

<b>Gutierrez v New York State Off. of Children &amp; Family Servs.</b>
2021 NY Slip Op 31578(U)
May 10, 2021
Supreme Court, New York County
Docket Number: 452224/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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JOHNNY GUTIERREZ

Plaintiff,

- v -

NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES,

Defendant.

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INDEX NO. 452224/2020
MOTION DATE 11/08/2020
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 17

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that, pursuant to CPLR 7804 (g), the application by petitioner Johnny Gutierrez seeking to vacate and annul a determination by respondent (motion sequence number 001) is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to said subsection. 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 by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to transfer the file to the Appellate Division, First Department; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance

with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “ E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh))].

Petitioner Johnny Gutierrez (Gutierrez) seeks a judgment to vacate a decision by the respondent New York State Office of Children and Family Services (OCFS) which was issued after an administrative hearing on the allegations contained in child abuse reports investigated by the non-party New York City Administration for Children's Services (ACS; motion sequence number 001). This matter is respectfully transferred to the Appellate Division, First Department, pursuant to CPLR 7804 (g).

### FACTS

On October 21, 2017, two separate complaint reports were made to the State Central Register maintained by OCFS that alleged maltreatment by Gutierrez of his three children, who were respectively aged 10, 4, and 1 years old. *See* verified petition, ¶ 16; verified answer, ¶¶ 89-92; exhibit C (administrative record). Those reports were transmitted to ACS, which conducted timely investigations of them, and issued determinations on December 21, 2017 that found both reports were “indicated,” as that term is defined in Social Services Law (SSL) § 412 (7).<sup>1</sup> *Id.*; verified answer, ¶¶ 93-94; exhibit C. Gutierrez requested an administrative review of the findings in ACS's reports, and a hearing was held before an OCFS administrative law judge (ALJ) on May 20, 2019. *Id.*; verified answer, ¶¶ 95-99; exhibit C. Both Gutierrez and ACS submitted documentary evidence and testimony at the hearing. *Id.*; exhibit B (hearing transcript). On December 16, 2019, the OCFS ALJ issued a “decision after hearing” (DAH) that found as follows:

“The request of [appellant] Johnny Gutierrez that the indicated reports (SCR Case Id #: 26834224, Intake Stage Id #: 31629637, 31629640, dated 10/21/2017, 10/21/2017) be amended to unfounded and sealed is denied. The Appellant has been shown by a fair preponderance of the evidence to have committed maltreatment. However, while the

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<sup>1</sup> The currently effective version on SSL § 412 (7) specifically provides that “[a]n ‘indicated report’ means a report made pursuant to this title if an investigation determines that some credible evidence of the alleged abuse or maltreatment exists.”

report will not be amended to unfounded and sealed, the specific allegation of choking/twisting/shaking of [child's name redacted] in the first report ((SCR Case Id #: 26834224, Intake Stage Id #: 31629637) will be amended to unsubstantiated.

“As so amended, such maltreatment is relevant and reasonably related to childcare employment, the adoption of a child or the provision of foster care. Accordingly, the existence of the indicated reports may be disclosed to provider and licensing agencies making inquiry regarding the Appellant pursuant to SSL § 424-a.”  
*Id.*; verified answer, ¶¶ 95-99; exhibit A (DAH). Gutierrez thereafter commenced this Article 78 proceeding on November 20, 2020 seeking an order to vacate the OCFS's DAH and amend the subject ACS reports from “indicated” to “unfounded.” *See* verified petition. OCFS filed an answer on January 6, 2021 that requests that Gutierrez's petition be transferred to the Appellate Division, First Department, for review under the “substantial evidence” standard. *See* verified answer. Despite delays occasioned by the Covid-19 national pandemic, this matter is now fully submitted (motoin sequence number 001).

#### DISCUSSION

A trial court's usual role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). A determination will only be deemed arbitrary and capricious if it is “without sound basis in reason, and in disregard of the facts.” *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference with the agency's determination. *Matter of Pell v Board of Educ. of Union*

*Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Nevertheless, if an Article 78 petition challenges “a determination made as a result of a hearing held, and at which evidence was taken,” on the ground that that determination was not supported by “substantial evidence,” CPLR 7804 (g) mandates that the trial court transfer the petition to the appropriate Appellate Division to be reviewed under that standard. CPLR 7804 (g) also provides that “the court shall first dispose of such other objections as could terminate the proceeding,” and only if the determination of those objections does not dispose of the matter shall the court shall make the transfer order. Here, the court finds that transfer to the Appellate Division, First Department is appropriate.

First, the administrative record makes it clear that the DAH was rendered after “a hearing held, and at which evidence was taken.” CPLR 7804 (g); *see* verified answer, exhibit C. Second, the petition itself specifically argues that “[t]he ALJ wrongly concluded that the October 21, 2017 report[s] of maltreatment was supported by substantial evidence.” *See* verified petition, ¶¶ 50-54. Thus, the two statutory criteria required for transfer are present in this case.

Gutierrez nevertheless also argues that “[t]he ALJ's failure to consider the relevant OCFS Guidelines that weighed in favor of the Petitioner constitutes an error of law.” *See* verified petition, ¶¶ 35-48. This argument facially asserts that the DAH was an arbitrary and capricious ruling because the ALJ improperly departed from the OCFS guidelines when deciding how much weight to accord to Gutierrez’s evidentiary submissions. *Id.*, ¶ 39. However, review of the totality of Gutierrez’s argument makes it clear that Gutierrez’s overriding intention is actually to contest the sufficiency of the ALJ’s factual findings, rather than to challenge his application of the governing procedural and/or evidentiary law. Thus, “regardless of the terms used by

petitioner [in the petition], a substantial evidence issue has been raised” in this case. *Matter of Blue v Zucker*, 192 AD3d 1693, 1694 (4<sup>th</sup> Dept 2021), quoting *Matter of Bulmahn v New York State Off. of Medicaid Inspector Gen.*, 106 AD3d 1504, 1505 (4<sup>th</sup> Dept 2013), lv den 22 NY3d 860 (2014).

Further, Appellate Division precedent uniformly recognizes that a petitioner’s objection that an agency ruling is arbitrary and capricious because it is affected by an “error of law” is not an objection that could have terminated the proceeding within the meaning of CPLR 7804 (g).” *Matter of Blue v Zucker*, 192 AD3d at 1694; *Matter of Quire v City of New York*, 189 AD3d 467, 467 (1<sup>st</sup> Dept 2020), quoting *Matter of OTR Media Group, Inc. v Board of Stds. & Appeals of the City of N.Y.*, 132 AD3d 607, 607 (1<sup>st</sup> Dept 2015); citing *Matter of G & G Shops v New York City Loft Bd.*, 193 AD2d 405, 405 (1<sup>st</sup> Dept 1993). Instead, that precedent holds that petitions advancing that argument should be transferred to the appropriate Appellate Division for de novo review under the “substantial evidence standard.” *Matter of Quire v City of New York*, 189 AD3d at 467. The court finds that that is clearly the appropriate course of action in this case. Therefore, the court determines that Gutierrez’s Article 78 petition should be transferred to the Appellate Division, First Department, pursuant to CPLR 7804 (g) for review under the “substantial evidence” standard.

#### DECISION

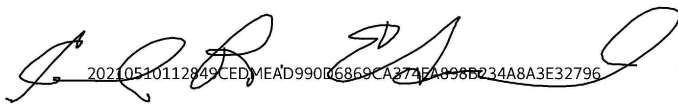
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that, pursuant to CPLR 7804 (g), the application by petitioner Johnny Gutierrez seeking to vacate and annul a determination by respondent (motion sequence number 001) is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to said subsection. 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 by law, is, on the entire record, supported by substantial evidence (CPLR 7803 [4]); and it is further

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5/10/2021  
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CAROL R. EDMead, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE