

**Matter of Andrews v New York State Off. of Children
& Family Servs.**

2018 NY Slip Op 30418(U)

March 12, 2018

Supreme Court, New York County

Docket Number: 452409/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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In the Matter of the Application of

CHERVANTES ANDREWS,

Petitioner,

**Index No. 452409/2017
Motion Seq: 001**

DECISION & ORDER

-against-

HON. ARLENE P. BLUTH

**NEW YORK STATE OFFICE OF CHILDREN AND
FAMILY SERVICES, NEW YORK STATE CENTRAL
REGISTER OF CHILD ABUSE AND MALTREATMENT,
and NEW YORK CITY ADMINISTRATION FOR
CHILDREN'S SERVICES,**

Respondents.

**For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules**

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The petition to *inter alia* annul a determination by respondent the New York State Office of Children and Family Services ("OCFS") and to amend and seal an indicated report against petitioner is respectfully transferred to the Appellate Division, First Department for disposition pursuant to CPLR 7408(g).

Background

This proceeding arises out of an incident that occurred while petitioner was walking her ten-year old son to school on the morning of November 17, 2015. During this walk, petitioner was involved in an altercation with another woman. Allegedly, this woman was the close friend of another woman who was romantically involved with petitioner's husband. OCFS argues that

petitioner was upset after viewing pictures on social media of a cake baked for her husband by the woman involved in the altercation. Petitioner claims the woman attacked her and petitioner was merely defending herself. OCFS, relying on statements from witnesses, insists that it was petitioner who initiated the fight. It is undisputed that the fight occurred right in front of petitioner's son.

As a result of the altercation, petitioner was arrested and eventually pleaded guilty to disorderly conduct— a non-criminal violation. A few months later, respondent the New York Administration of Children's Services ("ACS") investigated the incident and concluded that petitioner exhibited inadequate guardianship. In response to petitioner's challenge of that finding, in May 2017, an Administrative Law Judge ("ALJ") concluded, after a hearing, that the report was correctly indicated and denied petitioner's request to have the case sealed as not relevant or reasonably related to her work with children in a school setting. (Petitioner had worked as a classroom aide). Petitioner seeks to annul this determination.

OCFS claims that this proceeding must be transferred to the Appellate Division, First Department because it raises a question of substantial evidence. OCFS also insists that the decision was rational.

Discussion

"A report of child abuse or maltreatment must be established, at an administrative expungement hearing, by a fair preponderance of the evidence. Upon judicial review, the inquiry is limited to whether the administrative determination is supported by substantial evidence in the record" (*Parker v Carrion*, 90 AD3d 512, 935 NYS2d 14 [1st Dept 2011] [denying a petition, previously transferred to the Appellate Division by the Supreme Court, that sought to have sealed

and marked unfounded an OCFS decision]).

As an initial matter, the Court must first decide whether the proceeding must be transferred to the First Department. Where the issue of substantial evidence is raised “the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division” (CPLR 7804[g]).

Where a petition “raises an issue of substantial evidence, in the absence of other objections as could terminate the proceeding, the proceeding should [be] transferred to [the Appellate Division]” (*Dillin v Waterfront Commn. of New York Harbor*, 119 AD3d 429, 428, 990 NYS2d 170 [1st Dept 2014]).

The Court observes that petitioner used the term “substantial evidence” five times in the petition. For instance, petitioner alleged that “this [OCFS] decision lacked substantial evidence and was arbitrary, capricious, contrary to law and an abuse of discretion” (NYSCEF Doc. No. 1, ¶ 4). Petitioner’s memorandum of law in support explicitly states that “the ultimate finding of maltreatment lacks substantial evidence as a result of the ALJ’s reliance on this erroneous finding of ‘premeditated assault’” (NYSCEF Doc. No. 19 at 6).

Petitioner, in reply, attempts to distance herself from the statements in her moving papers and claims that the proceeding should not be transferred to the First Department. Petitioner claims that there are legal errors which this Court must address before reaching the issue of substantial evidence, including the ALJ’s failure to utilize the ten-factor test to determine

whether the maltreatment is relevant and reasonably related to employment. Petitioner also claims that the ALJ's decision improperly concluded that there was maltreatment by failing to consider whether petitioner's behavior fell below a minimum degree of care and caused harm to her son.

Maltreatment

Petitioner claims that ALJ's decision was arbitrary because it did not follow the statutory elements of a finding of maltreatment. In her decision, the ALJ identified the three-prong test applicable to maltreatment, which includes "(1) the child's physical, mental or emotional condition was impaired, or was in imminent danger of becoming impaired; (2) the parent or custodian failed to exercise a minimum degree of care under the circumstances in question; and (3) the parent's or custodian's failure to exercise the requisite degree of care caused, or threatened, the impairment in the child's condition" (NYSCEF Doc. No. 3 at 4). With respect to this issue, the ALJ found that:

During the investigation, the Appellant admitted to having her son with her, handing him her pocketbook and defending herself. The notes record several times the Appellant was loud, or belligerent with workers and refused to allow anyone to talk to her son about the incident. The Appellant pled guilty to disorderly conduct and has a two-year order of protection. It is not disputed that Appellant's son was present and next to her [sic] mother when the altercation started. It is also clear from the evidence that the victim sustained injuries and the Appellant [sic] self-serving testimony denying she did nothing more than hold the woman at arm's length is not credited. Appellant was involved in a physical altercation outside with her son observing the incident and in close proximity of the physical altercation. Accordingly, it is determined that the Agency has met its burden of proving by a fair preponderance of the evidence that the Appellant committed the maltreatment alleged (NYSCEF Doc. No. 3 at 7).

Petitioner does not dispute that the ALJ identified the correct elements for maltreatment. Instead, petitioner claims that the ALJ did not analyze the three elements. But the paragraph

cited above implicitly analyzes all of the elements of maltreatment. Petitioner's son was in imminent danger by standing right next to his mother while she was in a fight. The fact that the ALJ discredited petitioner's testimony and found that she was much more than a passive participant (i.e., that petitioner did more than just hold the woman at arm's length) directly applies to the second and third elements. Whether these findings are enough to support a claim for maltreatment is a question of substantial evidence. It is not an error of law or an abuse of discretion simply because petitioner disagrees with the ALJ's conclusions.

Ten-Factor Test

Petitioner also argues that the ALJ did not properly utilize the ten-factor test to consider whether petitioner's maltreatment was relevant and reasonably related to employment by a child care agency. However, this issue cannot be divorced from the substantial evidence analysis and, therefore, it is not a basis to terminate the proceeding. The ALJ's finding on this issue concluded that:

The Appellant's testimony that her actions were a matter of a momentary loss of composure are inconsistent with the record. Her actions during the incident were premeditated. She handed off her pocket book and attacked the other woman. Further, her anger continued during the investigation. Only a short period of time has passed since the incident. One anger management class, learning breathing skills, hardly seems significant when compared to a premeditated assault, which the Appellant seems to have stewed over for an extended period. Appellant's testimony on this issue is not found to be credible. Accordingly, it is determined that the indicated report is still relevant and reasonably related to childcare issues and may be disclosed to licensing agencies and prospective employers. (NYSCEF Doc. No. 3 at 8-9)

Petitioner's memorandum of law admits that some factors were addressed and does not argue that all factors must be analyzed (*see* NYSCEF Doc. No. 19 at 7-8). Instead, petitioner identifies three factors that the ALJ evaluated and contends that the analysis of two of the factors

is unconvincing and that other factors should have been considered. This Court is unable to find that the ALJ erred in applying the law because the ALJ did not address certain factors, especially where the ALJ *was not required to* address all 10 factors. The fact that this Court may have drafted the decision differently does not require this Court to reverse the ALJ's determination.

This is not a case where the ALJ applied the wrong law or failed to cite any facts in support of her conclusion. The ALJ, according to petitioner, addressed the seriousness of the incident, the amount of time that has passed since the incident and petitioner's purported rehabilitation. That is the essence of a substantial evidence question—whether the ALJ's decision relating to the ten-factor test was supported by enough facts. This Court does not consider the ALJ's decision to be arbitrary or capricious simply because petitioner thinks that other factors should have been addressed and that these factors are favorable to petitioner.

Petitioner's reliance on *Natasha W. v New York State Office of Children and Family Services* (145 AD3d 401; 42 NYS3d 126 [1st Dept 2016]) does not compel a different outcome. In *Natasha W.*, the underlying facts were undisputed—petitioner used her five year old son to help her shoplift (*id.* at 402). Here, the facts are disputed—petitioner claims she was not the aggressor in the fight and that she merely held the other woman off while the ALJ concluded that it was a premeditated assault.¹ Accordingly, it does not matter that the Supreme Court in *Natasha W.* did not transfer the proceeding to the First Department based on the issue of substantial evidence—in

¹ Although petitioner insists that the ALJ's conclusion that it was a premeditated assault was irrational given that petitioner pleaded guilty to disorderly conduct, the Court notes that petitioner also claims that this finding was not supported by substantial evidence (NYSCEF Doc. No. 19 at 14). And pleading to a lesser charge and undergoing anger management does not prevent the ALJ from finding that the fight was premeditated. It can certainly factor into whether there was substantial evidence for that conclusion, but the ALJ was entitled to discredit petitioner's account of the incident and find that she had a motive to attack the other woman.

Natasha W., there were only legal issues to consider because the facts of the case were not in dispute.

Summary

This Court cannot reverse the ALJ's decision because the ALJ did not explicitly apply the elements of maltreatment to the facts or address the applicability of every factor included in the ten-factor test. Of course, adding that analysis would have provided more clarity with respect to the basis for the ALJ's findings. Nevertheless, the Court cannot specifically instruct the ALJ how to draft decisions.

At oral argument, petitioner stressed that the ALJ's decision was baseless because the ALJ's "finding of facts" section only found that petitioner was in a physical altercation and does not mention that it was premeditated (*see* NYSCEF Doc. No. 3 at 2-3). But the ALJ's findings are not limited to that section; the ALJ found petitioner's testimony not credible and found that the fight was premeditated later in the decision (*id.* at 8). Simply because those findings were not included in the ALJ's self-titled "finding of facts" section does not render the conclusion meritless. And the conclusion itself— that the attack was premeditated— is a question of substantial evidence. The ALJ clearly thought it was premeditated based on her evaluation of petitioner's testimony and reports about witnesses' statements concerning the fight.

To the extent that petitioner claims that the ALJ's determination was supported by unreliable hearsay, that assertion does not prevent this Court from transferring this proceeding to the First Department. Petitioner raised the hearsay issue for the first time in reply and the ALJ was entitled to rely on hearsay evidence and to make credibility determinations (including whether the evidence was corroborated) at the hearing. For instance, petitioner contends that no

photographs of the injuries suffered by the other woman in the fight or Facebook messages allegedly revealing petitioner's motive were produced at the hearing. Those are substantial evidence issues.

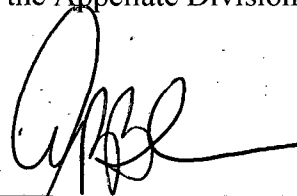
To be clear, this decision only considers whether this Court can terminate the instant proceeding separate and apart from the issue of substantial evidence. The Court finds that the issue of substantial evidence is inextricably intertwined with the objections raised by petitioner especially where, as here, the facts are in dispute, petitioner does not raise procedural objections and there is no claim that the ALJ applied the wrong standards. Instead, petitioner claims that ALJ should have used the same variable, ten-factor test and analyzed the same elements of maltreatment to reach a different conclusion based on petitioner's version of the facts. That is a question of substantial evidence.

Accordingly, it is hereby

ORDERED that the application by petitioner seeking to vacate and annul a determination by OCFS is respectfully transferred to the Appellate Division, First Department for disposition pursuant to CPLR 7408(g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, is supported by substantial evidence (CPLR 7803[4]).

Petitioner is directed to serve a copy of this order with notice of entry upon the County Clerk (Room 141B), who is directed to transfer the file to the Appellate Division, First Department.

Dated: March 12, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH