Circuit Court for Worcester County
Case No. 23-C-16-00625, 23-C-16-00626

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 202

September Term, 2017

WILLIAM CATHELL

v.

WORCESTER COUNTY
DEPARTMENT OF
SOCIAL SERVICES

Nazarian,
Arthur,
Raker, Irma S.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: March 26, 2018

William Cathell, a teacher at Pocomoke Middle School, was accused by several young female students of touching them inappropriately. After a Department of Social Services (the "Department") investigation and a criminal trial at which he was acquitted in full, the Department found him responsible for indicated child abuse as to two of the students. Mr. Cathell challenged these findings, and after a hearing on a stipulated record, an administrative law judge ("ALJ") affirmed the finding as to one student and found the other unsubstantiated. The circuit court affirmed the ALJ's rulings, and so do we.

I. BACKGROUND

In June 2015, officials at Pocomoke Middle School (the "School") received reports from four female students—T, Ch., B, and C (collectively the "Students")[1]—that one of their teachers had touched them inappropriately. The Students claimed that Mr. Cathell, a foreign language teacher who had worked at the School since approximately 2012, brushed his hand against their butts[2] in class, made inappropriate comments to them, and, in at least one instance, touched a student's breasts. The School reported the complaints to the Department and local police. The Department assigned a social worker to investigate, and the Department found the claims indicated as to at least two of the Students, B and C. A hearing before an ALJ contesting the finding of indicated child sexual abuse was stayed pending the resolution of criminal charges.

[1] For the sake of privacy, we refer to the students only by initials.

[2] "Butts" is the term the victims used to describe where they were touched and, like the ALJ, we will use that term for clarity and consistency.

Mr. Cathell went to trial on twenty-four criminal charges arising from the Students' allegations in August 2015. At trial, all four Students testified. The court dismissed the charges arising from the allegations of two of the students, T and Ch., at the close of the State's case. After deliberations, a jury acquitted Mr. Cathell on the charges arising from the allegations of the two remaining students, C and B.

Mr. Cathell then pursued his challenge to the Department's indicated child sexual abuse findings regarding C and B, which culminated in a hearing before an ALJ (the "Hearing"). Both Mr. Cathell and the Department had the ability to present additional evidence or testimony at the Hearing, but neither did—instead, they submitted the record from the Department's investigation and the exhibits and transcript from the criminal trial (the "Record") by stipulation.[3]

The stipulated Record included the following evidence and testimony:

[3] Despite the stipulation, Mr. Cathell attempted to exclude B's and C's testimony as hearsay:

> MR. CATHELL'S COUNSEL: What we have here in the record, in the record and also in the videos, which is part of the record, are hearsay statements of these students, and their testimony is permissible; however, it should not be given the same weight. Failing to call the accusers in this instance should cause the evidence regarding their statements to [the Department] to be viewed in the light most favorable to Mr. Cathell. The Department's failure to call the accusers as witnesses creates a situation in which Mr. Cathell had an in-opportunity to cross examine, but also places their testimony into solely a hearsay position.

The ALJ denied the motion.

In her initial complaint, C told the Department's social worker that Mr. Cathell "likes to touch and … will bump into you and grab you." At her videotaped interview with the Department, C claimed that Mr. Cathell touched her first when she was making a piñata with some other students in her class around a shared table. As she backed away from the table, she said that she bumped into Mr. Cathell, who allegedly grabbed her butt. The second incident occurred a week before she reported Mr. Cathell to School administration in June 2015. C said that she went to Mr. Cathell's class to hang out with friends and he came up behind her and grabbed her butt. C claimed that she told her friends about Mr. Cathell's behavior and they shared other instances where he had behaved similarly towards them.

At trial, C's story changed slightly from her first interview with the Department. C testified that Mr. Cathell had leaned over her to grab something, and did not grab her butt at the time of the piñata incident. Another time, C testified that she pushed back her chair in class and felt Mr. Cathell's hand on her butt. Finally, C testified that she was participating in a competition in Mr. Cathell's class when she slipped, and he grabbed her around her waist and butt, a story initially told by one of Mr. Cathell's other accusers, Ch. C also mentioned that Mr. Cathell had called her and her friends beautiful, and had noticed when her pants' zipper was down, a theory she tested by coming into his classroom with it undone multiple times.

B complained that Mr. Cathell touched her butt and looked at female students' breasts during class. B said that she left the classroom immediately after Mr. Cathell

touched her and went to report it to one of the School administrators, Mr. Perry. B went home visibly upset that day and told her grandmother about being groped. B said that her grandmother called Mr. Perry about Mr. Cathell's behavior and came to the school the next day. In his testimony, however, Mr. Perry did not recall meeting with B's grandmother until several weeks after he reported Mr. Cathell to the Department. At her recorded interview with the Department, B, like C, disclosed she had heard from other girls in her grade that Mr. Cathell would inappropriately touch them in class. When cross-examined during Mr. Cathell's criminal trial, B, unlike C, was adamant that she felt Mr. Cathell's hand on her butt, not papers or any other part of his body. B's story remained consistent throughout her interview with the Department and her testimony at trial.

Mr. Cathell testified at his criminal trial. He described how he conducted his "exploratory" foreign language class in a manner that encouraged active student participation and movement and required constant re-arranging of his classroom to accommodate these activities. He explained that the small size of his classroom, which he characterized as smaller than the juror's box, meant that people often ran into each other. He also claimed that the conspicuous location of his classroom, adjacent to a hallway that students and administrators used frequently to reach a home economics classroom, its large windows, and its proximity to other students would have made any inappropriate touching immediately obvious. Mr. Cathell contended that these facts, as well as the fact that nobody else in class had corroborated B's or C's stories, demonstrated that the girls were lying.

Mr. Cathell denied ever touching B or C inappropriately, but acknowledged that he could have bumped into them in the classroom during activities that required more movement. Likewise, Mr. Cathell asserted that C was not one of his students at the time of the alleged second incident, so she would have had no reason to be there unless she was skipping another class. As to B, Mr. Cathell stated that she often skipped his class and appeared unhappy to be there when the School administration enforced her attendance, despite evidence that she had received high grades in his class. Mr. Cathell never spoke to the Department in the course of their investigation beyond a phone call asking when he'd be "exonerated," and one attempt by the Department to interview him while he was in custody, which he declined without his attorney present.

After considering this evidence, the ALJ issued a separate order as to each girl. In the *first* order, the ALJ downgraded the Department's finding of indicated child sexual abuse of C to unsubstantiated child sexual abuse. The ALJ noted that although she found C's testimony in her recorded interview with the Department to be credible,[4] the extent to which her story changed over the eight months between her interview and Mr. Cathell's criminal trial cast some doubts on her allegations. In addition, the ALJ pointed out inconsistences in the timing of the harassment that C claimed she received from Mr. Cathell. Ultimately, the ALJ found that because she'd initially found C's testimony to be credible in her recorded interview and believed that "some type of inappropriate touching

[4] The ALJ based her assessment of credibility on the factors for ascertaining the reliability of children's out-of-court statements set forth in *Montgomery County Department of Health and Human Services v. P.F.*, 137 Md. App. 243 (2001).

occurred at some point by [Mr. Cathell]," even if she was uncertain about the timing and circumstances, the evidence did not support a finding that abuse could be ruled out.

In the *second* order, the ALJ upheld the Department's indicated child sexual abuse for B. The ALJ found that the Department had met its burden of proof by a preponderance of the evidence. The ALJ considered the differences in B's and Mr. Cathell's accounts and found hers credible and consistent, both in her recorded interview at the Department and her testimony at trial. Although there were inconsistencies across witnesses about whether B actually left class when Mr. Cathell touched her and when the School received her report, the ALJ found that she reported the incident closely in time to when it occurred. Finally, the ALJ noted that "it would have been easy for [Mr. Cathell] to touch [B's] butt without anyone seeing. If [Mr. Cathell] stood between [B] and other students that could have a clear view from other tables, it is likely they would not have observed his hand on her butt."

Mr. Cathell appealed the ALJ's decisions to the circuit court. After a hearing at which it heard arguments from both sides, the circuit court affirmed the ALJ's decision. Mr. Cathell took issue with the fact that the ALJ decided the case on a paper record, although in response to questions from the court, he affirmed that he had stipulated to that procedure and waived his rights to testify before the ALJ or to require B or C to testify:

> MR. CATHELL'S COUNSEL: Based on the facts that were presented to the [ALJ], it was not sufficient and substantial evidence to draw the conclusions that were drawn from the record that was presented to [the ALJ]. Specifically, in this particular case there was not a full hearing, it was simply oral arguments and a transcript of the criminal proceeding and the transcript or the record from the [Department].

THE COURT: Well, then why was that done? Why wasn't there actual testimony?

MR. CATHELL'S COUNSEL: Well, there was no actual contention regarding the statements. We had a full blown criminal proceeding where the witnesses testified and there all of the witnesses --

THE COURT: And that was all the – the ALJ saw all of that?

MR. CATHELL'S COUNSEL: Yes, that's correct.

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THE COURT: Did you represent Mr. Cathell at [the criminal trial]?

MR. CATHELL'S COUNSEL: No[.]

THE COURT: Would not it have been in Mr. Cathell's – to his advantage to make [B and C] testify before the ALJ?

MR. CATHELL'S COUNSEL: Well, the burden in this particular instance and the record clearly showed the criminal proceeding, the burden was for the [Department] to present sufficient evidence.

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THE COURT: But [the Record was] not subject to cross-examination, correct? It was simply a –

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THE DEPARTMENT: No, because he waived his right to have a hearing.

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THE COURT: Okay. And then [the ALJ] was also given [the Record]?

> THE DEPARTMENT: Yes.
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> THE COURT: But I take it Mr. Cathell never testified at the ALJ hearing?
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> THE DEPARTMENT: Correct, he waived that right.
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> THE COURT: He voluntarily waived that right?
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> MR. CATHELL'S COUNSEL: Yes.
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> THE COURT: And the ALJ never asked to hear from the witnesses in person?
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> THE DEPARTMENT: No, not if they stipulated that this was their evidence.
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> THE COURT: And are you saying that the attorney for Mr. Cathell at the time did not insist that [B] and [C] re-testify?
>
> THE DEPARTMENT: Oh, absolutely, he didn't want them to re-testify, he said how about if we go on the – they had decided beforehand, the two attorneys that this is how they'd proceed and that there was no need for live testimony.

The circuit court issued an order affirming the ALJ's decisions on March 21, 2017. In that order, the circuit court noted that "[t]he real issue in this case is credibility. Were the girls to be believed? … The [c]ourt sees no reason to question the ALJ's decision to believe the two girls." Mr. Cathell timely appealed.

II. DISCUSSION

Mr. Cathell presents two questions for review that we have consolidated into one: did the administrative law judge misapply the law or fail to base her decision on substantial evidence when she did not rule out child abuse against B or C?[5] Mr. Cathell argues *first*

[5] In his brief, Mr. Cathell phrased his Questions Presented as follows:

that the ALJ's decision relied solely on uncorroborated hearsay evidence and, therefore, there was not substantial evidence to satisfy the Department's burden of proof. *Second*, he contends that the inconsistencies in C's and B's stories indicated that they were lying and thus required the ALJ to rule out child abuse. *Third*, he claims that because he was acquitted at the criminal trial and, he says, never had an opportunity to state his side of the case before the ALJ, the child abuse findings must be dismissed.

The Department responds *first* that the ALJ relied properly on the Record—to which both parties stipulated—in making her credibility determinations. *Second*, the Department asserts that the outcome of Mr. Cathell's criminal trial did not require the ALJ to absolve him because the Department's burden of proving child abuse is lower than the State's burden in a criminal case.

When reviewing an agency decision, we do not "review the [c]ircuit [c]ourt's judgment [directly], but rather [] review the decision of the ALJ[.]" *MVA v. Shea*, 415 Md. 1, 17 (2010). The ALJ's "decision can only be reviewed on grounds identical to those relied upon by the agency," *Doe v. Allegany County Dep't of Soc. Servs.*, 205 Md. App. 47, 55 (2012), and when reviewing such a decision, "we must first determine whether the agency decision was a legal conclusion, a factual finding, or a mixed question of law and fact."

1. Whether there was substantial evidence in the record before the Administrative Law Judge (ALJ) to support a finding of Unsubstantiated Child Sexual Abuse in the case of 23-C-16-000625.
2. Whether there was substantial evidence in the record before the Administrative Law Judge (ALJ) to support a finding of Indicated Child Sexual Abuse in the case of 23-C-16-000626.

Charles County Dep't of Soc. Servs. v. Vann, 382 Md. 286, 296–97 (2004). A finding of indicated child abuse is not "solely a legal one," but instead a mixed question of law and fact. *Vann*, 382 Md. at 297. Therefore, the ALJ's decision is "entitled to deferential review" under the substantial evidence test. *Id.* at 298. The substantial evidence test asks "whether reasoning minds could reach the same conclusion from the facts relied upon by the [agency]." *Mayberry v. Bd. of Educ. of Anne Arundel County*, 131 Md. App. 686, 701 (2000). And "[g]enerally, when the entire record shows that the findings of fact and conclusions of law are supported by competent, material and substantial evidence taken before the agency . . . it is the function of the court to affirm the order of the agency[.]" *Bernstein v. Real Estate Comm'n of Md.*, 221 Md. 221, 230 (1959).

A. Acquittal Does Not Preclude A Finding Of Indicated Child Abuse.

Section 07.02.07.12 of the Code of Maryland Regulations ("COMAR") defines three possible outcomes after a Department investigation of suspected child sexual abuse: the alleged abuse is indicated, unsubstantiated, or ruled out. *Montgomery County Dep't of Health and Human Servs. v. P.F.*, 137 Md. App. 243, 262–63 (2001). The Department bears the burden of defending its abuse findings in a contested case hearing by preponderance of the evidence. COMAR § 07.02.07.12(B). To find indicated child sexual abuse, the Department must find credible evidence, not satisfactorily refuted, that a parent or caretaker sexually molested or exploited a child under the age of eighteen and that the child's health or welfare was harmed or that there was substantial risk of harm. COMAR § 07.02.07.12(A). Physical injury is not necessary. *Id.* at (A)(2)(b). In order to rule out child sexual abuse, the Department must conclude based on credible evidence, that no

sexual abuse, molestation, or exploitation occurred. *Id.* at (C)(1). If the Department cannot determine by a preponderance of the evidence that abuse did or did not occur based on credible evidence, it must find that the abuse is unsubstantiated. COMAR § 07.02.07.12(B). If the Department makes a finding of indicated child sexual abuse, the subject may ask for a contested case hearing before an ALJ. *S.B. v. Anne Arundel County Dep't of Social Servs.*, 195 Md. App. 287, 303 (2010). The ALJ applies the same standards as the Department to determine whether abuse has occurred. *P.F.*, 137 Md. App. at 264.

In contrast, the State in a criminal trial must prove all of the elements of the sexual abuse crime beyond a reasonable doubt. *See Brackins v. State*, 84 Md. App. 157, 161 (1990). This is a much more stringent burden, and the State's failure to carry it at Mr. Cathell's criminal trial does not, as a matter of law or logic, say anything about whether the Department sustained its burden to prove child abuse here. Mr. Cathell does not argue, nor could he, that his acquittal has any preclusive effect. And it doesn't. Mr. Cathell's challenge, ultimately, is a factual one, measured by whether the record contained the quantum of evidence on which a reasoning mind—not even necessarily these three reasoning minds—could reach the conclusions the Department reached in this case. He takes greatest issue with the contents of the Record, and thus the factual bases on which the Department reached its conclusions, and we address those next. But his acquittal on criminal charges arising from B's and C's allegations of unwanted sexual contact doesn't bear on whether the Department could find under a regulatory standard that Mr. Cathell had committed acts of child sexual abuse.

B. Substantial Evidence Supported The ALJ's Findings.

Mr. Cathell asserts that the ALJ's decisions were not grounded in substantial evidence because, he says, they relied solely on C's and B's uncorroborated hearsay statements, which he characterizes as not credible and insufficient to support a finding of indicated or unsubstantiated child sexual abuse. There is no dispute that the statements were hearsay. But they were not the only evidence on which the ALJ relied and, in any event, Mr. Cathell agreed to submit the case to the ALJ on a stipulated record that contained evidence amply sufficient to sustain the ALJ's findings.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. Md. Rule 5-801(c). Although hearsay is generally inadmissible in judicial proceedings, it may be admitted in administrative proceedings, *see Maryland Dep't of Human Resources v. Bo Peep Day Nursery*, 317 Md. 573, 595 (1989), so long as the admission "observes the basic rules of fundamental fairness." *Para v. 1691 Ltd. Partnership*, 211 Md. App. 335, 381 (2013). Hearsay "statements that are sworn under oath, or made close in time to the incident, or corroborated [] ordinarily [are] presumed to possess a greater caliber of reliability," *Travers v. Baltimore Police Dep't,* 115 Md. App. 395, 413 (1997), whereas uncorroborated hearsay alone is not sufficient. *Consolidated Edison Co. of NY v. NLRB*, 305 U.S. 197, 230 (1938). Administrative law judges often err on the side of admitting probative and relevant hearsay evidence so that they can use it to assist them in determining what testimony to credit when sifting through contradictory evidence. *P.F.*, 137 Md. App. at 271. The ALJ serves as fact-finder and must "sift between potentially conflicting information provided by [the Department] and the alleged abuser to determine whether

there are sufficient facts to meet the definitions of" indicated or unsubstantiated abuse. *C.S. v. Prince George's County Dep't of Soc. Servs.*, 343 Md. 14, 33 (1996).

When considering hearsay statements of minors alleging sexual abuse, ALJs often measure the statements' reliability against the factors identified in *P.F.* 137 Md. App. at 272–73. These factors were derived from a criminal procedure statute that governs the admissibility of hearsay statements by child abuse victims under age twelve in juvenile and criminal court proceedings:

> (1) The child's personal knowledge of the event; (2) The certainty that the statement was made; (3) Any apparent motive to fabricate or exhibit partiality by the child, including interest, bias, corruption, or coercion; (4) Whether the statement was spontaneous or directly responsive to questions; (5) The timing of the statement; (6) Whether the child's young age makes it unlikely that the child fabricated the statement that represents a graphic, detailed account beyond the child's knowledge and experience and the appropriateness of the terminology to the child's age; (7) The nature and duration of the abuse; (8) The inner consistency and coherence of the statement; (9) Whether the child was suffering pain or distress when making the statement; (10) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement; (11) Whether the statement is suggestive due to the use of leading questions; and (12) The credibility of the person testifying about the statement.

Id. at 272–73 (cleaned up).

Mr. Cathell argues that the lack of in-person testimony at the Hearing means the Department could not satisfy its burden of proof from the evidence in the Record. Setting aside the fact that Mr. Cathell agreed to proceed on the Record in lieu of subpoenaing C and B or testifying himself, he misapprehends the standard of review for this appeal. The

question we must ask is whether there was substantial evidence that would permit a "reasoning mind [] [to] reach the same conclusion from the facts" as the ALJ. *Mayberry v. Bd. of Educ. of Anne Arundel County*, 131 Md. App. 686, 701 (2000). And there was.

In both Orders, the ALJ thoroughly explained the bases of her findings. *First*, the ALJ applied the factors from *P.F.* to ascertain the credibility of the victims' statements in their interviews with the Department. *P.F.*, 137 Md. App. at 272–73. The ALJ found that B's interview contained important indicia of reliability:

> When I analyzed her statements in light of the factors listed in the *P.F.* case, I found her responses in the interview to exhibit some of the factors that would tend to indicate the reliability of her statements. She responded to questions with certainty. She did not appear to have a motive to fabricate her story. Her statements were responsive to non-leading questions. Based on [B]'s statements, [Mr. Cathell] would have had the opportunity to commit the touching of which she described. She reported the incident very close in time to when she alleged it occurred.

The ALJ addressed the minor inconsistencies in B's allegations across the testimony presented at the criminal trial and found them "immaterial and irrelevant to the ultimate question of whether the incident occurred." Additionally, the ALJ explained how the set-up of the classroom corroborated B's allegations because it "would have been easy for [Mr. Cathell] to touch [B]'s butt without anyone seeing."

In C's case, the ALJ ultimately downgraded the Department's finding of indicated child sexual abuse to unsubstantiated child sexual abuse, based on inconsistencies between her testimony at trial and her recorded interview at the Department, which left the ALJ "to question exactly what happened, and when these contacts occurred." Although the ALJ

initially found C "convincing and believable" in her Department interview in light of the *P.F.* factors "that would tend to indicate the reliability of her statements," *P.F.*, 137 Md. App. at 272–73, her "more vague and inconsistent" testimony at the criminal trial diminished her credibility. The ALJ did not believe that eight months was "such a significantly long period of time during which one would expect memory to fade." The fact that the ALJ altered one of the Department's indicated child sexual abuse findings demonstrates that the ALJ considered the credibility issues that Mr. Cathell raises here. And because the ALJ properly assessed the reliability of B's and C's hearsay statements in addition to all of the other facts in the Record, and "a reasoning mind reasonably could have reached the factual conclusion that the agency reached," *Eberle v. Baltimore County, Maryland*, 103 Md. App 160, 166 (1995), there was substantial evidence to support the ALJ's findings of indicated and unsubstantiated child sexual abuse.

Both in his brief and at oral argument, Mr. Cathell contended that the Department was required to bring B and C to testify live at the hearing before the ALJ, even though he agreed to proceed on the stipulated Record. But by agreeing to proceed as he did, he forfeited any argument that the girls were required to testify in person, and in any event, as we have explained above, the evidence in the stipulated Record supported the ALJ's findings as a matter of sufficiency. We don't disagree that the case turned largely on credibility, but nothing prevented Mr. Cathell from putting the Department to its full burden before the ALJ. He could have required the ALJ to bring B and C to testify, or subpoenaed them himself, and he could have testified as well. He chose not to. And on

this posture, it is not our role to second-guess the ALJ's credibility assessments. It *is* our role to assess the sufficiency of the Record to support the ALJ's findings, and we hold that substantial evidence in the Record supports the ALJ's conclusions as to both victims.

JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY AFFIRMED. APPELLANT TO PAY COSTS.