

ARKANSAS COURT OF APPEALSDIVISION II
No. CA11-792SPARKMAN LEARNING CENTER,
INC.

APPELLANT

V.

ARKANSAS DEPARTMENT OF
HUMAN SERVICES

APPELLEE

Opinion Delivered March 7, 2012

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT, SIXTH
DIVISION
[NO. CV-2006-7329]HONORABLE TIMOTHY DAVIS
FOX, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from a Pulaski County Circuit Court order finding that appellant was not deprived of due process in its second hearing before the Arkansas Department of Human Services. Appellant argues that the procedure used by the Department in this hearing was so irregular that it violated appellant's rights to due process under the Fourteenth Amendment to the United States Constitution. We affirm.

Review by appellate courts of administrative-agency decisions is directed not to the decision of the circuit court but rather to the decision of the administrative agency. *Arkansas Department of Human Services v. Bixler*, 364 Ark. 292, 219 S.W.3d 125 (2005). Judicial review is limited in scope, but the circuit or appellate court may reverse the agency decision if, among other things, it concludes that the agency's findings, conclusions, or decisions are made upon unlawful procedure. Ark. Code Ann. § 25-15-212(h)(3) (Repl. 2002). A party

appearing before an administrative agency is entitled to due process in the proceedings, and a fair hearing by a fair tribunal is a basic requirement of due process. *Arkansas Department of Human Services v. A.B.*, 374 Ark. 193, 286 S.W.3d 712 (2008). An appellant attacking an administrative procedure on the basis of a denial of due process has the burden of proving its invalidity. *C.C.B. v. Arkansas Department of Human Services*, 368 Ark. 540, 247 S.W.3d 870 (2007). A party is entitled to a fair hearing but not a perfect one, and even where procedural error is present, the appellant has the burden of showing that he was prejudiced by the error. *Id.*; *Berna v. State*, 282 Ark. 563, 670 S.W.2d 434 (1984).

Here, the Department terminated appellant's contract to provide services to the Federal Child and Adult Care Food Program based on a finding that appellant violated federal law by placing a disqualified individual in a position of authority. Appellant appealed this determination to the Department. At the scheduled administrative adjudication, appellant objected to the presence of the administrative law judge's supervisors at the hearing. This hearing resulted in an order upholding the Department's decision to terminate appellant's contract; appellant then appealed to circuit court alleging a due-process violation based on its assertion that the supervisors were there to influence the ALJ's decision in a manner prejudicial to appellant. Although the Department denied that any irregularities had taken place at the initial hearing, it voluntarily moved the circuit court to remand the matter to the Department to be heard by a person not employed by the Department so as to eliminate any question that the administrative process was biased against appellant. Consequently, an agreed

order was entered by which a new hearing would be conducted not by an agency ALJ but instead by an independent third party approved by appellant.

After inquiring as to the appointed hearing officer's qualifications and background, appellant stated he was completely satisfied, and a second hearing was conducted, resulting in an order upholding the termination. Appellant again appealed to circuit court on due-process grounds. The circuit court found that the procedure employed did not violate due process. This appeal followed.

Appellant's argument hinges on its assertion that there were improper ex parte communications between the appointed hearing officer and the agency prior to issuance of a final opinion. There is no evidence of such irregularities, but appellant urges us to infer from differences in the wording of the specially appointed hearing officer's preliminary opinion and final opinion that her final opinion was influenced by ex parte contact with the agency. We find no error. Hearing officers are presumed to be unbiased; this presumption can be rebutted by a showing of conflict of interest or some other specific reason for disqualification, but the burden of establishing such a disqualifying interest rests with the party making the assertion, and speculation and conjecture cannot substitute for credible evidence. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007); see also *Cloverleaf Express v. Fouts*, 91 Ark. App. 4, 207 S.W.3d 576 (2005). Here, appellant directs us to no specific differences between the drafts, or to any evidence of bias on the part of the special hearing officer whom appellant had approved, and to assume bias on this record would be to engage in sheer conjecture.

Furthermore, appellant has failed to demonstrate prejudice. Both the preliminary and the final opinion prepared by the specially appointed hearing officer, although differing somewhat in phrasing, found essentially the same facts, and both concluded that appellant was properly terminated from the program. We do not reverse in the absence of demonstrated prejudice. *C.C.B. v. Arkansas Department of Human Service, supra*.

Affirmed.

GLADWIN and MARTIN, JJ., agree.