SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ERIKA M. EDWARDS** **PART 10M**

Justice

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In the Matter of the Application of KENNETH W.,

Petitioner,

- v -

SUZANNE MILES-GUSTAVE, in her capacity as Acting Commissioner of the NEW YORK STATE OFFICE OF CHILDREN AND FAMILY SERVICES; and JESS DANNHAUSER, IN HIS CAPACITY as Commissioner of the NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

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INDEX NO. 451351/2023

MOTION DATE 06/05/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 37

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, the court denies Petitioner Kenneth W.'s Verified Petition and dismisses it as against Respondents Suzanne Miles-Gustave ("Miles-Gustave"), in her capacity as Acting Commissioner of the New York State Office of Children and Family Services ("OCFS"), and Jess Dannhauser ("Dannhauser"), in his capacity as Commissioner of the New York City Administration for Children's Services ("ACS") (collectively, "Respondents").

Petitioner brought this Article 78 proceeding against Respondents seeking an order vacating and annulling Respondent Miles-Gustave's determination, dated February 16, 2023, that denied Petitioner's request to amend his record from indicated to unfounded, directing her to amend and seal Petitioner's record in the Statewide Central Register of Child Abuse and Maltreatment ("SCR") and directing Respondent Dannhauser to similarly amend the records of the report maintained by ACS.

The main issue in this proceeding is whether the amendment to Social Services Law ("SSL") § 422(8)(b)(ii)(B), which became effective as of January 1, 2022, requiring OCFS to amend an SCR report from indicated to unfounded when a Family Court Act ("FCA") Article 10 petition is dismissed, applies to Petitioner's administrative appeal of his indicated SCR report, filed prior to the enactment date, when his FCA Article 10 petition was dismissed prior to the enactment date, but his administrative hearing and the determination both took place after the enactment date.

The court determines that the statutory amendment's irrebuttable presumption does not apply to Petitioner's case since he filed his request for the amendment of his SCR report to unfounded, which initiated his administrative appeal, prior to the enactment date of the statutory amendment. Therefore, OCFS's determination denying Petitioner's request to amend his SCR report and to seal it was not arbitrary and capricious, nor affected by an error of law.

In a previous decision and order, dated August 18, 2023, filed as NYSCEF Doc. No. 34, the court granted Petitioner's request for a permanent anonymous caption and directed the parties to redact any personally identifying information contained in the records filed with the court which could identify Petitioner, his family, or any other cases related to the allegations contained in the indicated report.

On November 25, 2020, a report was filed with SCR alleging maltreatment by Petitioner of his child, K.W. The report alleged in substance that Petitioner was intoxicated while he was the sole caregiver of K.W. during a trip to Pennsylvania. Petitioner was found to be impaired by alcohol and while he was packing the car to return home, the car rolled back and pinned K.W. between the car's door and body. Petitioner was arrested and charged with driving under the

influence and endangering the welfare of a child. In February 2022, Petitioner pled guilty to both charges and was sentenced to 24 months of probation.

ACS investigated the report and indicated the report for inadequate guardianship and drug/alcohol misuse based on its finding that the report was substantiated by some credible evidence. By letter, dated August 5, 2021, Petitioner requested an administrative review of the indicated report. OCFS determined that the allegations of maltreatment were supported by a fair preponderance of the evidence, that the allegations were relevant and reasonably related to childcare and on October 27, 2021, OCFS issued notice that it decided to retain the indicated report.

On December 1, 2020, a FCA Article 10 neglect petition was filed against Petitioner in Queens County Family Court. Over the next several months, Petitioner completed 12 weeks of an alcohol education program, 12 weeks of a parenting skills program and another parenting skills course. On July 29, 2021, the Family Court granted Petitioner an adjournment in contemplation of dismissal ("ACD"), without a hearing, on the condition that Petitioner cooperate with ACS supervision and visits, refrain from being under the influence of intoxicants in K.W.'s presence, cooperate with reasonable referrals for services and sign authorizations so ACS can monitor Petitioner's compliance with such services. Petitioner complied with the conditions and on August 27, 2021, the Family Court dismissed the Article 10 petition.

Following the enactment of the statutory amendment, an administrative fair hearing was conducted on May 23, 2022, where evidence was presented and Petitioner was represented by counsel. Petitioner argued in substance that the irrebuttable presumption applied and that OCFS was required to amend the SCR report to unfounded under SSL § 422(8)(b)(ii).

OCFS issued its Determination After Hearing, dated February 16, 2023, and found that ACS demonstrated by a fair preponderance of the evidence that Petitioner committed maltreatment. However, it found that the maltreatment was not relevant and reasonably related to childcare, primarily because of the courses Petitioner completed and the efforts that he made to address his issues subsequent to his arrest. Therefore, OCFS denied Petitioner's request to amend and seal his SCR report, but it precluded disclosure of the report to provider and licensing agencies under SSL § 424-a.

In his Article 78 Verified Petition, Petitioner alleges in substance that the determination is arbitrary and capricious and affected by an error of law. Petitioner argues in substance that the amendment to the Social Services Law § 422(8)(b)(ii)(B), which was in effect at the time of the hearing and decision, requires OCFS to amend an "indicated" report to "unfounded" when a family court petition containing the same allegations is dismissed. Petitioner further argues in substance that OCFS's administrative directive that stated in substance that it will only apply the new law to administrative appeals which begin after the legislation went into effect, incorrectly determines that the administrative appeal begins on the date when the subject requests an amendment of his or her SCR report and does not begin on the date that the hearing takes place, or when the decision is rendered.

Respondents oppose the Petition and argues in substance that the determination was not arbitrary and capricious and not an error in law. Respondents argue in substance that the determination was rationally based and consistent with the applicable law in effect at the time the administrative appeal began. Respondents further argue that OCFS did not err by declining to apply the irrebuttable presumption to Petitioner's administrative appeal because it was commenced before the statutory amendment's effective date.

Prior to January 1, 2022, reports received by the SCR were "indicated" by the appropriate CPS agency when an investigation determines that "some credible evidence of the alleged abuse or maltreatment exists" (Social Services Law § 412[7]). After January 1, 2022, the standard changed and reports were "indicated" if the investigation determines that there was "a fair preponderance of the evidence" (id.). Respondents explained that the amendments imposed additional obligations on OCFS and the CPS agency where there has been a petition filed in New York State Family Court against the subject of the report, pursuant to FCA Article 10 alleging abuse or neglect on the basis of the same conduct.

Respondents further argue in substance that OCFS interpreted the statutory amendments to the SCR administrative appeal process, which includes the application of the irrebuttable presumption in SSL§ 422(8)(b)(ii)(B), to apply prospectively to appeals commenced on or after January 1, 2022, the effective date of the amendments. Respondents argue that an appeal of an indicated report is commenced when the subject requests that the report be amended to unfounded and sealed. Respondents further argue that since Petitioner filed his request for the administrative appeal prior to the enactment date, he is not entitled to the irrebuttable presumption and OCFS correctly applied the current law and denied Petitioner's request to amend his report to unfounded.

In an Article 78 proceeding, the scope of judicial review is limited to whether a governmental agency's determination was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law (*see* CPLR § 7803[3]; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]; and *Scherbyn v BOCES*, 77 N.Y.2d 753, 757-758 [1991]). In reviewing an administrative agency's determination, courts must ascertain whether there is a rational basis for the agency's action or whether it is arbitrary and

capricious in that it was without sound basis in reason or regard to the facts (*Matter of Stahl York Ave. Co., LLC v City of New York*, 162 AD3d 103, 109 [1st Dept 2018]; *Matter of Pell*, 34 NY2d at 231). Where the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (*Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010]). When a court reviews an agency's determination it may not substitute its judgment for that of the agency and the court must confine itself to deciding whether the agency's determination was rationally based (*Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 [1st Dept 1988]).

Furthermore, an agency is to be afforded wide deference in the interpretation of its regulations and, to a lesser extent, in its construction of the governing statutory law, however an agency cannot engraft additional requirements or assume additional powers not contained in the enabling legislation (*see Vink v New York State Div. of Hous. and Community Renewal*, 285 AD2d 203, 210 [1st Dept 2001]).

Here, the court agrees with Respondents that OCFS's interpretation of the application of the statutory amendment is reasonable, rationally based, and consistent with the statute, intent of the legislators and controlling legal authority. It is not arbitrary and capricious, nor an error in law. Therefore, the court defers to OCFS's determination in this matter.

It is clear that the entire process was overhauled and the enactment date was significantly delayed. Therefore, it is reasonable that the legislators intended for all steps in the administrative appeal process to be initiated subsequent to the statutory enactment date for the irrebuttable presumption to apply. In cases where the request for the amendment was made prior to the

enactment date, the administrative appeal process is deemed to have begun as of this date and the irrebuttable presumption does not apply.

Petitioner relies upon *Jeter v. Poole*, in support of his argument that the statutory amendment and irrebuttable presumption applies as of the date of the fair hearing or the OCFS determination (*Jeter v Poole*, 206 AD3d 556 [1st Dept 2022]). However, since the request for the amendment, the fair hearing and the OCFS determination all occurred prior to the enactment date, the court did not determine the exact date when the administrative appeal actually began. Additionally, leave to appeal the decision was granted. However, as noted in *Jeter v Poole*, "[a] statute is presumed to apply only prospectively and will not be given retroactive effect unless the language expressly or by necessary implication requires it" (*id*. at 558 [internal citations and quotations omitted]).

The court agrees with the decisions relied upon by Respondents, *Woodley v. Poole*, and *Portocarrero v. Poole*, where this court denied petitioners' requests to amend their SCR reports from indicated to unfounded and for them to be sealed because their initial administrative appeals were filed prior to the enactment of the statutory amendments, even though their fair hearings were conducted subsequent to the enactment of the statutory amendment (*Woodley v Poole*, Sup Ct, NY County, March 20, 2023, Engoron, J., index No. 452183/2022; and *Portocarrero v Poole*, Sup Ct., NY County, April 14, 2023, Kelley, J., index No. 452958/2022).

The court finds that if it were to require OCFS to apply the statutory amendment's irrebuttable presumption in Petitioner's favor, then it would be improperly requiring OCFS to apply the statutory amendment retroactively, which would be a dangerous precedent.

The court is not persuaded by Petitioner's arguments to the contrary.

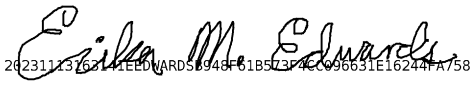
Therefore, the court denies Petitioner's Verified Petition and dismisses it.

The court has considered all additional arguments raised by the parties which were not specifically discussed herein, and the court denies any additional requests for relief not expressly granted herein.

As such, it is

ORDERED and ADJUDGED that the court denies Petitioner Kenneth W.'s Verified Petition and dismisses it as against Respondents Suzanne Miles-Gustave, in her capacity as Acting Commissioner of the New York State Office of Children and Family Services, and Jess Dannhauser, in his capacity as Commissioner of the New York City Administration for Children's Services.

This constitutes the decision and order of the court.



11/13/2023
DATE

ERIKA M. EDWARDS, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE