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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

CARMEN VARGAS,)	Appeal from the Circuit Court
)	of Lake County.
Plaintiff-Appellant,)	
)	
v.)	No. 13-MR-560
)	
RICHARD H. CALICA, as Director of the)	
Department of Children and Family Services,)	Honorable
)	Jorge L. Ortiz,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's decision to uphold an indicated finding of child neglect for inadequate supervision against plaintiff was clearly erroneous. We reversed the trial court's order affirming defendant's decision and ordered defendant to expunge the indicated finding from the state central register.

¶ 2 After the Department of Children and Family Services (DCFS) entered an indicated finding of child neglect for inadequate supervision against plaintiff, Carmen Vargas, she administratively appealed the finding and requested that it be expunged from the state central register. Following an evidentiary hearing, the administrative law judge (ALJ) recommended

granting plaintiff's request for expungement. Defendant, director of DCFS, Richard H. Calica,¹ rejected the ALJ's recommendation and denied plaintiff's request for expungement. Plaintiff sought administrative review in the trial court, which affirmed defendant's decision. Plaintiff timely appeals from that order. For the following reasons, we reverse the trial court's decision and direct defendant to expunge the indicated finding entered against plaintiff.

¶ 3

I. BACKGROUND

¶ 4 Plaintiff operated a licensed home day care center from her home in Waukegan, Illinois. As of April 2012, plaintiff had been a day care provider for about seven years. During that time, plaintiff had no reported concerns regarding her day care services. Plaintiff began caring for a five-year-old boy, R.C., in April 2012. On April 24, 2012, R.C. exited plaintiff's home undetected and was found over an hour later more than a half mile away. R.C. suffered no harm, and police returned him to plaintiff. Following receipt of a hotline telephone call, DCFS began an investigation. The investigation resulted in an indicated finding against plaintiff for child neglect based on inadequate supervision. On June 20, 2012, plaintiff appealed that finding and requested that it be expunged from the state central register. The following testimony was presented at an evidentiary hearing conducted by an ALJ on December 10, 2012.

¶ 5 Plaintiff testified that on April 24, 2012, she had been providing day care for R.C. for two weeks. Plaintiff said that R.C. "would cry a little bit" upon being dropped off in the morning. R.C. arrived at about 7 or 7:30 that morning and proceeded to take a nap on a mat in the living room as he usually did. Plaintiff was in the kitchen tending to the four other children in the day

¹ Defendant notes in his brief that Bobbie Gregg is the current acting DCFS director and was substituted as defendant by operation of law pursuant to section 2-1008(d) of the Code of Civil Procedure (735 ILCS 5/2-1008(d) (West 2012)).

care. Although plaintiff could not see R.C. from the kitchen, she “kept checking on him” every five or six minutes. Plaintiff noticed that R.C. was not on his mat and assumed that he was in the bathroom because the light was on and the door was ajar. When she checked again at about 9:10 a.m., she discovered that R.C. was not in the bathroom. Plaintiff began searching for R.C. in the house. She noticed that the latch on the front door was off. Plaintiff explained that the latch was located high enough on the door that R.C. should not have been able to reach it. After quickly looking outside for R.C., plaintiff called a neighbor to come over and watch the other children while she searched for R.C. Plaintiff walked down the street and asked two neighbors if they had seen a child. She walked back the other way and saw a bus stopped. Plaintiff asked the bus driver if he had seen a child. Plaintiff gave the driver her name, address, and telephone number in case the driver happened to see R.C. Plaintiff then drove around the neighborhood looking for R.C. She again saw the bus driver, who suggested that she call the police.

¶ 6 Rosalba Aguilar testified that she lived across the street from plaintiff. Aguilar said that at about 9:30 a.m. on April 24, 2012, plaintiff called her to come over. Aguilar arrived at plaintiff’s house within about five minutes. Plaintiff left for about 20 minutes. When she did not find R.C., plaintiff returned to the house and searched it again. Plaintiff called the police about 10:20 or 10:30 a.m.

¶ 7 Isabel Leyva testified that, on the morning of April 24, 2012, she and a friend were driving to the store when they saw a boy walking on Lewis near the intersection of Lewis and Golf. The boy appeared to be lost, so Leyva and her friend stopped and asked him his name and where his parents were. When the boy could not provide his address, Leyva called the police. The boy was calm and appropriately dressed.

¶ 8 Marianne Zimmer, a DCFS child protective investigator, testified that she met with plaintiff at the day care home on the day of the incident. Zimmer testified that the first floor of the split-level home was devoted to day care. She described it as being in good order with numerous activities and child-appropriate furnishings. Zimmer's testimony about plaintiff's description of the morning's events was consistent with plaintiff's testimony. Plaintiff told Zimmer that she thought that R.C. had been missing for a total of one hour. Zimmer said that plaintiff showed her the "slip locks" installed above the front- and back-door knobs, which were elongated fasteners to secure the doors. Plaintiff told Zimmer that she thought R.C. had pulled himself up on a window sill by the front door to reach the slip lock. Zimmer suggested that plaintiff move the slip locks higher, and plaintiff did so the same day.

¶ 9 Zimmer further testified that she met with R.C. and his parents on April 25, 2012, at the DCFS office. R.C. told Zimmer that he had left the day care because he wanted "to go where his father cooks." He also related that he wanted to go to a store to buy his mother a book. R.C. told Zimmer that he "snuck out" carrying his shoes. He explained how he was able to open the lock. R.C. told Zimmer that he was not scared when he was outside.

¶ 10 Zimmer next testified that she had obtained a copy of the police report, which noted that R.C. had been found at the intersection of Lewis and Golf in Waukegan. She did not know at which corner of the intersection R.C. had been found. Zimmer said that she was familiar with the intersection; it was a "main intersection" but had only two lanes, not four. Zimmer testified that she used MapQuest to determine the distance between the intersection and the day care. Over plaintiff's objection, the ALJ allowed Zimmer to testify that MapQuest calculated the distance as .82 miles. Zimmer testified that the police report also indicated that R.C. had been in police custody for an hour before plaintiff called to report him missing.

¶ 11 Zimmer explained that she met with her supervisor and they agreed that the case should be indicated primarily because of R.C.'s age and the distance he had traveled by himself, as well as the fact that plaintiff had not called the police immediately. Zimmer and her supervisor also noted, based on the police report, that R.C. had "snuck" out and had been missing for more than an hour. On May 10, 2012, Zimmer participated in a teleconference to allow plaintiff to provide evidence prior to a final determination on whether the case should be indicated. After the conference, DCFS formally indicated plaintiff for child neglect based on inadequate supervision.

¶ 12 The ALJ admitted the DCFS file and the police report with no objection from plaintiff and took the case under advisement. On January 11, 2013, the ALJ issued a written recommendation and opinion. The ALJ noted that inadequate supervision occurs when "[t]he child has been placed in a situation or circumstances that are likely to require judgment or actions greater than the child's level of maturity, physical condition, and/or mental abilities would reasonably dictate." See 89 Ill. Adm. Code 300.Appendix B (Allegation 74) (2011). The ALJ's written opinion included the entire text of Allegation 74, including the examples cited and factors to be considered (child factors, caregiver factors, and incident factors).

¶ 13 The ALJ made the following findings of fact. As of April 24, 2012, R.C. had been attending plaintiff's day care for two weeks. R.C. was three feet, seven inches tall at the time. Plaintiff's front door was secured by a slip lock five feet from the bottom of the door. Plaintiff could not see the living room where R.C. was sleeping; she was in the kitchen toward the rear of the house preparing and serving food to three or four younger children. Plaintiff checked on R.C. "from time to time as she moved around the house." Plaintiff was "where she should have been" as R.C.'s caregiver. R.C. had a plan to sneak out of the day care to go see his father at work. R.C. carried his shoes so that no one would hear him leaving. R.C. probably left the day

care at about 9 a.m. Plaintiff noticed R.C. was not on his mat, but she thought that he was in the bathroom. Several minutes later, plaintiff discovered that R.C. was not in the bathroom and began searching the house. She noticed that the front door was not locked and, at about 9:30 a.m., called Aguilar to come over and watch the other children so she could search for R.C. Aguilar arrived five minutes later. Plaintiff walked around the neighborhood asking people if they had seen R.C. When she was unable to locate R.C., plaintiff drove around the neighborhood for about 20 minutes. When she still could not find R.C., she returned home and called the police at approximately 10 a.m. By the time plaintiff called the police, Leyva had found R.C. walking alone at the “busy” intersection of Golf and Lewis streets, “well over half a mile” from the day care. Leyva called the police, and an officer retrieved R.C. When plaintiff called in to report R.C. missing, the officer returned R.C. to plaintiff after observing her home environment. The amount of time that R.C. was with Leyva and the officer was not clear from the police report or from Leyva’s testimony. The ALJ also found that plaintiff was a credible, truthful witness and a responsible person.

¶ 14 The ALJ then turned to the specific factors listed in Allegation 74. With regard to the child factors, the ALJ found that R.C. was five years old at the time of the incident and was not mature enough to be without supervision. The ALJ further found that R.C. “had little ability to comprehend dangerous situations, make reasoned judgments or protect himself,” but that he was “clever enough to escape from [plaintiff’s] house and put himself in danger.” With respect to the caretaker factors, the ALJ found that, although plaintiff could not see R.C. sleeping in the living room while she was in the kitchen, “she could hear him unless he was purposely trying not to make noise.” Plaintiff regularly checked on R.C. while he slept. She “reasonably assumed that [R.C.] could not unlock the front door due to his size” and was unaware of his plan to escape.

Plaintiff did not hear R.C. leave “because he stealthily left the residence.” When she noticed R.C. was gone, “she took a progression of actions that were reasonable under the circumstances, concluding with her call to the police.” Considering the incident factors, the ALJ found that the duration of the incident was “at least an hour” and that there had been no prior incidents. Plaintiff “reasonably thought [R.C.] was safe, secure and within her immediate supervision.” After R.C. left the house, “he was in a precarious and dangerous situation well beyond his maturity level” and was very fortunate that he was not harmed.

¶ 15 The ALJ concluded that DCFS failed to meet its burden of proof, explaining:

“I am unconvinced that [plaintiff] is legally responsible under allegation #74 for the circumstance of danger to [R.C.] on [April 24, 2012]. Sometimes, even when caretakers are doing things in an acceptable manner, kids still find a way to get into trouble. I find that situation here. The degree of danger posed to a child (which was severe in this case) must be accompanied, under allegation #74, by some proven negligent act or omission on [plaintiff’s] part. I find that the necessary act or omission constituting neglect [is] absent here. From the evidence presented to me [plaintiff] was doing her job on [April 24, 2012] and a situation occurred due to the ingenuity and determination of a 5[-]year[-]old boy who wanted to be with his father. Given [plaintiff’s] previous record as a day care provider, I recommend the [r]eport be unfounded given the circumstances.”

¶ 16 On January 24, 2013, following review of the ALJ’s recommendation, defendant sent plaintiff a letter denying her request to expunge the indicated finding from the central register. Defendant essentially adopted the ALJ’s findings of fact but “strongly disagree[d]” with the ALJ’s conclusion that plaintiff was not responsible under Allegation 74. Defendant reasoned:

“It was [plaintiff’s] responsibility to ensure that even a clever 5 year old would not be able to escape her home and place himself in circumstances beyond his level of maturity, physical condition, and mental abilities. It is her responsibility as a caretaker to provide a level of supervision that anticipates and protects even the ingenious five[-]year[-]old mind. While it is unfortunate that [plaintiff] had only been providing services for a few weeks for this child, the level of care provided for each child must be adequate on the first day and each day that the service provider works for the family. The fact that the provider misjudged the child’s physical ability to open the door does not excuse her from her responsibility to supervise the child.”

Defendant concluded, “Since [plaintiff] was unable to see the child directly from her position in the kitchen where she was attending the other children, there was clearly a time when the child was not adequately supervised, as he was able to climb up on the window sill, open the door, and leave undetected.”

¶ 17 Plaintiff sought administrative review in the trial court. On September 26, 2013, the trial court affirmed DCFS’s final administrative decision. Plaintiff timely appeals.

¶ 18 **II. ANALYSIS**

¶ 19 Plaintiff argues that (1) defendant erred in denying her petition to expunge the indicated finding of neglect; (2) DCFS exceeded its rulemaking authority in promulgating 89 Ill. Adm. Code 336.120 (2000) (delineating the ALJ’s authority), thus rendering the rule void *ab initio*; and (3) the ALJ abused his discretion in admitting testimony about the distance R.C. had traveled from plaintiff’s day care.

¶ 20 Under the Abused and Neglected Child Reporting Act (Reporting Act) (325 ILCS 5/1 *et seq.* (West 2012)), DCFS maintains a central register of all reported cases of suspected child

abuse or neglect. 325 ILCS 5/7.7 (West 2012); *Shilvock-Cinefro v. Department of Children & Family Services*, 2014 IL App (2d) 130042, ¶ 20. DCFS operates a 24-hour telephone hotline for reports of suspected abuse or neglect. 89 Ill. Adm. Code 300.30(a) (2011); *Julie Q. v. Department of Children & Family Services*, 2011 IL App (2d) 100643, ¶ 29, *aff'd*, 2013 IL 113783. When DCFS investigates a report of neglect, it must determine whether the report is “indicated,” “unfounded,” or “undetermined.” 325 ILCS 5/7.12 (West 2012); *Julie Q.*, 2011 IL App (2d) 100643, ¶ 29. A report is indicated “if an investigation determines that credible evidence of the alleged abuse or neglect exists.” 325 ILCS 5/3 (West 2012); *Shilvock-Cinefro*, 2014 IL App (2d) 130042, ¶ 20. An indicated report must be entered on the central register, where it will remain for a minimum of five years. *Julie Q.*, 2011 IL App (2d) 100643, ¶ 29.

¶ 21 The subject of an indicated report has the right to an administrative appeal and to request that the report be expunged. 325 ILCS 5/7.16 (West 2012); 89 Ill. Adm. Code 336.40, 336.50, 336.60 (2000); *Bolger v. Department of Children & Family Services*, 399 Ill. App. 3d 437, 447 (2010). DCFS bears the burden of proof in justifying its refusal to expunge the indicated report and must prove that a preponderance of the evidence supports the indicated finding. 89 Ill. Adm. Code 336.100(e) (2000); *Shilvock-Cinefro*, 2014 IL App (2d) 130042, ¶ 21. Following the hearing, the ALJ makes a recommendation to the DCFS director, who may accept, reject, amend, or return the recommendation. 89 Ill. Adm. Code 336.220(a) (2000); *Slater v. Department of Children & Family Services*, 2011 IL App (1st) 102914, ¶ 24. The director’s decision is the final administrative decision. 89 Ill. Adm. Code 336.220(a) (2000); *Shilvock-Cinefro*, 2014 IL App (2d) 130042, ¶ 21.

¶ 22 Judicial review of the director’s decision is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq.* (West 2012)). 325 ILCS 5/11.6 (West 2012); *Slater*, 2011 IL App

(1st) 102914, ¶ 28. Jurisdiction to review final administrative decisions is vested in the trial court, from which a party may appeal to this court. 735 ILCS 5/3-104, 3-112 (West 2012). This court reviews the agency's decision, not the trial court's decision. *Slater*, 2011 IL App (1st) 102914, ¶ 28. The agency's application of the law to the facts presents a mixed question of law and fact, which we review for clear error. *Shilvock-Cinefro*, 2014 IL App (2d) 130042, ¶ 23. The agency's decision will be deemed clearly erroneous "only where the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Shilvock-Cinefro*, 2014 IL App (2d) 130042, ¶ 23. "The clearly erroneous standard of review affords more deference to the agency than *de novo* review but less deference than manifest weight review. Therefore, applying the clearly erroneous standard to mixed questions yields some deference to administrative expertise." *Du Page County Airport Authority v. Department of Revenue*, 358 Ill. App. 3d 476, 482 (2005).

¶ 23 In pertinent part, the Reporting Act defines a neglected child as one who is not receiving the "care necessary for his or her well-being." 325 ILCS 5/3 (West 2012); *Slater*, 2011 IL App (1st) 102914, ¶ 39. DCFS promulgated Appendix B (89 Ill. Adm. Code 300.Appendix B (2011)) to delineate specific allegations of harm sufficient to trigger an investigation of reported child neglect. *Julie Q.*, 2011 IL App (2d) 100643, ¶ 32. Allegation 74, entitled inadequate supervision, states, "The child has been placed in a situation or circumstances that are likely to require judgment or actions greater than the child's level of maturity, physical condition, and/or mental abilities would reasonably dictate." 89 Ill. Adm. Code 300.Appendix B (Allegation 74) (2011). Allegation 74 includes a nonexhaustive list of examples of inadequate supervision, including when a child is left unattended in a place that is unsafe based on the child's maturity, physical condition, and mental ability. Allegation 74 further provides factors to be considered,

which are categorized into child, caregiver, and incident factors. Child factors pertinent here include the child's age, developmental stage, ability to make sound judgments in an emergency, physical condition, and mental abilities. Caregiver factors include the amount of time it takes the caregiver to reach the child, whether the caregiver can see or hear the child, and the caregiver's maturity, physical condition, emotional condition, and cognitive ability to make appropriate judgments on the child's behalf. Relevant factors about the incident include the frequency of the occurrence, the time of day, the condition and location of the place the child was left, and any other factors that may endanger the child. 89 Ill. Adm. Code 300.Appendix B (Allegation 74) (2011).

¶ 24 Defendant essentially adopted the ALJ's findings of fact, which are not contested by the parties. R.C. was five years old at the time of the incident. R.C. "had little ability to comprehend dangerous situations, make reasoned judgments or protect himself" but was "clever enough to escape from [plaintiff's] house and put himself in danger." Plaintiff's front door was locked and secured by a slip lock that plaintiff did not think R.C. could reach. Plaintiff was in the kitchen and could not see the living room where R.C. was sleeping. However, she could hear him, unless he purposely tried not to make noise, and she checked on him regularly. R.C. had a plan to sneak out of the day care; he carried his shoes and exited stealthily at about 9 a.m. When plaintiff noticed R.C. was not on his mat, she thought he was in the bathroom. Several minutes later, plaintiff discovered that R.C. was not in the bathroom. Plaintiff conducted a progressive search for R.C. in the house, the yard, and the neighborhood. When plaintiff was unable to find R.C., she called the police at approximately 10 a.m. By the time plaintiff called the police, Leyva had found R.C. walking alone at the busy intersection of Golf and Lewis streets, well over half a mile from the day care.

¶ 25 The question before us is whether defendant’s application of the law to these undisputed facts was clearly erroneous. See *Bolger*, 399 Ill. App. 3d at 448 (reviewing under the clearly-erroneous standard DCFS’s indicated finding of medical neglect to determine whether the facts satisfied the agency’s legal standard for medical neglect). Pursuant to Allegation 74, defendant was tasked with deciding whether plaintiff had placed R.C. “in a situation or circumstances that [we]re likely to require judgment or actions greater than [his] level of maturity, physical condition, and/or mental abilities would *reasonably dictate*” (emphasis added) (89 Ill. Adm. Code 300.Appendix B (Allegation 74) (2011)). Thus, defendant had to determine whether it was reasonable for plaintiff to allow five-year-old R.C. to sleep in the living room, out of her sight, with the front door locked and the slip lock latched, while plaintiff checked on him every five or six minutes from the kitchen.

¶ 26 Defendant found nothing unsafe in the day care environment. Nor did defendant find anything in particular about R.C.’s maturity, physical condition, or mental ability that would render unreasonable plaintiff’s decision to check on him every five or six minutes. Instead, defendant reasoned, “Since [plaintiff] was unable to see the child directly from her position in the kitchen where she was attending the other children, there was clearly a time when the child was not adequately supervised, as he was able to climb up on the window sill, open the door, and leave undetected.” In other words, defendant concluded that, because R.C. was able to exit undetected, he must have received inadequate supervision.

¶ 27 We agree with plaintiff that defendant failed to address the reasonableness of plaintiff’s supervision of R.C. as required under Allegation 74 and, in essence, imposed a standard of strict liability. Although child neglect cases must be decided on a case-by-case basis, *Slater* offers some guidance. See *Shilvock-Cinefro*, 2014 IL App (2d) 130042, ¶ 25 (turning to other cases for

guidance in addressing an indicated finding of child abuse). In *Slater*, DCFS entered an indicated finding of neglect against a young mother based on an incident in which her seven-month-old daughter obtained a pencil and was seriously injured when she fell on it. *Slater*, 2011 IL App (1st) 102914, ¶ 1. The mother was using colored pencils on a coffee table while her infant daughter played nearby. *Slater*, 2011 IL App (1st) 102914, ¶ 7. The infant was able to obtain one of the pencils without the mother's noticing. The infant fell on the pencil, puncturing her lung. *Slater*, 2011 IL App (1st) 102914, ¶ 8. On administrative appeal, the DCFS director adopted the ALJ's recommendation to deny the mother's request for expungement. The mother sought administrative review in the trial court, which affirmed the director's decision, but the appellate court reversed. *Slater*, 2011 IL App (1st) 102914, ¶ 1.

¶ 28 The appellate court held that the ALJ's determination that the mother had neglected her child was clearly erroneous. *Slater*, 2011 IL App (1st) 102914, ¶ 37. The court reasoned, "There is no doubt that [the infant] was seriously injured by one of [the mother's] colored pencils. However, it cannot be the case that the existence of the injury itself automatically results in a finding of neglect. Instead, the ALJ was required to determine whether [the infant's] injury was the result of [the mother's] neglectful conduct." *Slater*, 2011 IL App (1st) 102914, ¶ 37. The court held that the mother's conduct was not neglectful because she was generally attentive, despite the fact that she had been distracted or otherwise unaware of the infant's movements and that she could have chosen to use the pencils at a higher table. *Slater*, 2011 IL App (1st) 102914, ¶ 39.

¶ 29 *Slater* shows that the proper analysis of a child neglect case requires an examination not only of the result but also of the adult's conduct. See also *Briggs v. State*, 323 Ill. App. 3d 612, 619 (2001) (holding that DCFS failed to prove that a teacher abused a student where the student

was injured but the teacher’s “actions did not constitute excessive corporal punishment”); *Korunka v. Department of Children & Family Services*, 259 Ill. App. 3d 527, 532 (1994) (same). Like the court in *Slater*, the ALJ in the present case properly took into account not only the bad result (R.C. escaped) but also plaintiff’s conduct. The ALJ explained that “[t]he degree of danger posed to a child *** must be accompanied, under allegation #74, by some proven negligent act or omission on [plaintiff’s] part. I find that the necessary act or omission constituting neglect [is] absent here. From the evidence presented to me [plaintiff] was doing her job ****.” In contrast, defendant’s reasoning was guided solely by the result—if R.C. was able to escape, then plaintiff’s supervision was inadequate. Given the absence of any evidence that plaintiff’s actions were unreasonable, defendant’s decision was clearly erroneous.

¶ 30 Defendant argues that it would have been reasonable for plaintiff to anticipate that R.C., who was still transitioning to day care, might seek a way to find his parents. Be that as it may, there was no evidence to establish that a lack of such anticipation was unreasonable. Moreover, based on her seven years of child care experience, plaintiff took affirmative steps to ensure that her supervision of R.C. was adequate. She not only kept the front door locked, but also had a slip lock five feet from the floor above the door knob. Plaintiff also regularly checked on R.C. to ensure that he was still sleeping. That R.C. was “clever enough to escape from [plaintiff’s] house and put himself in danger” does not render plaintiff’s supervision inadequate. We join the ALJ’s common-sense approach: “Sometimes, even when caretakers are doing things in an acceptable manner, kids still find a way to get into trouble.” See *Slater*, 2011 IL App (1st) 102914, ¶ 39 (determining that the child’s injury was the “result of an isolated incident that could happen to anyone”).

¶ 31 Based upon our review of the record, we are left with the “definite and firm conviction that a mistake has been committed” (internal quotation marks omitted) (*Shilvock-Cinefro*, 2014 IL App (2d) 130042, ¶ 23). Accordingly, defendant’s decision denying plaintiff’s request to expunge the indicated finding was clearly erroneous.

¶ 32 Given our holding, we need not address plaintiff’s remaining arguments.

¶ 33 For the reasons stated, we reverse the trial court’s decision affirming defendant’s denial of plaintiff’s petition to expunge the indicated finding and order defendant to expunge the indicated finding.

¶ 34 Reversed with directions.