for ten of the children on June 29, 2005.

The Review Panel upheld the agency decision by vote at the conclusion of the hearing. Appellant appealed to circuit court, which court remanded the case for findings of fact and conclusions of law. The Review Panel prepared a more extensive set of findings of fact and conclusions of law, after which the circuit court affirmed and ordered that appellant be responsible for the costs associated with preparation of the record. Appellant appeals to our court.

The relevant findings made were that (1) appellant's secondary child care giver, her sister Ms. Covington, left a nine-year-old child in charge of nine other children in the daycare violating the requirement for prudent supervision, (2) on June 29, 2005, the number of

children in daycare exceeded appellant's permitted number of five, (3) children were transported in an unlicensed vehicle without proper restraints, and (4) on June 29, 2005, appellant was unable to provide records for all the children in her care, but rather provided documents for only four of the children.

Assuming for the sake of argument that appellant's facility was in fact closed on the day in question, appellant was found to have violated at least one condition of her probationary license that did not depend upon the daycare being open, that being proper record keeping. Any violation left unrebutted would suffice as substantial evidence to support the agency decision.

It is apparent that without specifically stating so, the agency deemed the facility to be open for business on June 29, 2005. This is made apparent by the findings of fact that discuss the lack of supervision and lack of required records on this particular date. While not found by date certain, the findings also determine that Ms. Covington left a child in charge of supervising the other nine children found inside the daycare, and Ms. Covington drove four children in an unsafe manner by failure to have them in safety restraints on that day. Only by finding that appellant was in business on that day could the agency make these findings of fact relevant to the daycare license.

Appellant's final argument is a general attack on the fairness of these proceedings where the Review Panel, the Panel facilitator, and the DHHS attorney seeking to uphold the agency action, are all employed by the State. Appellant argues that this unfairness is

demonstrated by the initial hearing officer's rejection of appellant's videotape being played at the administrative hearing.

Appellant submitted letters from parents for consideration at the hearing, which were admitted into evidence. Appellant noted that she had a videotape showing the layout of her daycare facility. The hearing officer stated in that regard:

> [W]e'll discuss the tape a little more in detail when it gets time for it to be shown, and maybe that it's published to the Board if not actually accepted as an Exhibit, because it probably, from what she's explained to me, has pictures of children in that–on it. So, we'll have to wait and see what it is completely, before we accept it or reject it.

At no point thereafter did appellant seek to introduce the tape. Therefore, she can show no prejudice where she was not denied any request.

As to the other component of this argument, appellant asserts that the overall process is unfair where the "prosecutor" via DHHS and the "judge" via the hearing officer for the agency stem from the same seed. Appellant did not raise this argument to the hearing officer or the Review Panel, although it was raised to the circuit court at the final stage of those proceedings. Appellant has failed to preserve this issue. *See Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co.*, 347 Ark. 320, 64 S.W.3d 241 (2001) (holding that an appellant must obtain a ruling from the Board in order to preserve an argument, even a constitutional one, for an appeal from an administrative proceeding). It is the appellant's obligation to raise such matters first to the administrative agency and obtain a ruling. *See Franklin v. Arkansas Dep't of Human Servs.*, 319 Ark. 468,892 S.W.2d 262 (1995) (declining to review appellant's arguments that she was denied due process and her right to a hearing

under Ark. Code Ann. § 25-15-208 where such arguments were not made to the administrative tribunal); *Wright v. Arkansas State Plant Bd.*, 311 Ark. 125, 842 S.W.2d 42 (1992) (declining to reach "several arguments" that were not raised before the Board); *Alcoholic Bev. Control Div. v. Barnett*, 285 Ark. 189, 685 S.W.2d 511 (1985) (declining to reach a challenge to the timing of two local option elections because the argument was not raised before the Board). The rationale behind this rule is that, if the appellate court were to set aside an administrative determination on a ground not presented to the agency, it would usurp the agency's function and deprive the agency of the opportunity to consider the matter, make its ruling, and state the reasons for its action. *See Wright*, *supra*. For this reason, this issue is not preserved for appellate review.

Even were we to conclude that the issue was fully developed at the agency level, we would reject it. In *C.C.B. v. Arkansas Department of Health & Human Services*, ___ Ark. ___, ___ S.W.3d ___ (Jan. 25, 2007), the supreme court held that an allegation regarding the appearance of impropriety, based on the fact that the administrative law judge and prosecutor were employees of the same agency seeking to keep the alleged maltreater on the child-maltreatment registry, standing alone, was insufficient to demonstrate bias or even an appearance of bias. The supreme court required more than a bare allegation of bias in order to demonstrate denial of due process. *See id.*

For the foregoing reasons, we affirm the agency decision to revoke appellant's daycare license.

VAUGHT and BAKER, JJ., agree.