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ARKANSAS COURT OF APPEALS

DIVISION I
No. CV-13-402

ARKANSAS DEPARTMENT OF HUMAN SERVICES APPELLANT V. R.F. APPELLEE	**Opinion Delivered** November 20, 2013 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, SECOND DIVISION [NO. CV-2011-3709] HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE REVERSED

PHILLIP T. WHITEAKER, Judge

The Department of Human Services (DHS) Office of Appeals and Hearings found that the appellee, R.F., sexually abused his minor son, R.R.F., by allowing R.R.F. to view pornography. The Pulaski County Circuit Court reversed the decision of DHS. DHS appeals the circuit court's ruling, arguing that (1) substantial evidence supports the finding that R.F. maltreated R.R.F. by forcing him to watch pornographic videos and (2) the agency did not abuse its discretion in making this finding. We reverse the circuit court's decision and affirm that of the administrative agency.

On February 10, 2010, an anonymous report was received by the child-abuse hotline regarding the alleged sexual abuse of R.R.F. The report alleged that R.R.F., a fifteen-year-old autistic male with cerebral palsy, was sexually abused by his father R.F. The report also alleged that, in 2003, R.F. had forced R.R.F. to watch pornographic videos on

three separate occasions. The Arkansas State Police Crimes Against Children Division (CACD) investigated the allegations. The initial allegation of sexual abuse was determined to be unsubstantiated. However, CACD issued a true finding of child maltreatment against R.F. for the allegation concerning pornographic videos and recommended his placement on the Child Maltreatment Registry. R.F. timely requested an administrative hearing on that determination.

The administrative law judge (ALJ) received testimony from two witnesses: Rebecca Baxter, the CACD investigator, and W.F., R.R.F.'s mother and former wife of R.F. R.R.F. did not testify at the hearing. Counsel for R.F. initially objected to any testimony regarding R.R.F.'s responses to investigators regarding the allegations, because the ALJ would not be able to observe R.R.F. to gauge the reliability of those responses. A letter from Easter Seals Disability Services where R.R.F. resides during the week detailed R.R.F.'s physical, cognitive, and verbal limitations. The ALJ allowed the testimony, but ordered the hearing held open until R.R.F. could be made available for questioning. At the end of the hearing, counsel for R.F. indicated that R.R.F.'s presence would not be necessary.

The ALJ issued an order finding that the agency had presented sufficient evidence to substantiate a true finding of exposure to pornography. The ALJ relied upon the following facts presented at the hearing:

> (a) [W.F.] presented credible testimony that when [R.R.F.] was seven or eight years old, she personally saw [R.F.] allowing the juvenile to watch pornography on the television;
>
> (b) [R.F.] did not deny the allegation;

(c) what was being watched on television was purely sexual in nature with no identifiable story line, and no serious literary value;

(d) [R.R.F.] was wheel chair bound, and could not get up and walk away;

(e) [W.F.] had no motive to distort the truth and she emphasized in her testimony that she and [R.F.] gets [sic] along well, which is an important factor for the sake of their juvenile child.

The ALJ did not rely on any testimony relating to R.R.F.'s responses regarding the allegations.

R.F. appealed to the circuit court, which reversed the decision of the agency, finding that the decision of the ALJ was not supported by substantial evidence and was therefore arbitrary. The court determined that DHS had failed to show by a preponderance of the evidence that R.F. had abused R.R.F. The court concluded that R.F. should not be placed on the Child Maltreatment Registry. In its oral ruling, the circuit court indicated that he was concerned with the age of the complaint and the circumstances under which it arose. DHS filed a timely appeal of the order.

Our review of an administrative agency decision is extremely limited in scope. *Ark. Dep't of Human Servs., St. Francis Div. of Children & Family Servs. v. Thompson*, 331 Ark. 181, 959 S.W.2d 46 (1998). Our review is directed not to the decision of the circuit court but to the decision of the administrative agency. *Id.* Our review is limited to ascertaining whether there is substantial evidence to support the agency's decision. *Ark. Prof'l Bail Bondsman Licensing Bd. v. Oudin*, 348 Ark. 48, 69 S.W.3d 855 (2002). 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." *Id.*

(quoting *Ark. State Police Comm'n v. Smith*, 338 Ark. 354, 362, 994 S.W.2d 456, 461 (1999)). The challenging party has the burden of proving an absence of substantial evidence. *Id.* To establish an absence of substantial evidence, the challenging party must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. *Id.* In making the substantial-evidence determination, the appellate court reviews the entire record and gives the evidence its strongest probative force in favor of the agency's ruling. *Id.* Our supreme court has stated that, between two fairly conflicting views, even if the reviewing court might have made a different choice, the agency's choice must not be displaced. *Id.*

Arkansas Code Annotated section 12-18-103(6) (Supp. 2011) defines child maltreatment as "abuse, sexual abuse, neglect, sexual exploitation, or abandonment." "Sexual abuse" as defined by Arkansas Code Annotated section 12-18-103(18)(A)(iv) includes the forced watching of pornography or live sexual activity by a person thirteen (13) years of age or older to a person younger than eighteen (18) years of age. Ark. Code Ann. § 12-18-103(13)(A)(vii) (Supp. 2011).

Pornography is defined as:

> (A) Pictures, movies, or videos that lack serious literary, artistic, political, or scientific value and that, when taken as a whole and applying contemporary community standards, would appear to the average person to appeal to the prurient interest;
>
> (B) Material that depicts sexual conduct in a patently offensive manner lacking serious literary, artistic, political, or scientific value; or
>
> (C) Obscene or licentious material.

Ark. Code Ann. § 12-18-103(15) (Supp. 2011).

The testimony of W.F. was persuasive upon the ALJ. W.F. observed R.F. showing R.R.F. pornography on television when R.R.F. was approximately seven or eight years old. At the time, R.R.F. had limited mobility and was strapped into his wheelchair. She stated that the video on screen was not a R-rated movie and depicted sexual activity with no discernible plot line. R.F. explained to her that he was attempting to educate R.R.F. about sex. The ALJ found W.F. to be credible. The ALJ concluded that R.F. showed a video, which was purely sexual in nature with no identifiable story line or serious literary value, to R.R.F. when he was seven or eight years and was wheelchair bound and could not leave of his own volition. We find that substantial evidence supports the agency decision and that the appellant has failed to demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded persons could not reach its conclusion. Additionally, these findings, as stated by the ALJ, fall squarely under the definition of sexual abuse under the child-maltreatment statute.

R.F. argues that the ALJ's decision was improperly based on W.F.'s allegations, which have now been recanted. He notes that the initial allegations were made during divorce proceedings more than ten years ago at a time when W.F. held a grudge against him. He argues that W.F. has since dropped the allegations and no longer wished to pursue them. R.F. is incorrect. While W.F. did express her desire that the matter be dropped by DHS, she fell far short from recanting her testimony. Rather, she clearly testified that R.F. forced R.R.F. to watch pornographic videos.

R.F. also asserts that the ALJ improperly relied on his failure to deny the allegations. While the court did note that R.F. had failed to deny the allegations, it also found that W.F.'s credible testimony supported the maltreatment finding. Her testimony alone was sufficient to support the allegations.

The order of the circuit court is reversed and the decision of DHS is reinstated.

VAUGHT and BROWN, JJ., agree.

Tabitha Baertels McNulty, DHS Office of Policy and Legal Services, for appellant.

R.F., pro se appellee.