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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0631

In the Matter of the
Appeal of Parents in Community Action, Inc. (PICA)
Regarding the Order to Forfeit a Fine

Filed December 30, 2013
Affirmed
Larkin, Judge

Department of Human Services
OAH Docket No. 11-1800-22356-2

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Huspeni, Judge.*

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Relator challenges respondent-agency's order to forfeit a fine for failure to timely report an allegation of sexual abuse. Relator argues that the order is based on several

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

errors of law, unsupported by substantial evidence, made upon unlawful procedure, and arbitrary and capricious. We affirm.

FACTS

Relator Parents in Community Action Inc. (PICA) is a Head Start organization that operates the Glendale Early Childhood Family Development Center. The Glendale Center provides a comprehensive early-childhood-education program, which includes preschool, child care, health and dental care, home visits, family resources, and programs for families. PICA employs "visiting advocates," who visit families in their homes to recruit families, prepare children for kindergarten, and provide information about events and activities.

On November 23, 2010, F.J., a teacher at the Glendale Center, contacted the alleged victim's (A.V.) parents regarding the A.V.'s unexplained absence from school between November 9 and 23. The A.V.'s mother was very upset and told F.J. about a recent incident involving the A.V. The A.V., who was four years old at the time, ran into the living room without pants, spread her legs, and asked her little brother to lick her vagina. The A.V.'s mother was shocked and asked the A.V. where she learned such behavior. The A.V. replied that she had seen it on television. The A.V.'s mother did not accept that explanation and again asked where the A.V. had learned it. The A.V. told her mother that she had been in a bathroom at school with a teacher, the suspected employee (S.E.), while the other children were outside on the playground and that the S.E. removed her pants and asked the A.V. to lick her genital area.

On December 6, F.J. told visiting advocate A.A. that she wanted to talk to her about something serious that a parent had told her that "no one can know about." F.J. insisted that A.A. hear the story directly from the A.V.'s mother. So, F.J. arranged for the two to meet on December 8. A.A. told the center director, A.H., that she was meeting with a parent about something serious and would call her as soon as the meeting was over. During the meeting, the A.V.'s mother told A.A. about the A.V.'s sexualized behavior. She also stated that the family does not have cable television and that there had been no encounters between the A.V. and teenagers or other adults that would explain the A.V.'s sexual knowledge. The A.V.'s mother was convinced that the A.V. would not have thought up the sexual behavior herself and that she had to have seen it somewhere. A.A. informed the A.V.'s mother that she and F.J. are mandatory reporters and that they needed to talk to A.H. and report the situation.

That same day, A.A. told A.H. what she had learned from the A.V.'s mother. A.H. immediately called the A.V.'s mother and asked to meet with her, but the A.V.'s mother said that it was not a good time. A.H. then called the A.V.'s home and spoke with her father. He stated that the only concern he had about the situation was that he did not want his daughter discharged from the school. A.H. assured him that the A.V. would not be discharged.

On the morning of December 15, the A.V.'s mother dropped her off at school and spoke to A.H. The A.V.'s mother stated that she had some concerns about the A.V. exposing her body parts and told A.H. about the November incident. A.H. offered the services of the school's psychologist and explained that A.H. needed to report the

incident to authorities. The A.V.'s mother asked A.H. not to report the incident and to instead speak with her husband. A.H. agreed to do so.

On December 17, A.H. spoke with the A.V.'s father. The A.V.'s father stated that he did not believe anything happened between the A.V. and the S.E. A.H. told him that she needed to report the incident, but he said that he did not want her to do so. After the A.V.'s father left, A.H. called Hennepin County Child Protection and respondent Minnesota Department of Human Services (the department) and reported the information.

The department assigned an investigator, and the investigator contacted the Minneapolis Police Department. The investigator also visited the Glendale Center and interviewed A.H., F.J., A.A., and the S.E. Cornerhouse, a child-advocacy center that, among other things, conducts forensic interviews of children who allegedly have been sexually abused, interviewed the A.V. twice. Following its investigation, the department concluded that maltreatment could not be determined. It further concluded that PICA had failed to report the incident in a timely manner and ordered it to forfeit a $200 fine.

PICA exercised its statutory right to challenge the fine. An administrative-law judge (ALJ) held a contested-case hearing pursuant to PICA's request and recommended that the commissioner of human services affirm the department's order to forfeit a fine. The commissioner affirmed the order, reasoning that:

> There is undisputed evidence that the facility had "reason to believe" that a child enrolled in its program had been subject to sexual abuse and that it failed to timely report the information. The reported behavior of the four-year-old child and the obvious concerns of the child's mother—who had kept the child out of school for a significant number of days—are both strong indications that something happened to

> the child. Each teacher's reaction at the facility also evidenced their obvious concerns that the child had been the subject of some form of abuse. Each of them considered the report very "serious" and took deliberate steps to have the child's mother share the report with others. The assertion in hindsight that this information provided no "reason to believe" the child had been subject to abuse is inconsistent with the actions taken in response to the mother's report. It is also inconsistent with the fact that the facility did ultimately report the information—even though there was no new information of abuse.

This certiorari appeal follows.

D E C I S I O N

This case is governed by Minnesota's mandatory reporting act. Minnesota has a public policy "to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse." Minn. Stat. § 626.556, subd. 1 (2012). In furtherance of that policy, the state requires "the reporting of neglect, physical or sexual abuse of children in the home, school, and community settings." *Id*.

> A person who knows or has reason to believe a child is being neglected or physically or sexually abused, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, agency responsible for assessing or investigating the report, police department, or the county sheriff if the person is . . . a professional . . . engaged in the practice of . . . child care [or] education.

Id., subd. 3(a) (2012). "'[I]mmediately' means as soon as possible but in no event longer than 24 hours." *Id.*, subd. 3(e) (2012). Licensed facilities that provide child-care services have the same obligation to report suspected sexual abuse. *See* Minn. R. 9503.0130,

subp. 1 (stating that a licensed child-care center must comply with the reporting requirements for abuse and neglect specified in Minn. Stat. § 626.556).

The statute requires the department of human services to investigate "allegations of maltreatment" in its licensed facilities. Minn. Stat. § 626.556, subd. 3c(b) (2012). And the commissioner may assess a $200 fine against a licenseholder who violates a law governing the health, safety, or supervision of a child. Minn. Stat. § 245A.07, subd. 3(c)(4) (2012).

PICA argues that the department's order to forfeit a fine is based on several errors of law, is unsupported by substantial evidence in the record, is made upon unlawful procedure, and is arbitrary and capricious. An appeal from a decision and order of the department of human services may be commenced in accordance with the Administrative Procedure Act (APA). *See id.*, subd. 3(c)(1) (2012) ("If the license holder was ordered to pay a fine, the notice must inform the license holder of the . . . right to a contested case hearing under [the APA] . . . ."). When reviewing an agency's decision in a proceeding under the APA, this court

> may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
>
> (a) in violation of constitutional provisions; or
> (b) in excess of the statutory authority or jurisdiction of the agency; or
> (c) made upon unlawful procedure; or
> (d) affected by other error of law; or
> (e) unsupported by substantial evidence in view of the entire record as submitted; or

(f) arbitrary or capricious.

Minn. Stat. § 14.69 (2012).

Relator bears the burden of proving that the agency's decision violates one or more provisions of Minn. Stat. § 14.69. *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977). Decisions of administrative agencies are presumed to be correct and to have been based on the application of the expertise necessary to decide technical matters that are within the scope of the agencies' concerns and authority. *In re Universal Underwriters Life Ins. Co.*, 685 N.W.2d 44, 45-46 (Minn. App. 2004). In reviewing agency decisions, the courts must exercise judicial restraint so as not to substitute their judgment for that of the agency. *Id*. at 45. "We defer to the agency's expertise in fact finding, and will affirm the agency's decision if it is lawful and reasonable." *In re Investigation into Intra-LATA Equal Access & Presubscription*, 532 N.W.2d 583, 588 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995).

With these principles in mind, we turn to PICA's arguments.

I.

PICA contends that the department's order to forfeit a fine is based on several errors of law. First, PICA argues that the department and the ALJ misapplied the statute by applying a "lower standard" requiring that every allegation of abuse be reported regardless of whether the mandatory reporter had reason to believe the abuse occurred. PICA notes that "'[a]lleged mistreatment' . . . is not the standard under Minn. Stat. § 626.556 (3). Rather, Minn. Stat. § 626.556 (3) requires that the mandated reporter 'know[] or ha[ve] reason to believe a child is being . . . abused.'" (Alteration in original).

PICA insists that the "knows or has reason to believe" standard for mandatory reporting was not met. PICA basically argues that, because its employees did not believe the A.V.'s allegation against the S.E. and the evidence did not support the allegation, it did not have reason to believe that sexual abuse occurred. PICA therefore contends that there was no duty to report the allegation. PICA asserts that, while the statute espouses "an objective standard, the obvious starting point for the analysis is the question, what did the mandated reporter actually believe?" Because PICA's assertion disregards the objective triggering standard under the mandatory reporting act, we reject the assertion.

The mandatory reporting statute sets forth both a subjective and an objective standard for mandatory reporting: "knows or has reason to believe a child is being neglected or physically or sexually abused." Minn. Stat. § 626.556, subd. 3(a). "[K]nows" is subjective; "reason to believe" is objective. The distinction was discussed in *State v. Grover*, when the Minnesota Supreme Court was asked to determine whether the "reason to believe" standard in Minn. Stat. § 626.556, subd. 6 (1986), was "uncertain or susceptible of arbitrary enforcement." 437 N.W.2d 60, 62 (Minn. 1989). The 1986 version of subdivision 6, like the current version, set forth a criminal penalty for violations of the mandatory-reporting requirement. *Compare* Minn. Stat. § 626.556, subd. 6 (1986) *with* Minn. Stat. § 626.556, subd. 6 (2012). Moreover, the reporting triggers in the penalty provisions of the former and current statutes are identical to the trigger in subdivision 3: "knows or has reason to believe." *Compare* Minn. Stat. § 626.556, subd. 6 (1986) *and* Minn. Stat. § 626.556, subd. 6 (2012) *with* Minn. Stat. § 626.556, subd. 3 (2012).

The supreme court concluded that Minn. Stat. § 626.556, subd. 6 (1986) was "neither unconstitutionally vague nor unconstitutionally overbroad" and found "no merit to the argument that requiring compliance with the statute might somehow interfere with the mandatory reporter's right of free speech by compelling him to espouse a viewpoint with which he may not wish to be associated." *Grover*, 437 N.W.2d at 63-64. The supreme court explained that:

> Minnesota's criminal code provides that "'know' requires only that the actor believes that the specified fact exists." Minn. Stat. § 609.02, subd. 9(2) (1986). Thus, it is apparent that violation of the child abuse reporting statute entails either one of two levels of culpability: A mandated reporter who knows or believes that a child is being or has been abused but fails to report it exhibits the callousness associated with the knowing commission of a criminal act. On the other hand, neither knowing violation nor conscious disregard of substantial risk are requisite to a violation of the reporting act. A mandated reporter who has reason to know or believe that a child is being or has been abused but fails to recognize it also violates the statute though the actor's culpability is merely negligent rather than purposeful, knowing or reckless.

Id. at 62-63.

The supreme court further explained that although "[n]egligence at criminal law is not the same as negligence giving rise to a civil cause of action," the negligence element is nonetheless objective. *Id*. at 63 (referencing the "objective element of negligence" and reaffirming that "we will interpret any criminal negligence statute as requiring a showing that the actor's conduct involved a gross deviation from the standard of care that a reasonable person would observe in the actor's situation" (quotation omitted)). The supreme court highlighted the difference between the subjective "know" and the

objective "reason to believe" standards, stating "a professional is free to include in a report that although the report is mandated because the reporter has 'reason to believe' that a child has been abused, the reporter does not hold a personal belief that the child has been physically or sexually abused." *Id*. at 64.

The ALJ correctly applied the objective standard, consistent with *Grover*. As succinctly stated by the ALJ:

> [R]eason to believe is an objective standard and . . . PICA failed to follow that standard. Whether or not any individuals at PICA actually believed that [S.E.] had committed the acts contained in the child's allegations is irrelevant when they have specific, articulable facts presented to them that would give a reasonable person reason to believe that sexual abuse of a child has occurred.

In sum, contrary to PICA's assertion and in accordance with the ALJ's conclusion under the objective standard, a mandatory reporter may have reason to believe abuse has occurred and thus be required to report it, even if the reporter does not subjectively believe that abuse occurred. We therefore reject PICA's argument that, because it had reasons not to believe the accusation against the S.E., the order to forfeit a fine is based on an incorrect legal standard.

PICA also argues that the ALJ erred by concluding that PICA had a duty to conduct an "independent and unbiased" investigation. The ALJ stated that when determining if it has reason to believe that abuse has occurred, "the individual reporter or organizational reporter, like the [d]epartment, must make a determination based on reason, not pure speculation." The ALJ further stated that PICA employees had a "preconceived belief" that the S.E. did not abuse the A.V. and that "[o]ne cannot conduct

an independent and unbiased investigation when the investigator has prejudged the result." Regardless of the ALJ's comments regarding PICA's investigation, it is clear that the order to forfeit a fine is based on PICA's failure to report and not the quality of its investigation. Thus, PICA is not harmed by the alleged error and it does not provide a basis to reverse. *See* Minn. R. Civ. P. 61 (harmless error to be ignored).

PICA further argues that the ALJ erred by concluding "that a license holder must decide whether it has reason to believe that sexual abuse has occurred 'within a 24-hour timeframe of the time that the individual or organization has obtained factual allegations that suggest a child has been maltreated.'" PICA correctly observes that "[t]he statute simply does not impose a requirement that a mandated reporter decide 'within a 24-hour timeframe' whether he or she 'knows or has reason to believe' that a child is being abused." But even if the ALJ's conclusion constitutes an error of law, it does not provide a basis for reversal. *See id*. As explained in the next section, the ALJ correctly concluded that PICA had reason to believe that the A.V. had been sexually abused and that PICA did not report the alleged abuse within 24 hours of having such reason.

In sum, we are not persuaded by PICA's contention that "the [d]epartment's [o]rder affirming the [o]rder to [f]orfeit a [f]ine is rife with errors of law that undermined and prejudiced the 'substantial rights' of PICA."

II.

PICA next contends that the department's finding that it knew or had reason to believe the A.V. "had been sexually abused is not supported by substantial evidence." Substantial evidence is "such relevant evidence as a reasonable mind might accept as

adequate to support a conclusion." *Minneapolis Van & Warehouse Co. v. St. Paul Terminal Warehouse Co.*, 288 Minn. 294, 299, 180 N.W.2d 175, 178 (1970) (quotation omitted).

PICA argues that "the [d]epartment failed to offer any evidence that PICA had 'reason to believe' the [A.V.'s] allegation." PICA further argues that "the evidence before the ALJ all pointed to the [A.V.'s] allegation being meritless and not worthy of belief by PICA staff." PICA offers the following assertions as support: a teacher asking a young girl to lick her vagina is "difficult to believe"; the A.V. only made the allegation after her mother disagreed with her first explanation for the behavior; the S.E. was under scrutiny "over a five-year period"; there was no testimony or documentary evidence from PICA staff that the S.E. had ever mistreated a child; the department "determined that maltreatment did not occur"; the policies at PICA guarded against such an incident ever occurring; the police did not find any evidence of abuse; the A.V. continued to attend school after she made the allegation; the A.V.'s parents were happy with PICA; and the S.E. denied abusing the A.V.

The flaw in PICA's argument is that it focuses exclusively on evidence that tends to show whether or not the allegation against the S.E. was true. In other words, PICA inappropriately focuses on whether the abuse actually occurred and not on whether PICA had reason to believe that any abuse had occurred. Moreover, some of the evidence that PICA relies on, including the S.E.'s denial and the conclusion by police that abuse had not occurred, did not exist until after PICA complied with the mandatory reporting act.

In this case, the A.V. was absent from school for approximately two weeks. During that time, the A.V. engaged in behavior that was extremely sexualized for a four-year-old child. The A.V. did not have cable television in her home and there had been no encounters between the A.V. and teenagers or other adults. And the A.V. alleged that she had been sexually abused. Moreover, A.A. viewed the A.V.'s allegation as serious and something that should be reported, A.H. told the A.V.'s mother two days before she reported the allegation that she needed to report the incident to the authorities, and A.H. testified that she "felt like something was being hidden." This record provides objectively reasonable grounds for PICA to have believed that the A.V. had been sexually abused, even if there were reasons to doubt the A.V.'s claim that the S.E. was the perpetrator. *See Grover*, 437 N.W.2d at 63 (applying a reasonable person standard when assessing whether there was "reason to believe").

PICA argues that, because the department ultimately concluded that no abuse had occurred, there was no reason to believe that the A.V. was being abused prior to the report. PICA states, "In sum, the ALJ reached a conclusion that the [A.V.] had been abused based on his own professed expert opinion—an opinion not shared by any actual expert who looked at the allegations." This argument is not persuasive because the relevant inquiry is whether PICA had reason to believe the A.V. was abused prior to reporting, and not whether a professional investigation after the report concluded that there was abuse.

PICA offers several other detailed criticisms of the ALJ's reasoning and decision. We have reviewed all and conclude that none provides a basis to reverse for lack of

substantial evidence. *See Engquist v. Wirtjes*, 243 Minn. 502, 503, 68 N.W.2d 412, 414 (1955) ("The function of an appellate court is that of review. It does not exist for the purpose of demonstrating to the litigants through a detailed statement of the evidence that its decision is right.").

In sum, the order to forfeit a fine is supported by substantial evidence in the record.

III.

PICA contends that the order is based on unlawful procedure because "the ALJ relied on alleged evidence nowhere to be found in the record, and the [d]epartment's [o]rder must therefore be reversed." "No factual information or evidence shall be considered in the determination of the case unless it is part of the record." Minn. Stat. § 14.60, subd. 2 (2012). PICA contends that there is no evidence in the record to support the ALJ's findings that "'a reasonable person would conclude that the four-year-old child in question had been subjected to sexual abuse' and that it would be 'extremely unusual for any child that age' and from that 'cultural makeup' to come up with the sexual behavior on her own."

But there is evidence in the record that the A.V. is of Somali descent and that in the Somali culture sexuality, especially around children, "is shameful." There is also evidence in the record that the four-year-old A.V. did not have cable television in her home and did not spend time with any teenagers or other adults who may have imparted sexual knowledge to her. Thus, there was sufficient evidence in the record to support the ALJ's findings.

IV.

Lastly, PICA contends that the order is arbitrary and capricious because "the [d]epartment exercised no 'judgment' in imposing the fine." An agency's decision is arbitrary and capricious if the decision represents the agency's will, not its judgment. *Pope Cnty. Mothers v. Minn. Pollution Control Agency*, 594 N.W.2d 233, 236 (Minn. App. 1999). PICA bases this argument on the testimony of the department's investigator, who testified that all allegations of mistreatment must be reported because "it's our responsibility to investigate whether or not it did or did not occur."

PICA's argument on this point is a restatement of its argument that the department and the ALJ applied an incorrect, "lower standard" when determining whether PICA violated the reporting obligation. For the reasons explained in section I, we reject this argument. More specifically, regardless of the investigator's opinion regarding the standard that triggers the mandatory reporting requirement, the ALJ and the commissioner applied the correct standard. *See Grover*, 437 N.W.2d at 64 (distinguishing the subjective "know" standard and the objective "reason to believe" standard). Thus, there is no basis for reversal. *See* Minn. R. Civ. P. 61 (harmless error to be ignored).

Affirmed.