IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M.N.,	:	
Petitioner	:	
	:	
v.	:	
	:	
Department of Public Welfare,	:	No.1396 CD 2012
Respondent	:	Submitted: November 1, 2013

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 23, 2013

M.N. challenges the order of the Department of Public Welfare, Bureau of Hearings and Appeals (Bureau) which adopted the recommendation of the Administrative Law Judge (ALJ) to deny M.N.'s request to expunge an indicated report[1] of child abuse. See CPSL, 23 Pa.C.S. §§6301-6385.

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[1] Section 6303 of the Child Protective Services Law (CPSL), 23 Pa.C.S. §6303(a), defines an "indicated report":

> [a] child abuse report made pursuant to this chapter if an investigation by the county agency or the Department of Public Welfare determines that substantial evidence of the alleged abuse exists based on any of the following:
> 1. Available medical evidence.
> 2. The child protective service investigation.
> 3. An admission of the acts of abuse by the perpetrator.

Pursuant to Section 6336 of the CPSL, 23 Pa.C.S. §6336, a central statewide registry is maintained of all "founded" and "indicated" reports of child abuse. See L.W.B. v. Sosnowski, 543 A.2d 1241 (Pa. Cmwlth. 1988). An entry of a founded or indicated report of abuse against a person in the central register may adversely affect that person's ability to obtain employment in a childcare facility or program or a public or private school. 23 Pa.C.S. §6338.

M.N. is the step-grandfather of a female child, C.D., born on October 23, 1998. The Venango County Office of Children and Youth Services (VCCYS) received a report of suspected child sexual abuse of C.D. by M.N. On July 22, 2010, VCCYS filed an "indicated report" of child sexual abuse against M.N. from February 1, 2010, to April 1, 2010. M.N. appealed this determination and sought an expungement. The Bureau scheduled a hearing for January 12, 2011. After hearing some preliminary matters on January 12, 2011, the Administrative Law Judge (ALJ) took testimony on February 10 and 11, 2011.

Julie Simpson (Simpson), Intake Supervisor with the Clarion County Children and Youth Services (CCCYS), testified that in May 2010, VCCYS requested assistance from CCCYS in the investigation of M.N. because M.N. was a Venango County employee. Simpson met C.D. and observed the forensic interview of C.D. on June 1, 2010. Notes of Testimony, February 10, 2011, (N.T.) at 28-29; Reproduced Record (R.R.) at 24A, 26A.[2] Simpson detailed the allegations against M.N., "The allegations were that C[.D.] was at her grandparents' home, and that she was sitting on her grandfather's lap, he was rubbing her back, and then he put his hand across her stomach and then up on her chest, under her shirt." N.T. at 29; R.R. at 26A. Simpson believed that indicated status was warranted:

[2] The Reproduced Record contains four pages of the hearing transcript per page. However, the Reproduced Record has four page numbers per page rather than one. The hearing transcript is numbered from the top left of the page to the bottom left to the top right to the bottom right. The Reproduced Record is numbered from the top left to the top right to the bottom left to the bottom right. Therefore, on occasion two consecutive pages on the hearing transcript were not denoted by two consecutive pages in the Reproduced Record.

> I felt that the child's statements were credible and consistent. She didn't appear to have any secondary motivation, nothing to gain by making the allegation. The reason of her disclosure was she was upset about the possibility of returning to the alleged perpetrator's home. Therefore, I advised Sharon [Wise of VCCYS] that if it had been my investigation I would indicate it.

N.T. at 29-30; R.R. at 26A, 25A.

Sharon Wise, casework supervisor for VCCYS and previously an intake caseworker, signed the indicated report based on the results of the interview with C.D., C.D.'s statements, and Simpson's opinion that "if it was her investigation she would indicate it." N.T. at 36; R.R. at 32A.

C.D. testified that she has lied in the past to protect someone and his or her feelings but denied that she lied to the police when she told who shot her with a BB gun in a previous unrelated incident. N.T. at 48; R.R. at 44A. C.D. testified that in January 2010, she was at M.N.'s house in Franklin in the living room and was lying down on a recliner next to M.N. C.D. was trying to sleep and M.N. was watching television at 8:00 or 9:00 p.m. C.D. was planning to spend the night at her grandparents' house. She was wearing pajamas and underpants. N.T. at 56-58; R.R. at 52A-54A. C.D. testified that M.N. rubbed her back, "[h]e went up to my stomach area," and "[h]e kept going up my shirt." N.T. at 60; R.R. at 56A. When asked whether M.N. touched her breast area, C.D. responded, "Yes." N.T. at 60; R.R. at 56A. M.N. kept asking her whether she was uncomfortable. C.D. responded, "'no,' because I thought that he would stop." N.T. at 60; R.R. at 56A. C.D. testified that this lasted for five minutes until Ma.N, her grandmother, called M.N. into the kitchen. N.T. at 60-61; R.R. at 56A, 58A. C.D. went to her

grandparents because her mother and her mother's boyfriend were fighting. N.T. at 61; R.R. at 58A. When C.D. was asked when she had last been to her grandparents' house, she replied, "We went there on Valentine's Day, and then we went there for Easter." N.T. at 63; R.R. at 59A. Prior to the incident, C.D. said, "Me [sic] and him [sic] were . . . really good friends. Like, grandfather to granddaughter. It's, like, daughter to father." N.T. at 64; R.R. at 60A. After the incident C.D. did not "really want to see [M.N.] again." N.T. at 66; R.R. at 61A. On cross-examination, C.D. admitted that she had previously stated when she was interviewed that she heard her cat's mother talking to her from heaven and that the cat's mother told her to take care of her cat and train it to be like the mother. N.T. at 81; R.R. at 78A.

G.F., the nine year old daughter of C.D's mother's boyfriend, testified that C.D, told her before G.F. had her first communion that M.N. "went up the front side of her." N.T. at 102; R.R. at 97A.

S.D., C.D's mother, testified, "I have never gotten along with my mother [Ma.N., M.N.'s wife]." N.T. at 106; R.R. at 101A. S.D. testified that the week after Easter in 2010, C.D. told her that she did not want to see M.N. at G.F's first communion because M.N. '"touched me, Mom. He was rubbing my back when I was on the phone with you. He put his hand up my shirt and was rubbing my back, he reached around the front and started rubbing my chest."' N.T. at 108; R.R. at 104A. On cross-examination, S.D. admitted that her mother had her institutionalized as a child because S.D. put a gun to her mother's and sister's heads. S.D. stated that she did not do that. N.T. at 120; R.R. at 116A. She also

admitted that M.N. and Ma.N. refused to pay her cellular telephone bill and service was turned off. N.T. at 121; R.R. at 118A.

Ma.N.,[3] C.D.'s grandmother, testified that S.D. once accused M.N. of fondling her son, N.D., in the men's room at a family wedding:

> At the wedding, I had planned a song to be sung to Melissa [another daughter of Ma.N.], Butterfly Kisses, as they were coming down the isle [sic], and I was standing in the back and S. [D.] made a huge big deal because there wasn't supposed to be any singers.
> . . . .
> Well, we were going to the reception, and she said that I blew out E's ears because he had to stand in front of the speaker.
> . . . .
> [A]t the reception, she wanted the kids to come over and sit with us so she could go out dancing and stuff, and N. had to go to the bathroom. She asked my husband, M.[N.], 'Could you take him to the bathroom?' So he did, and came back out, and we were sitting there and later in the day when we were cleaning up everything, she came to me and said that M.[N.] had fondled N.[D.] in the bathroom.

N.T. 2/11/11 at 164; R.R. at 158A. Ma.N. testified that she took N.D. and C.D. home with her after midnight on the night M.N. allegedly abused C.D. because S.D. went to her house in Emlenton after a dispute with her boyfriend. Ma.N. determined that the children could not stay there because there was no heat so she

[3] A.C., S.D.'s sister, testified that S.D. and her family were not at M.N. and Ma.N.'s house on Easter in 2010. Notes of Testimony, February 11, 2011, (N.T. 2/11/11) at 151; R.R. at 147A.

took them to her house. Ma.N. testified that she arrived home after 1:00 a.m. N.T. 2/11/11 at 178-179; R.R. at 173A, 175A.

M.N. corroborated Ma.N.'s testimony concerning when N.D. and C.D. came to their house. N.T. 2/11/11 at 223-224; R.R. at 218A-219A. When asked whether he slept with C.D. on a couch or chair, M.N. replied, "No." When asked whether he ever fondled C.D., touched her inappropriately, or touched her breast area, M.N. replied, "Never." N.T. 2/11/11 at 225; R.R. at 220A.

The ALJ found C.D., Simpson, and Wise credible. The ALJ did not find M.N. credible. The ALJ determined that VCCYS established that the report was accurate and supported by substantial evidence. In fact, the ALJ characterized C.D.'s testimony as clear and convincing.

On August 2, 2011, the Bureau issued an order in which it adopted the ALJ's recommendation in its entirety. M.N. requested reconsideration. On September 7, 2011, the Secretary of the Department of Public Welfare granted reconsideration. On July 6, 2012, the Secretary of the Department of Public Welfare issued a final order and upheld the decision of the Bureau.

M.N. contends that the ALJ's determination was unsupported by substantial evidence, that the ALJ's determination was based on a capricious

disregard of the evidence, and that ALJ erred when he decided the case when he did not preside over the hearing.[4]

Initially, M.N. contends that the ALJ's determination was unsupported by substantial evidence and was based on a capricious disregard of evidence because the ALJ "consciously disregarded inconsistent evidence which went against the weight of evidence necessary to support the finding dismissing the appeal." Appellant's Brief at 14.

The term "child abuse" is defined in pertinent part in Section 6303(b)(1)(i) of the CPSL, 23 Pa.C.S. §6303(b)(1)(i), as "[a]ny recent act or failure to act by a perpetrator which causes nonaccidental serious physical injury to a child under 18 years of age."

The term "sexual abuse or exploitation" is defined in Section 6303(a) of the CPSL, 23 Pa.C.S. §6303(a):

> Any of the following:
>
> (1) The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in sexually explicit conduct.
>
> (2) The employment, use, persuasion, inducement, enticement or coercion of a child to engage in or assist another individual to engage in simulation of sexually

[4] This Court's review is limited to a determination of whether constitutional rights have been violated, whether an error of law has been committed, and whether the necessary findings of fact are supported by substantial evidence. E.D. v. Department of Public Welfare, 719 A.2d 384 (Pa. Cmwlth. 1988).

> explicit conduct for the purpose of producing visual depiction, including photographing, videotaping, computer depicting and filming.
>
> (3) Any of the following offenses committed against a child:
> (i) Rape.
> (ii) Sexual Assault.
> (iii) Involuntary deviate sexual intercourse.
> (iv) Aggravated indecent assault.
> (v) Molestation.
> (vi) Incest.
> (vii) Indecent exposure.
> (viii) Prostitution.
> (ix) Sexual abuse.
> (x) Sexual exploitation.

The county agency bears the burden of proof in an action for expunction of an indicated report of child abuse, and in order to meet this burden, it must present clear and convincing evidence that the report is accurate. T.T. v. Department of Public Welfare, 48 A.3d 562 (Pa. Cmwlth. 2012). In T.T., this Court explained "clear and convincing evidence":

> Clear and convincing evidence is the highest burden in our civil law and requires that the fact-finder be able to come to clear conviction, without hesitancy, of the truth of the precise fact in issue. . . . To meet that standard, it necessarily means that the witnesses must be found to be credible, that the facts to which they have testified are remembered distinctly, and that their testimony is so clear, direct, weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. . . . (Citations omitted).

T.T., 48 A.3d at 567.[5]

M.N. asserts that the original CY-48 report indicated that C.D. was abused by M.N. between February and April of 2010, but that C.D. testified before the ALJ that the alleged incident took place in January 2010. M.N. challenges the credibility of C.D.:

> Minor child C.D. testified that she would be willing to lie if someone asked her to and it was okay to lie to protect someone's feelings. Additionally, C.D. testified that she heard voices from two different cats. The voices tell her what to do and she in turn fulfills their directives. It is clear from her testimony that she knows the difference between right and wrong, but is still willing to tell a lie if asked or if she believes she is protecting someone.
>
> During C.D.'s testimony regarding whether she had previously lied to law enforcement officers about who shot her with the bb [sic] gun, C.D.'s demeanor and responses demonstrated her hesitance and lack of truthfulness in her answers. As the Court observed during this line of questioning, C.D. began to speak softer, fidget, and stopped making eye contact with the Court, all signs of deception especially in young children.
>
> Overall, C.D.'s testimony raises definite concerns about he [sic] mental status and the voices she is hearing. Her

[5] Initially, this Court notes that M.N. asserts that the decision should be evaluated on the substantial evidence standard rather than the clear and convincing evidence standard. In G.V. v. Department of Public Welfare, 52 A.3d 434 (Pa. Cmwlth. 2012), *petition for allowance of appeal granted*, 66 A.3d 252 (2013), this Court held that while county children and youth services agencies are bound by the substantial evidence standard when they issue an indicated child abuse report, DPW must follow the stricter clear and convincing evidence standard when it determines whether to maintain a summary of such report on the ChildLine Registry. Because this Court has determined that the county agency must present clear and convincing evidence to establish the accuracy of an indicated report of child abuse, this Court will evaluate the record under that standard.

> testimony raises serious credibility concerns about whether she was being truthful and whether the incident even actually happened.

Appellant's Brief at 16.

The Bureau is the factfinder in expunction appeals. This Court lacks the authority to disturb credibility determinations of the factfinder absent an abuse of discretion. F.V.C. v. Department of Public Welfare, 987 A.2d 223 (Pa. Cmwlth. 2010). The Bureau adopted the recommendation of the ALJ in its entirety.

Here, the ALJ addressed M.N.'s concern about the date of the incident and C.D.'s testimony as a whole:

> The second thing wrong with the Appellant's [M.N.] argument is that most people, even adults, are notably poor reporters when it comes to relating the specific date or time of an event that took place a month or six months or a year earlier. Here, the forensic interview . . . did not take place until June 1st, 2010. Clearly, an adult, let alone a child in a tense situation, would have difficulty recalling exact dates that far removed from the actual event. As to the rest of the child's testimony, it is entirely consistent. Granted, the recorded forensic interview is somewhat difficult to understand, the court listened closely to it, and in the interview the child recites almost verbatim the exact testimony that she gave before the court and to the CYS personnel. The child states unequivocally and credibly that M.N. rubbed her back, rubbed the front of her body, and touched her breasts. She is clear in whose home this happened, in which room of the home it happened, where they were sitting when it happened, what kind of chair they were sitting on, and that her brother N. was asleep in the room at the time it happened.
>
> There are, of course, some troubling aspects to this matter. The child has been known in the past, to

> fantasize about an imaginary cat, and to state that she has had conversations with the mother of the cat. There is also clear animosity between the subject child's mother and Ma.N., the child's grandmother. And there have been times where the mother has instructed the subject child to lie about certain incidents. But there is no showing, beyond innuendo, that the child's mother coached her or coerced her into lying in this instance.
>
> In the final analysis, the testimony of the subject child herself is more than sufficient to carry the day for CYS. The Appellant [M.N.] denies ever having abused the child. The child, on the other hand, is vehement and clear in her testimony. The child described in graphic detail what happened, where it happened, what the room looked like in which it happened.
>
> Finally, the admissible, consistent and credible testimony of the subject child here more than carries the day and is entirely supportive of the Child Protective Service Investigation Report. The subject child's testimony was clear and convincing. Her testimony was consistent with her revelations to CYS and there was no evidence of taint or any reason given why the child would have fabricated the story. The Appeal should be denied.

Adjudication at 8-9.

The ALJ weighed the possible inconsistencies with C.D.'s testimony, the past history of lying when instructed to by her mother, the odd testimony about the cat, the history of animosity between S.D. and her mother, Ma.N., and the testimony of M.N. and determined that C.D.'s testimony clearly and convincingly supported the report of child abuse. The Bureau and then the Secretary of DPW adopted the ALJ's report. The VCCYS established through clear and convincing evidence that M.N.'s indicated report should not be expunged.

M.N. next contends that the ALJ erred when he decided the case because he did not preside as the hearing judge on the days when testimony was taken.

In R. v. Department of Public Welfare, 535 Pa. 440, 636 A.2d 142 (1994), our Pennsylvania Supreme Court addressed a similar issue. In January 1987, the Montgomery County Office of Children and Youth (Montgomery) received a report of suspected child abuse and alleged that R. sexually abused his daughter. Based upon a caseworker's investigation, Montgomery filed an indicated report for child abuse. DPW denied a request for expungement of the indicated report. R. appealed to DPW's Office of Hearings and Appeals. Five days of hearings occurred. Hearing Examiner John F. Lieban conducted the first four days of hearings, while Hearing Examiner Thomas G. Devlin presided over the final day of hearings. Hearing Examiner Devlin issued the Adjudication and recommended that the expungement be denied. The Office of Hearings and Appeals adopted the recommendation. This Court affirmed. R. then appealed to our Pennsylvania Supreme Court. R., 535 Pa. at 444-445, 636 A.2d at 144.

One of the issues R. raised before the Supreme Court was that he was denied due process when a hearing examiner made credibility evaluations of witnesses he did not see or hear testify. The Supreme Court did not agree:

> We begin by noting that the Office of Hearings and Appeals functions as the finder of fact in expungement hearings. It was designated as such by the Secretary of the Department of Public Welfare, 55 Pa.Code § 3490.106(c), who is authorized to appoint a designee to perform her statutorily assigned duties to find facts and decide whether to expunge an indicated report. . . .

> Because the Office of Hearings and Appeals, not the hearing examiner, is the ultimate finder of fact in this case, it is of no moment that the hearing examiner who issued the Adjudication and Recommendation did not hear the testimony given during the first four days of hearings. The hearing examiners are assistants who are constitutionally permitted to help the agency by taking, sitting through, and analyzing the evidence. . . . The critical issue is whether there are sufficient safeguards, as measured by Peak [v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985)], to protect against arbitrary action by the Office of Hearings and Appeals.
>
> Both conditions articulated in Peak for satisfying due process requirements are met here. First, as with any administrative agency adjudication, a reviewing court must determine, inter alia, whether substantial evidence exists to support the decision. . . . Second, the reasons the Office of Hearings and Appeals denied R.'s request to expunge his record are clear enough to permit meaningful appellate review. The Office summarily adopted the recommendation of Hearing Examiner Devlin, whose nine page report thoroughly describes the basis for his recommendation. Therefore, we find that R. was not denied due process when the Office of Hearings and Appeals accepted the recommendation of a hearing examiner who presided over one of the five days during which testimony was heard. (Footnote and citations omitted).

R., 535 Pa. at 446-448, 636 A.2d at 145.

Here, as in R., it was irrelevant that the ALJ who issued the adjudication did not preside over the course of the hearing because the ALJ is not the factfinder, the Bureau is. See F.V.C.. 987 A2d at 228. Further, the Adjudication provided a clear basis for the decision such that this Court is able to

render meaningful appellate review. M.N.'s right to due process was not compromised.

Accordingly, this Court affirms.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

M.N., Petitioner	:	
v.	:	
Department of Public Welfare, Respondent	:	No.1396 CD 2012

O R D E R

AND NOW, this 23rd day of December, 2013, the order of the Department of Public Welfare, Bureau of Hearings and Appeals in the above-captioned matter is affirmed.

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BERNARD L. McGINLEY, Judge