SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

In the Matter of the Application of
JEFFREY ROSENVOLD,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

-against-

GLADYS CARRION, as Commissioner of the New York State Office of Children and Family Services, and **JANET DeMARZO**, as Commissioner of the Suffolk County Department of Social Services,

Respondents.

INDEX NO.: **2234-2009**

MOTION SEQ NO: 01 - MD
ORIG. MOTION DATE: 02/05/09

FINAL SUBMIT DATE: 07/07/10

UPON the following papers numbered 1 to 13 read on this Order to Show Cause:
- ;Petitioner's Order to Show Cause (Papers 1-3);
- Respondent NEW YORK's Answer & Return (Papers 4-7);
- Respondent SUFFOLK's Opposition & Answer (Papers 8-11);
- Petitioner's Reply (Papers 12-13);

it is,

ORDERED, that the application of Petitioner is hereby denied to the extent set forth herein below.

Petitioner has moved this Court for a judgment, pursuant to Article 78 of the CPLR, annulling and setting aside the determination of Respondents CARRION and DeMARZO, and for such other and further relief as may seem just and proper.

Petitioner is a resident of Suffolk County and resides with his wife and two children, C and J. Respondent CARRION is the Commissioner of the New York State Office of Children and Family Services, an agency of the State of New York. Respondent DeMARZO was the Commissioner of the Suffolk County Department of Social Services, an agency of the County of Suffolk, State of New York.

Petitioner challenges the action of Respondent DeMARZO, in her official capacity, wherein, acting through the Office of Child Protective Services, it was determined that allegations of child neglect and/or maltreatment against Petitioner were founded. Petitioner further challenges the actions of Respondent CARRION, in her official capacity, wherein it was found, after a hearing, that the allegations of child neglect and/or maltreatment against Petitioner were substantiated. Petitioner challenges said actions of Respondents pursuant to CPLR 7803 (3) and (4).

On or about December 12, 2005, a social worker at Ronkonkoma Junior High School made a report to the New York State Central Register of Child Abuse and Maltreatment, alleging that C, a student at that school, then fourteen years old, had a bruise on her upper left arm. As a result of these allegations, Child Protective Services of the Suffolk County Department of Social Services ("CPS") began an investigation of Petitioner concerning allegation of "Lacerations, Bruises and Welts' as to C, "Inadequate Guardianship," as to C and J, and "Parent's Drug/Alcohol Misuse" as to C and J.

James Feely of CPS was assigned to investigate these allegations. As a result of the investigation, Feely concluded that the allegations of "Parent's Drug/Alcohol Misuse" were unsubstantiated, but the allegations of "Inadequate Guardianship" and "Lacerations, Bruises and Welts" were substantiated. As a result, the investigation was deemed "indicated" and a report finding Petitioner culpable for child maltreatment was filed with the Central Register.

Petitioner, through his attorney, disputed these findings and requested that the Central Register amend the report to "unfounded," and seal the record. By letter dated June 19, 2006, the State Central Register refused to amend the report to unfounded, and Petitioner was granted a hearing pursuant to NY Social Services Law §422.8(b).

The hearing was held on July 28, 2008 at the Suffolk County Department of Social Services before Florence Monwe, an Administrative Law Judge acting on behalf of Respondent CARRION. The purpose of the hearing was to determine whether CPS proved, by a fair preponderance of the evidence, that Petitioner committed the acts of maltreatment alleged in the report, and if so, whether those alleged acts are reasonably related to employment by a child care agency, to the adoption of a child, or to the provision of foster care.

Laurene Molz-D'Angelo, a Senior Caseworker for CPS, was the only witness to testify on behalf of SUFFOLK. Molz-D'Angelo had not participated in any of the investigation of this matter. She admitted on cross-examination that she never observed any of the alleged bruising, nor did she talk to C or any other witnesses. Instead, Molz-D'Angelo submitted into evidence the reports and documents generated by caseworker Feely. In lieu of Feely's testimony, the Judge allowed Molz-D'Angelo to testify as to the sum and substance of Feely's notes of his investigation, and then admitted his notes into evidence.

Molz-D'Angelo, testifying from Feely's notes, states that Feely's investigation, based upon conversations with C, disclosed that on December 9, 2005, Petitioner and his wife were involved in a verbal dispute which C observed. Feely alleged that C told him Petitioner "wrapped a cable" around her mother's arm, and that C intervened to help her mother. It was at that time, According to Feely, that Petitioner grabbed C by her arm and dragged her into her bedroom. Feely documented bruises on C's upper arm which he attributes to Petitioner.

At the hearing, C testified on Petitioner's behalf, stating that on the night of December 9, 2005, she was in her bedroom and her parents were discussing the options for her continued treatment. She became angry and left her room and wanted to intervene in the conversation. Her parents told her to go back to her room, but she refused. She eventually started to get hysterical and became physically aggressive toward her father. She further admitted that she had been suffering from emotional problems and that around the time of the incident, she had been taking medication for depression that made her suicidal. She further testified that her father was not physically abusive toward her, and that the bruise she had on her arm was a result of wrestling with her younger brother, and was not inflicted by Petitioner. Courtney further stated that the story she told

CPS was a fabrication, and that she made the story up because she was angry with her father.

Feely also interviewed Petitioner's wife (Sherri), who, according to Feely's report, admitted that she and her husband were arguing on the night of December 9, 2005, but denied that the argument became physical. She further stated that Petitioner does not drink excessively. Moreover, she advised Feely that C had been prescribed the anti-depressant Lexipro, but was taken off the medication after a suicide attempt wherein she swallowed a bottle of medicine.

Sherri also testified at the hearing that on December 9, 2005, that she and Petitioner were having a verbal argument regarding the escalation of C's misbehavior and whether or not she should be taken off of her medication, or otherwise have the medication switched. J was not home at the time of the discussion and C was in her bedroom. At some point, Sherri testified, C left her bedroom and came into the room where her parents were, and attempted to intervene in the discussion. Petitioner asked C to go back to her room, and C became enraged, screaming at Petitioner and trying to strike him.

Sherri further testified that Petitioner attempted several times to ask C to go to her room, and it was only when C became physically abusive and posed a danger both to Petitioner and to herself, that Petitioner was forced to restrain her. Sherri testified that Petitioner did not grab C violently, but rather employed the minimal amount of force necessary to prevent C from causing injury to herself and to guide C into her bedroom, in an attempt to diffuse the situation and calm C down.

Petitioner also testified on his own behalf, and his testimony was substantially the same as his wife's, adding that at the time of the incident, he felt C was a danger to herself as well as a danger to him. Petitioner further testified that as a result of these allegations, he was subjected to an investigation by the New York City Police Department, and as a result of that investigation, was cleared of any wrongdoing.

Feely's notes also indicate that he interviewed Petitioner's mother, Jean Rosenvold (Jean), who advised that she and her husband live across the street from Petitioner. Jean told Feely that Petitioner neither drank excessively nor was violent towards his wife or any other family member, stating "he would never do that to his family." Jean also stated that C had been exhibiting behavioral problems over issues such as her curfew and the way she dresses.

Feely interviewed Petitioner's brother, James Rosenvold (James), who lives nearby and has a good relationship with both C and J. James told Feely that he has never seen Petitioner drinking excessively or being physically abusive towards his wife. He further advised that C had been rebelling recently.

Additionally, there was a second caseworker, Pamela Hammond, who also participated in the investigation. Hammond apparently spoke to C's treating psychologist, who confirmed that C was depressed and had attempted suicide in the past. The psychologist also advised that C "has the capacity to not always tell the truth" and further advised that C has lied in some of their sessions.

By Decision dated September 19, 2008, the Bureau of Special Hearings upheld the determination of the CPS.

Petitioner argues that his right to confront witnesses against him, as due process mandates, was violated when, in lieu of Feely's testimony, the Judge allowed Molz-D'Angelo's hearsay testimony as to the sum and substance of Feely's notes of his investigation, and then admitted such notes into evidence. Petitioner relies

on ***In Re Robert M. Erdman v Hollis S. Ingraham***, 28 AD2d 5, which states, "it is well settled that a fair hearing on the administrative level requires that a party be given the opportunity of cross-examination of witnesses giving material testimony which may be used against him."

However, as stated so poignantly in ***In the Matter of George Tsakonas v Michael Dowling***, 227 AD2d 729, and as is the case here,

> ...petitioner's reliance upon ***Matter of Erdman v Ingraham*** (28 AD2d 5), a case decided on the basis of the subsequently repudiated "legal residuum rule" (***300 Gramatan Ave Assocs v State Div of Human Rights***, 45 NY2d 176, 180. Under the governing standard now in effect, hearsay evidence, if sufficiently believable, relevant and probative, may constitute substantial evidence (*see*: ***CPLR 7803 (4), Matter of Gray v Adduci***, 73 NY2d 741, 742; ***People ex rel Vega v Smith***, 66 NY2d 130, 139, ***Matter of Anderson v Bane***, 199 AD2d 708, 710).

Petitioner further argues that the evidence presented against him at his hearing consisted solely of hearsay evidence, and is thus not supported by substantial evidence, and so, again, is a violation of due process. Petitioner relies on a 1916 case, ***Carroll v Knickerbocker Ice Company***, 218 NY 435, in which the Court held, "[t]here must be in the record some evidence of a sound, competent and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by (the) court."

In more recent cases, such as ***In the Matter of Ronald A Scaccia, v Raymond P Martinez,*** 9 AD3d 882, the Courts have consistently found,

> ...contrary to the contention of petitioner, he was not deprived of his due process rights or his right of confrontation. Hearsay evidence is admissible in administrative hearings (*see:* ***Matter of Danielle G v Schauseil***, *292* AD2d 853, 738 NYS2d 913 [2002], ***Matter of Rivera v New York State Racing & Wagering Bd***, 201 AD2d 922, 607 NYS2d 772 [1994], ***Matter of Leon's Collision Shop v Adduci***, 167 AD2d 986, 562 NYS2d 316 [1990]), and such evidence may serve as "the basis of an administrative determination" without violating those rights (***Matter of Gray v Adduci***, 73 NY2d 741, 742, 532 NE2d 1268, 536 NYS2d 40 [1988]; *see generally:* ***Matter of Robert OO v Dowling***, 217 AD2d 785, 786, 629 NYS2d 494 [1995], *affd* 87 NY2d 1043, 666 NE2d 1052, 644 NYS2d 139 [1996], ***Matter of Prodromidis v McCoy***, 292 AD2d 769, 770, 738 NYS2d 630 [2002], ***Matter of St. Lucia v Novello***, 284 AD2d 591, 593, 726 NYS2d 488 [2001], ***Matter of O'Hara v Brown***, 193 AD2d 564, 565, 598 NYS.2d 207 [1993]).

Further, in ***New York ex rel Reginald Walker v New York State Board of Parole***, 98 AD2d 33; the Court notes that "the legal residuum rule of ***Matter of Carroll v Knickerbocker Ice Co (218 NY 435, 440)***..., has been abrogated by the Court of Appeals (***Matter of Eagle v Paterson***, 57 NY2d 831, 833, ***300 Gramatan Ave Assoc v State Div of Human Rights***, 45 NY2d 176, 180)."

Additionally, ***In the Matter of Anderson v Bane***, 199 AD2d 708, 606 NYS2d 339 the Court explains, "if the hearsay is 'believable, relevant, and probative', it alone may constitute a sufficient basis for the

administrative agency's determination (*see*, ***Riley v Schles***, 185 AD2d 437, 438, 585 NYS.2d 627, ***Matter of Harry's Chenango Wine & Liq v State Liq Auth of NY***, 158 AD2d 804, 805, 550 NYS2d 951)."

The Court continued, "nor do we find respondents' reliance on these out-of-court statements to have deprived petitioner of his right to cross-examine the witnesses against him. Petitioner could have subpoenaed the [witnesses], for this purpose... having chosen not to do so, it ill-behooves petitioner to now complain that the failure of these individuals to appear violated his due process rights (*see*, ***Matter of Lewis v Chesworth***, *135* AD2d 995, 996, 522 NYS2d 717, *lv denied* 71 NY2d 805, 529 NYS2d 276, 524 NE2d 877)" (see: ***Bane***, *supra.*).

It should be noted that it is well settled law in the State of New York that a Court may not substitute its own judgment for that of a reviewing board (*see*: ***Janiak v Planning Board of the Town of Greenville***, 159 AD2d 574 [2 Dept], *appeal denied*, 76 NY2d 707 [1990]; ***Mascony Transport and Ferry Service v Richmond***, 71 AD2d 896 [2 Dept 1979], *aff'd*, 49 NY2d 969 [1980]). Therefore, if the decision rendered by the reviewing board is within the scope of the authority delegated to it, the Court may not interfere and annul it, unless said decision is illegal, arbitrary, or an abuse of discretion (see ***Fuhst v Foley***, 45 NY2d 441, ***Miller v Zoning Board of Appeals of the Town of East Hampton***, 276 AD2d 633), the Bureau of Special Hearings's decision will be sustained if it has a rational basis and is supported by substantial evidence (see ***Miller***, supra).

If Respondent's decision on the hearing was based on admissible evidence, and if such decision was not illegal, arbitrary, or an abuse of discretion, such decision will be upheld.

Here, the Court is constrained to find that there has been no violation of Petitioner's due process rights. Respondent's decision to allow into evidence, in lieu of Feely's testimony, Molz-D'Angelo's testimony as to the sum and substance of Feely's notes of his investigation, is a permissible allowance. Further, all evidence presented against Petitioner at the hearing consisting solely of hearsay evidence is also permissible. Moreover, Petitioner could have subpoenaed the witnesses in question, but does not do so. Finally, Respondent may examine and weigh all evidence and determine which evidence is more credible, whether given under oath or admitted as evidence in Feely's report.

Upon review of the application request, the hearing decision is within the scope of the authority delegated to the Bureau of Special Hearings, and same could rationally conclude, based on the submitted evidence, that a report finding Petitioner culpable for child maltreatment was substantiated.

ORDERED, that the Petitioners' application for a judgment pursuant to Article 78 of the CPLR annulling and setting aside the determination of Respondents GLADYS CARRION and JANET DEMARZO is hereby denied as set forth against the respondent.

Dated: **Riverhead, New York**
September 13, 2010

HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

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