2014 IL App (4th) 130800-U

NO. 4-13-0800

FILED
August 26, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| DARRELL DRESCHER, | ) | Appeal from |
| Plaintiff-Appellant, | ) | Circuit Court of |
| v. | ) | Adams County |
| BOBBIE GREGG, Acting Director of Children and | ) | No. 12MR165 |
| Family Services; and THE DEPARTMENT OF | ) | |
| CHILDREN AND FAMILY SERVICES, | ) | Honorable |
| Defendants-Appellees. | ) | Thomas J. Ortbal, |
| | ) | Judge Presiding. |

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court (1) affirmed the final administrative decision of the Department of Children and Family Services and (2) found the regulation at issue was not unconstitutionally vague.

¶ 2 In June 2012, the Department of Children and Family Services (DCFS) indicated a report of child abuse against plaintiff, Darrell Drescher. In July 2012, plaintiff filed an administrative appeal with DCFS, requesting expungement of the indicated report. In October 2012, an administrative law judge (ALJ) found DCFS had proved the allegation and recommended the denial of the request for expungement. That decision was concurred in by Richard H. Calica, the Director of DCFS (substituted by current acting director, Bobbie Gregg, by operation of law (735 ILCS 5/2-1008(d) (West 2012)). In November 2012, plaintiff filed a complaint for judicial review. In August 2013, the circuit court affirmed DCFS' decision.

¶ 3 On appeal, plaintiff argues (1) the circuit court erred in affirming the ALJ's ruling

and (2) the regulatory allegation of the creation of risk of sexual abuse by possession and viewing of child pornography is unconstitutionally vague. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff is the father of two minor children: M.D., born in 2004, and E.D., born in 2005. In April 2012, law-enforcement officers executed a search warrant at plaintiff's residence in search of suspected child pornography. Officers observed evidence that children lived in the house and then contacted the DCFS child-abuse-and-neglect hotline.

¶ 6 In June 2012, DCFS indicated a report of child abuse against plaintiff, concluding credible evidence existed to lead a reasonable person to believe plaintiff had created a substantial risk of sexual abuse by actively acquiring and viewing child pornography in his children's residence. See 89 Ill. Adm. Code 300.Appendix B (Allegation 22, Option D) (2011).

¶ 7 In July 2012, plaintiff filed an administrative appeal, requesting expungement of the indicated report of child abuse. In September 2012, the ALJ held an administrative hearing. Adams County sheriff's sergeant Joseph Lohmeyer testified law-enforcement officials learned child pornography had been downloaded by a computer with an Internet Protocol address that was associated with plaintiff's computer. During an interview with plaintiff, Lohmeyer stated plaintiff changed his account several times regarding the duration, frequency, and number of child-pornography files he had downloaded. Plaintiff stated at first he had been viewing child-pornography files for only three weeks, but he later admitted to viewing it for three years prior to the investigation. Plaintiff told Lohmeyer his purpose in downloading and viewing the files was for research purposes rather than sexual arousal, claiming he wanted to determine whether his children had been victims of abuse. Plaintiff felt the downloaded files were not accessible to the children because he moved the files to a different folder.

¶ 8 Maurice McClean, a child-protection supervisor with DCFS, testified he interviewed plaintiff, who stated he had downloaded and viewed video files of child pornography. Plaintiff stated he was concerned his children, who were not in his care at all times, might be sexually abused and he wanted to know what to look for. McClean found the children to be well cared for, although much of the care had been provided by their grandparents. When asked about the evidence he relied on for the indicated finding, McClean stated plaintiff's admission that he had downloaded and viewed child pornography. The allegation in question is indicated when there is evidence the alleged perpetrator possesses child pornography and has unsupervised access to the children. McClean noted plaintiff downloaded and possessed the pornography and no one supervised his access to the children.

¶ 9 McClean consulted with his supervisor, Marsha Heitz, in April 2012. She agreed with McClean there was insufficient evidence that plaintiff was aroused by the materials he viewed or that he was trying to groom the children for later sexual contacts. Thus, DCFS did not seek to prevent plaintiff from having contact with his children.

¶ 10 Plaintiff's parents testified on his behalf. Both stated plaintiff's children lived in their home, but they had never witnessed either child using plaintiff's computers or viewing pornography.

¶ 11 In October 2012, the ALJ found DCFS had proved allegation No. 22 by a preponderance of the evidence. The ALJ noted that although there was no evidence plaintiff sexually abused the children or shared child pornography with them, he admitted downloading and viewing child pornography on his computer in the home. Further, his "statements to the police were inconsistent and frequently modified, suggesting efforts to hide or minimize information." While plaintiff claimed he was conducting research, the ALJ noted he "never

definitively identified any legitimate research project." The ALJ stated a parent concerned with the possible sexual abuse of his children does not download and view child pornography "but rather seeks assistance from the appropriate mental health, medical or law enforcement professions." The ALJ found DCFS met its burden in this case, stating plaintiff caused child pornography films or images to be present on his computer in the home he shared with his daughters, he had significant access to his children, and the supervision of his access was not monitored or of concern until his viewing of child pornography was discovered.

¶ 12 The ALJ recommended the Director deny plaintiff's request that the indicated report be expunged from the State Central Register. That same month the director of DCFS concurred that the request for expungement be denied.

¶ 13 In November 2012, plaintiff filed a complaint for judicial review in the circuit court. Plaintiff claimed the DCFS decision was erroneous and illegal in that the findings were contrary to the facts and law and unsupported by the evidence introduced at the hearing.

¶ 14 In August 2013, the circuit court held a hearing on the complaint. Plaintiff's counsel argued the term "supervision" in allegation No. 22, option D, should be interpreted to mean supervision of the children's access to the pornographic materials rather than supervision of the person who possessed those materials.

¶ 15 In a written order, the circuit court affirmed the final administrative decision of DCFS. The court found sufficient evidence existed to support DCFS' decision indicating the report of child abuse against plaintiff and denying his request for expungement. The court stated DCFS appropriately relied on plaintiff's interview with police officers, the investigatory file, and testimony adduced at the administrative hearing. The court also found DCFS properly weighed the credibility of the witnesses and any conflicting evidence in issuing its decision indicating the

report of child abuse against plaintiff. The court added the following:

> "Furthermore, the Court rejects the Plaintiff's interpretation of the administrative regulation in 89 Ill. Adm. 300, App. B. To the extent he argues that the requisite supervision identified in Allegation #22, Option D, refers to a child's access to child pornography possessed by an alleged perpetrator, the Court concludes that the Plaintiff's interpretation of the statute is inconsistent with the underlying legislative intent set forth in the Abused and Neglected Child Reporting Act and [DCFS'] administrative regulations. Therefore, as a matter of law, the Court rejects the Plaintiff's request to interpret the administrative regulation inconsistently with the interpretation set forth by [DCFS]."

This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 A. Forfeiture

¶ 18 Initially, we note defendants contend plaintiff forfeited his arguments that DCFS wrongly interpreted allegation No. 22, option D, which is contained within appendix B of section 300 of title 89 of the Illinois Administrative Code (89 Ill. Adm. Code 300.Appendix B (Allegation 22, Option D) (2011)), and that option D is unconstitutionally vague by not making that argument to the ALJ. Further, defendants claim that while plaintiff orally argued before the circuit court that the supervision referred to in option D should be interpreted to mean the possessor's supervision of his children's access to the child pornography, rather than supervision

of his own access to his children, he did not claim option D was unconstitutionally vague.

¶ 19 Defendants point out "issues or defenses not raised before the administrative agency are deemed waived and cannot be raised for the first time on administrative review." *Arvia v. Madigan*, 209 Ill. 2d 520, 526, 809 N.E.2d 88, 93 (2004). However, plaintiff states he was not allowed to present argument in front of the ALJ, and there was no appropriate situation whereby he could argue for the interpretation and unconstitutionality of allegation No. 22, option D. While our supreme court has stated constitutional issues not raised before an agency can be forfeited, even though the agency cannot decide such issues, a facial challenge to a statute or regulation "presents an entirely legal question that does not require fact-finding by the agency or application of the agency's particular expertise." *Arvia*, 209 Ill. 2d at 528, 809 N.E.2d at 94. Moreover, forfeiture "is an admonition to the parties rather than a limitation on [the] court's jurisdiction" and does not prevent this court from considering the merits of plaintiff's arguments in the interests of justice. *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill. 2d 262, 279, 695 N.E.2d 481, 489 (1998); see also *Montalbano v. Department of Children & Family Services*, 343 Ill. App. 3d 471, 475, 797 N.E.2d 1078, 1081 (2003). Accordingly, we will address plaintiff's issues.

¶ 20 B. Statutory Interpretation of Allegation No. 22, Option D

¶ 21 Plaintiff argues the circuit court erred in affirming the ALJ's ruling and interpretation of allegation No. 22, option D. We disagree.

¶ 22 1. *Standard of Review*

¶ 23 In reviewing a final administrative decision, we review the agency's decision and not the circuit court's determination. *Campbell v. Department of Personnel, Secretary of State, State of Illinois*, 2013 IL App (4th) 120610, ¶ 28, 989 N.E.2d 1198. As we are confronted with

interpretations of statutes and regulations, which involve questions of law, our review is *de novo*. *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16, 998 N.E.2d 1227. "Yet even where review is *de novo*, an agency's interpretation of its regulations and enabling statute are 'entitled to substantial weight and deference,' given that 'agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent.' " *Hartney Fuel Oil*, 2013 IL 115130, ¶ 16, 998 N.E.2d 1227 (quoting *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 387 n.9, 925 N.E.2d 1131, 1143 n.9 (2010)).

¶ 24 2. *Abused and Neglected Child Reporting Act*

¶ 25 Under section 2 of the Abused and Neglected Child Reporting Act (Act) (325 ILCS 5/2(a) (West 2012)), DCFS is required to investigate reports of child abuse or neglect to "protect the health, safety, and best interests of the child in all situations in which the child is vulnerable to child abuse or neglect." Upon receipt of a good-faith report of alleged child abuse or neglect, DCFS must conduct a formal investigation into the allegations. 325 ILCS 5/7.4(b)(3) (West 2012). All reports must be categorized as "indicated," "unfounded," or "undetermined." 325 ILCS 5/7.14 (West 2012). An indicated report will be found "if an investigation determines that credible evidence of the alleged abuse or neglect exists." 325 ILCS 5/3 (West 2012). An unfounded report will be found when "it is determined after an investigation that no credible evidence of abuse or neglect exists." 325 ILCS 5/3 (West 2012). A report will also be found to be undetermined where "it was not possible to initiate or complete an investigation on the basis of information provided to [DCFS]." 325 ILCS 5/3 (West 2012).

¶ 26 An individual who is the subject of an indicated report may appeal the report. 325 ILCS 5/7.16 (West 2012). At the administrative hearing, DCFS must prove its finding of abuse

or neglect by a preponderance of the evidence. 89 Ill. Adm. Code 336.100(e)(2) (2000). If the Director elects not to amend or expunge a report, the individual may seek judicial review under the Administrative Review Law (735 ILCS 5/3-101 to 113 (West 2012)). 89 Ill. Adm. Code 336.220(b) (2005).

¶ 27 An "abused child" is defined, in part, as a child whose parent or immediate family member "creates a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function." 325 ILCS 5/3(b) (West 2012). Section 4 of the Children and Family Services Act provides that DCFS has the authority "[t]o make all rules necessary for the execution of its powers." 20 ILCS 505/4 (West 2012). Pursuant to this authority, DCFS has promulgated rules for the enforcement and administration of the Act. 89 Ill. Adm. Code 300.10 to 300.180 (2011).

¶ 28 DCFS has promulgated appendix B, which includes allegation No. 22, "Substantial Risk of Sexual Injury," where "the parent, caregiver, immediate family member, other person residing in the home, or the parent's paramour has created a real and significant danger of sexual abuse." 89 Ill. Adm. Code 300.Appendix B (Allegation 22) (2011). The regulation provides several different courses of conduct that constitute creating a substantial risk of sexual injury to a child. Here, DCFS investigated plaintiff pursuant to option D of allegation No. 22, which provides:

> "A member of the household is suspected of, or known to possess or engage in, the making and/or distribution of child pornography and has significant access to the children and the extent/quality of the supervision is unknown or suspected to be

deficient.

> A member of the household has engaged in child pornography activities outside and/or inside the residence and has significant access to the child and the extent/quality of the supervision is unknown or suspected to be deficient." 89 Ill. Adm. Code 300.Appendix B (Allegation 22, Option D) (2011).

Plaintiff does not challenge DCFS' factual findings that he possessed and viewed child pornography in the home he shared with his children or that he had significant access to the children. Instead, he claims DCFS wrongly interpreted the meaning of allegation No. 22, option D. Plaintiff claims the proper interpretation of the two paragraphs in option D is "that they both refer to the supervision of the children's interaction with the child pornography or child pornography activities and not the household member[']s interaction with the children."

¶ 29 An administrative agency only has the power conferred by statute. *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 362 Ill. App. 3d 652, 655-56, 840 N.E.2d 704, 708 (2005). "An agency may adopt a rule and regulate an activity only insomuch as a statute empowers the agency to do so." *Illinois Bell Telephone*, 362 Ill. App. 3d at 656, 840 N.E.2d at 708.

¶ 30 "Administrative regulations have the force and effect of law and are interpreted with the same canons as statutes. [Citation.] Additionally, administrative agencies enjoy wide latitude in adopting regulations reasonably necessary to perform the agency's statutory duty. [Citation.] Such regulations carry a presumption of validity." *Hartney Fuel Oil*, 2013 IL 115130, ¶ 38, 998 N.E.2d 1227. "[T]he party challenging the validity of a regulation bears the burden of proving its invalidity." *Minifee v. Doherty*, 333 Ill. App. 3d 1086, 1088, 777 N.E.2d

510, 512 (2002).

¶ 31 In the case *sub judice*, plaintiff has failed to carry his burden of proving option D does not apply to his possession and use of child pornography in his children's home. The Act defines an abused child as one whose parent or immediate family member "creates a substantial risk of physical injury to such child by other than accidental means." 325 ILCS 5/3(b) (West 2012). Allegation No. 22, option D is consistent with the plain language of the Act's definition because it addresses the situation in which a parent has created a "real and significant danger of sexual abuse" by, among other things, possessing or engaging in child pornography activities inside the home, while having "significant access to the child and the extent/quality of supervision is unknown or suspected to be deficient." 89 Ill. Adm. Code 300.Appendix B (Allegation 22, Option D) (2011).

¶ 32 The Act charges DCFS with protecting the health, safety, and best interests of children in all situations when the minors are vulnerable to child abuse or neglect. 325 ILCS 5/2 (West 2012). Here, the evidence indicated plaintiff had unfettered access to his children without supervision at the time he was downloading and viewing child pornography. Director Calica determined plaintiff "had significant access to his children and the supervision of his access was not monitored or of concern until *** his child pornography viewing was known." Supervision of a child-pornography possessor's access to children is necessary since the supervising adult could step in to prevent harm if the possessor were to attempt to act out what he had viewed or use the children to create his own collection of child pornography. We find DCFS' interpretation of the regulation is entirely consistent with the purpose of the Act.

¶ 33 Plaintiff contends option D refers to the supervision of the children's interaction with the child pornography and not the household member's interaction with the children.

However, possession of child pornography is a criminal offense. 720 ILCS 5/11-20.1(a)(6) (West 2012). It would be absurd to read option D to require supervision of the children's access to materials that plaintiff is legally prohibited from possessing in the first place. See *Township of Jubilee v. State of Illinois*, 2011 IL 111447, ¶ 36, 960 N.E.2d 550 (stating "[c]ourts are obliged to construe statutes to avoid absurd, unreasonable, or unjust results"). Plaintiff's interpretation fails to prove the invalidity of the regulation, and thus we find DCFS did not err in denying his request for expungement of the indicated report.

¶ 34 C. Vagueness Challenge to Allegation No. 22, Option D

¶ 35 In the alternative, plaintiff argues allegation No. 22, option D, is unconstitutionally vague and any finding by DCFS under this section is a violation of due process. We disagree.

¶ 36 "A statute violates the due process clauses of the United States Constitution or the Illinois Constitution on the basis of vagueness 'only if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts.' " *Stern v. Northwest Mortgage, Inc.*, 179 Ill. 2d 160, 168, 688 N.E.2d 99, 103 (1997) (quoting *People v. Burpo*, 164 Ill. 2d 261, 266, 647 N.E.2d 996, 999 (1995)). "[A] statute is not unconstitutionally vague merely because one can imagine hypothetical situations in which the meaning of some terms might be called into question." *Unzicker v. Kraft Food Ingredients Corp.*, 203 Ill. 2d 64, 95, 783 N.E.2d 1024, 1043 (2002).

¶ 37 Here, the goal of the Act is to protect children from substantial risk of physical and emotional harm. 325 ILCS 5/3 (West 2012). That harm reasonably includes the substantial risk of injury from factors such as a member of the children's household with significant access to the children who possesses or engages in activities involving child pornography, conduct

which is itself a felony. The language of option D identifies the prohibited behavior, the persons involved, and the need for supervision of their access to the children. Thus, the language of option D is sufficiently precise to give notice of what constitutes substantial risk of sexual injury. Accordingly, plaintiff's vagueness challenge is without merit.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the judgment of the circuit court affirming the denial of plaintiff's request for expungement.

¶ 40 Affirmed.