

RENDERED: MARCH 21, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2001-CA-000546-MR

ADAIR'S PEACE OF MIND DAY CARE, LLC

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NO. OO-CI-00959

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH SERVICES

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: COMBS AND McANULTY, JUDGES; AND JOHN D. MILLER, SPECIAL
JUDGE.¹

¹ Senior Status John D. Miller Sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

McANULTY, JUDGE. Adair's Peace of Mind Day Care appeals from an opinion and order of the Boone Circuit Court, which affirmed the final order of the Secretary of the Cabinet for Health Services revoking the operating license of the child-care facility. We affirm.

Peace of Mind Day Care is a relatively small child-care facility owned by Pauline Adair and located in Boone County, Kentucky. Adair purchased the facility, which had previously operated under the name of Fantasyland Day Care Center, on February 1, 1999, and a license was issued on February 4, 1999. As a day care facility licensed by the Cabinet's Division of Licensing and Regulation (L & R) (now the Division of Licensed Child Care), Peace of Mind Day Care was subject to periodic onsite inspections by L & R to ensure that the facility was in compliance with all state and federal regulatory requirements for child day care facilities. See Kentucky Revised Statute (KRS) 199.892-896 and 922 Kentucky Administrative Regulations (KAR) 2:090.²

On February 10, 1999, the Cabinet received an anonymous complaint that Peace of Mind Day Care was understaffed. On February 17, B. J. Short, a Cabinet Surveyor

² All citations to the Kentucky Administrative Regulations are to the version in effect in 1999.

Supervisor, investigated the complaint and issued a Statement of Deficiencies (SOD) based on a violation of 922 KAR 2:120 Section 1, after finding there were seven children at the facility, two of which were infants, and only one staff member. Upon notification by the SOD, Peace of Mind Day Care submitted a Plan of Correction (POC) to remedy the deficiency. See 922 KAR 2:090 Section 2(5)(b).³ Peace of Mind Day Care submitted a POC that was deemed acceptable by L & R.⁴

On March 1, 1999, L & R received a second anonymous complaint that the day care was understaffed⁵ and was serving lunches that did not meet the nutritional requirements of the regulations.⁶ On March 8, 1999, James Skillman, a Cabinet Surveyor, investigated the complaint and substantiated the allegations in addition to finding another violation for not

³ Pursuant to this regulation, facilities receiving a written SOD and are required to submit a written plan for elimination or correction of the regulatory violation to the inspecting agency within ten (10) days of the SOD. The POC should include the dates by which each of the violations would be corrected.

⁴ See 922 KAR 2:090 Section 2(5)(c). Upon receipt of a POC, L & R was required to review the plan and notify the facility in writing of its decision to accept or not accept the plan. A license may be denied, suspended or revoked for failure to meet the regulatory standards. See 922 KAR 2:090 Section 6(a).

⁵ 922 KAR 2:120 Section 1.

⁶ 922 KAR 2:120 Section 2(18)(e)(3).

posting menus.⁷ L & R issued a SOD for the three violations. Peace of Mind Day Care submitted a POC that was deemed acceptable.

On March 18, 1999, L & R received a complaint from the mother of a child at Peace of Mind Day Care alleging it was letting unauthorized persons pick up her child. Skillman visited the facility and determined the allegation was unsubstantiated after speaking with Adair. On April 15, 1999, Skillman conducted a follow-up visit to the day care to determine whether the deficiencies cited in the February and March SODs had been corrected and found that they had been corrected.

On June 22, 1999, L & R received another anonymous complaint that Peace of Mind Day Care did not meet the minimum staff-child ratios, failed to provide separate space for the older and younger children,⁸ and failed to provide a safe and clean environment.⁹ On June 25, 1999, L & R received an anonymous complaint that the day care failed to provide a safe and clean environment because it was dirty and construction was

⁷ 922 KAR 2:120 Section 2(18)(i).

⁸ 922 KAR 2:120 Section 1(a).

⁹ 922 KAR 2:120 Section 5(1)(a).

going on while the children were present. On June 28, 1999, Stacy Smith, a Cabinet Surveyor, conducted an on-site investigation of the two complaints. He found children left unattended, carpet that was so stained and dirty that toddlers were not allowed on the floor, stained walls, a cracked ceiling, filthy and torn linens in cribs, no mattress in a play-pen, no overhead light in the changing area, peeling paint on walls, a 2 x 4 board supporting a sink in the changing area, and utility cords hanging from the ceiling within the reach of children. Smith also observed a general state of disrepair from construction that had been suspended by the contractor, i.e., exposed sheet rock on kitchen walls, missing ceiling tiles, a smoke detector hanging from the ceiling, 15 bags of cement in the kitchen, two opened bags of cement under the food preparation counter, and chemicals sitting on top of the refrigerator. In the play area, Smith saw various pieces of unassembled equipment lying on the grounds in an unsafe condition. Upon examining the records, Smith discovered that none of the records of the six staff members contained criminal record checks, only two had current tuberculosis tests, and no one with current training in CPR/First Aid was on duty that day. On August 24, 1999, Smith issued a SOD listing numerous

deficiencies¹⁰ involving the conditions described above. After missing the ten-day requirement, Adair eventually submitted a POC on September 24, 1999, concerning the deficiencies noted on the June 28 visit.

On October 14, 1999, Smith visited Peace of Mind Day Care as part of an annual relicensing survey and a follow-up on the June 1999 SOD. Most of the deficiencies listed in the June 1999 SOD had been corrected; however, the assembled playground equipment had a cot tied across an open area and there were boards with protruding nails in the play area. A review of the facility's records indicated none of the staff had criminal records checks from the Justice Cabinet as required, two of the staff did not have current tuberculosis tests, and Adair was the only person with a current CPR/First Aid certificate. On November 12, 1999, Smith issued another SOD concerning his October visit listing violations for inadequate supervision, lack of documentation of tuberculosis tests and on criminal records checks, failure to have staff on duty with First Aid training, failure to keep the building in good repair, failure to properly store medication, failure to properly store soiled

¹⁰ 922 KAR Section 1(8)(inadequate supervision); 922 KAR 2:110 Section 2(1)(f)(tuberculosis tests); 922 KAR 2:110 Section 2(1)(e)(criminal records on file); 922 KAR 2:120 Section 5(1)(a)(physical facilities); (FOOTNOTE CONTINUED)

diapers, failure to properly store bottles, failure to post the SOD and POC, failure to maintain a safe play area, and failure to maintain adequate identifying records for the enrolled children. Smith informed Adair that he was concerned about the number of apparent repeat deficiencies and that he would not recommend that the facility be relicensed.

Following her discussion with Smith, Adair spoke with B. J. Short and Connie Payne, the Regional Program Manager, about her perception that Smith was biased. Peace of Mind Day Care submitted a POC challenging several of the listed deficiencies. Short and Payne accepted the POC and decided that Short and another surveyor, James Skillman, would perform the follow-up inspection.

On November 23, 1999, Short and Skillman conducted a follow-up visit. During the visit, they observed a bottle of unlabeled cleaning solution in an area accessible to the children, an exposed light bulb in the bathroom, no tuberculosis test report for two new staff members, a criminal records check not obtained directly from the Justice Cabinet, protruding wires on the top of the fence in the play area, the cot still tied across the playground apparatus, a protective railing missing

922 KAR 2:120 Section 5(2)(a)(grounds); 922 KAR 2:110 Section 3(4)(b)(CPR/First Aid training).

from the playground apparatus, cigarette butts littering the back door area, a large piece of plate glass leaning against the outside of the playground fence, marked and flaking paint on tables and chairs, a stained belt on the changing table, and a dismantled and dirty infant swing. Short considered several of these deficiencies as safety hazards to the children. After discussing the recurring nature of the deficiencies with Payne, Short recommended seeking revocation of Peace of Mind Day Care's license. That recommendation was approved by several supervisory personnel in the Cabinet. On January 14, 2000, Payne notified Adair that the Cabinet intended to initiate action to revoke the facility's license and included a SOD associated with the November 1999 inspection.

On January 26, 2000, the Cabinet notified Adair of its preliminary order to close, stating Peace of Mind Day Care's license was being revoked based on noncompliance with five regulatory provisions: (1) 922 KAR 2:110 Section 1(11)(f), requirement to provide for the health, safety and comfort of the children; (2) 922 KAR 2:110 Section 2(1)(f), maintenance of copy of results of a negative tuberculosis skin test or chest x-ray for each employee; (3) 922 KAR 2:110 Section 2(1)(1), maintenance of criminal record check obtained directly from Justice Cabinet of employees with supervisory or disciplinary authority over children; (4) 922 KAR 2:120 Section 5 (2)(a),

requirements for safe, clean outdoor play area; and (5) 922 KAR 2:120 Section 5 (3)(a), requirement for clean and well-maintained equipment and furnishings. L & R informed Adair that she could appeal the decision and request a hearing pursuant to 922 KAR 2:090 Section 7, which she did. The notification included a copy of a SOD issued concerning deficiencies found in the November 1999 inspection.

On March 28, 2000, a hearing was conducted on the preliminary revocation order with both parties being represented by counsel. Witnesses for L & R included: B. J. Short; Stacy Smith; and James Skillman. The witnesses for Peace of Mind Day Care included Pauline Adair; Beth Marksberry, a parent of a child enrolled at the facility; Sue Rommel, an early childhood education specialist; and Pat O'Donnell, Commercial Loan Officer at First National Bank. Adair testified that she had corrected all of the deficiencies listed in the SOD from the November 1999 inspection. She stated that she has made extensive repairs and improvements in the facility, which had been delayed because of difficulty in obtaining financing. Rommel testified that based on her inspection of the facility, it was appropriate for young children. She admitted on cross-examination that the child-care regulations served to protect the children involved in such operations and it was important for operators to be conversant with and comply with the regulations. L & R's witnesses

testified to their inspections and the SODs they had issued. During the hearing, the hearing officer denied Peace of Mind Day Care's objection to evidence or testimony on any deficiencies other than those listed in the preliminary order to close.

On June 28, 2000, the hearing officer issued her findings of fact, conclusions of law, and recommendation that the Cabinet's decision to revoke Peace of Mind Day Care's license be affirmed. The hearing officer noted undisputed evidence of noncompliance with the five regulatory provisions cited in the preliminary order to close and stated many of the violations were recurring deficiencies. On July 14, 2000, Peace of Mind Day Care filed exceptions to the hearing officer's opinion challenging various factual findings and the overruling of its objection to evidence of prior deficiencies. On July 17, 2000, the Secretary of the Cabinet for Health Services entered a final order adopting and affirming the hearing officer's decision.

On August 14, 2000, Peace of Mind Day Care filed a petition in the circuit court seeking a stay and reversal of the Cabinet's final order. See KRS 13B.140(1). On February 15, 2001, the circuit court entered an opinion and order affirming the Cabinet's final order based on its holding that the agency's decision was not arbitrary. This appeal followed.

Peace of Mind Day Care challenges the trial court's decision by alleging the Cabinet's action was arbitrary on both procedural and substantive grounds. It is well established that judicial review of administrative agency decisions is limited to determining whether the agency's action was arbitrary. American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964); Burch v. Taylor Drug Stores, Inc., Ky. App., 965 S.W.2d 830, 835 (1998). Whether an agency action is arbitrary is a question of law. See Board of Education of Ashland v. Jayne, Ky., 812 S.W.2d 129, 131 (1991). In determining arbitrariness, the reviewing court looks at three factors: (1) whether the agency acted within its statutory powers; (2) whether the parties affected by the agency order received procedural due process; and (3) whether the agency's action is supported by substantial evidence. American Beauty Homes, 379 S.W.2d at 456; Board of Adjustments, Bourbon County v. Brown, Ky. App., 969 S.W.2d 214, 216 (1998). Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." Owens-Corning Fiberglass v. Golightly, Ky., 976 S.W.2d 409, 414 (1998); Burton v. Faster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002). An appellate court should not engage in a de novo review of the evidence or substitute its own judgment for that of an agency on factual

issues even though there may be contrary or conflicting evidence. Urella v. Kentucky Bd. of Medical Licensure, Ky., 939 S.W.2d 869, 873 (1997); Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642-43 (1994). "If the court finds the correct rule of law was applied to facts supported by substantial evidence, the final order of the agency must be affirmed." Commonwealth, Cabinet for Human Resources v. Bridewell, Ky., 62 S.W.3d 370, 373 (2001). The administrative agency, acting as the trier of fact, determines the credibility of witnesses and the weight of the evidence, not the reviewing court. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972); Johnson v. Galen Health Care, Inc., Ky. App., 39 S.W.3d 828, 832 (2001).

Peace of Mind Day Care maintains that the hearing officer erred in admitting evidence on alleged deficiencies at the facility other than those specifically cited in the preliminary order to close. First, it argues that admission of this evidence exceeded the authority of the agency. It asserts that by relying on past deficiencies in part as grounds to revoke the facility's license, the Cabinet in effect informally promulgated a regulation without comporting with the procedural and substantive requirements of KRS Chapter 13A. See, e.g., KRS 13A.130(1)(2).

First, it appears that this argument was not properly preserved. Although Peace of Mind Day Care objected to evidence concerning prior deficiencies several times throughout the administrative hearing, it never articulated this ground in support of its position. "Failure to raise an issue before an administrative body precludes a litigant from asserting that issue in an action for judicial review of an agency's action." Personnel Board v. Heck, Ky. App., 725 S.W.2d 13, 17 (1986). See also Urella, 939 S.W.2d at 873. In addition, failure to raise an issue before the trial court precludes review of that issue. See, e.g., Heck, supra; Abuzant v. Shelter Ins. Co., Ky. App., 977 S.W.2d 259, 262 (1998). This argument was raised for the first time in the appellant's brief before this Court. Thus, it was not properly preserved for judicial review.

In any event, the contention that the Cabinet's reliance on the entire body of cited regulatory deficiencies to support its revocation action as being beyond its statutory and regulatory authority is without merit. Under KRS 199.896, the Cabinet has authority to promulgate rules and regulations concerning the licensing and standards of care and service for child-care centers. Under 922 KAR 2:090 Section 6(1)(a), the Cabinet may deny, suspend, or revoke a license for failure to meet the standards of the administrative regulations. If one of the grounds for revocation exists and the condition creates an

immediate danger to the children in care, the Cabinet may suspend or revoke a license immediately. 922 KAR 2:090 Section 6 (3). "Immediate danger" includes a situation or condition in which children are likely to be harmed before appropriate corrective action can be taken as evidenced by a continuing or recurring condition. 922 KAR 2:001 Section 1(9)(a) and (b). Peace of Mind Day Care's assertion that utilization of past deficiencies is neither contemplated nor set forth by the regulations as grounds to revoke a license is erroneous.

Peace of Mind Day Care also challenges the use of prior deficiencies on constitutional due process grounds. It protests that under regulatory procedure calling for the issuance of a statement of an SOD and submission of a POC, licensees are not provided an opportunity to challenge the alleged violations. Peace of Mind Day Care states: "The lack of an opportunity to be heard prior to being required to submit a plan of correction for alleged violations is contrary to Adair's right to due process, especially if past violations can be used to show an alleged history of noncompliance, and the result is an arbitrary exercise of power over Adair's (sic) in violation of the 14th Amendment to the United States Constitution and Section 2 of the Kentucky Constitution."

Again, this issue was not properly preserved. While a party need not raise a constitutional issue before an

administrative agency, failure to raise this issue before the trial court precludes appellate review. See Taxpayer's Action Group of Madison County v. Madison County Bd. of Elections, Ky. App., 652 S.W.2d 666 (1983)(involving due process challenge); Burgess v. Taylor, Ky. App., 44 S.W.3d 806, 813 (2001).

Nevertheless, Peace of Mind Day Care also misconstrues the applicable statutes and regulations. Under KRS 199.896(5), KRS Chapter 13B, and 922 KAR 2:090 Section 7, a licensee is provided notice and a right to a hearing prior to revocation of a license.¹¹ The Cabinet bears the burden of persuasion on the issue of revocation by a preponderance of the evidence. See, e.g., KRS 13B.090(7).

In this case, the Cabinet informed Peace of Mind Day Care of its decision to revoke the facility's license in a preliminary order to close that cited violations of five administrative regulations. Attached to the preliminary order was the SOD issued by Short in November 1999. While Peace of Mind Day Care objected to any evidence involving deficiencies other than those listed in the November 1999 SOD, the hearing officer properly overruled the objection. The SOD itself stated

¹¹ The Cabinet may immediately suspend a license without a hearing where an immediate threat to public health, safety, or welfare exists, but the agency must provide an immediate emergency hearing with a right to appeal and judicial review. See KRS 13B.125.
(FOOTNOTE CONTINUED)

that two of the deficiencies were recurring deficiencies. As noted earlier, under the day care regulations, a license may be revoked for violation of the regulatory requirements and recurring conditions may be considered. Peace of Mind Day Care was given written notice of all the deficiencies and was allowed to challenge and cross-examine the surveyors who issued the SODs at the hearing before an impartial hearing officer. The SODs and POCs were not treated as an irrefutable presumption and were challenged at the hearing by Peace of Mind Day Care by presentation of its own evidence and cross-examination of the Cabinet's witnesses. Consequently, we reject Peace of Mind Day Care's position that it was not provided sufficient procedural due process.¹²

Peace of Mind Day Care also claims that the administrative regulation authorizing the suspension and revocation of a license is arbitrary in that it provides no standards for Cabinet action and therefore violates constitutional due process. It asserts that the lack of standards for determining which incidents justify suspension as opposed to revocation results in allowing unfettered discretion

¹² We note that the current version of KRS 199.896 (effective July 14, 2000) provides for informal dispute resolution with respect to deficiency citations.

by the Cabinet. Appellant's argument fails to recognize that administrative agencies are properly accorded a significant degree of discretion and that the Cabinet's discretion is restrained by the various provisions setting forth the specific regulatory standards governing operation of day care facilities. In addition, the Cabinet's exercise of discretion is subject to review by the courts to see that it acts within its statutory authority. The presence of agency regulations, the provision for a full due process hearing, and the right to judicial review provide sufficient safeguards to prevent an abuse of discretion by the Cabinet. See, e.g., Kentucky Commission on Human Rights v. Fraser, Ky., 625 S.W.2d 852, 854-55 (1981); Jones v. Cabinet for Human Resources, Ky. App., 710 S.W.2d 862, 865 (1986).

Finally, Peace of Mind Day Care maintains that the Cabinet's decision was arbitrary and capricious because it was not supported by substantial evidence and the deficiencies cited in the preliminary order to close were not sufficient to justify revocation. This argument, however, is predicated on consideration of only the five deficiencies cited in the November 1999 SOD. As discussed earlier, this proposition is erroneous and the Cabinet and circuit court properly considered Peace of Mind Day Care's history of deficiencies and their recurring nature. The evidence indicated that Peace of Mind Day Care had been cited for noncompliance with the regulatory

standards involving lack of supervision, the physical condition of the facility, and records keeping. Sue Rommel testified that it was important that day care operators comply with the regulatory requirements and correct any deficiencies quickly. She also agreed that the requirement for the maintenance of records on criminal records checks and tuberculosis tests for staff members was very important to protect the health and safety of the children. Pauline Adair admitted violating the records keeping regulations. While Peace of Mind Day Care eventually corrected most of the deficiencies, it was dilatory in many instances. B. J. Short testified that she did not accept Stacy Smith's recommendation to revoke Peace of Mind Day Care's license in order to give Adair another opportunity to comply with the standards. Only after finding additional and repeat deficiencies in the November 1999 inspection did the Cabinet decide to seek revocation. Despite Peace of Mind Day Care's assertions, several of the deficiencies implicated the potential health and safety of the children. Given the record, we agree with the circuit court that the hearing officer's decision was supported by substantial evidence and the Cabinet's decision was not arbitrary or an abuse of discretion.

For the foregoing reasons, we affirm the opinion of the Franklin Circuit Court.

ALL CONCUR.

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