

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANA DEHESA,
Appellant,
vs.
CLARK COUNTY DEPARTMENT OF
FAMILY SERVICES,
Respondent.

No. 83913-COA

FILED

FEB 15 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Dana DeHesa appeals from a district court order denying a petition for judicial review in an administrative matter. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

DeHesa was employed as a probation officer for the Clark County Department of Juvenile Justice Services for 14 years.¹ In August 2018, DeHesa was assigned to the E3 unit of the Clark County Juvenile Detention Center. Within that unit was J.J., a 15-year-old male under suicide watch. One afternoon, DeHesa began to direct the juveniles to their assigned rooms due to the shift change of the probation officers. Prior to securing J.J. into his room, DeHesa and J.J. engaged in "horseplay," which consisted of the two playing at slapping each other. When DeHesa went to close the door to J.J.'s room, J.J. stuck out his arm and tried to slap DeHesa. Despite seeing J.J.'s outstretched arm, DeHesa continued to close the door onto the juvenile's forearm. DeHesa pressed the door with both arms and his foot three times before allowing J.J. to remove his arm. As a result, J.J. sustained an injury to his forearm.

¹We do not recount the facts except as necessary to our disposition.

A few days later, J.J. reported the incident to his parents when they were visiting him at the detention center. J.J.'s parents raised their concern about the incident to the probation officer on duty, but he was unable to address their concerns because he could not locate an incident report involving J.J. on the day in question.² The following day, the probation officer who had spoken with J.J.'s parents filed an incident report. The incident report also indicated that J.J. "got in trouble and thought that because he was reporting something he did not have to face consequences for his behavior." Respondent Clark County Department of Family Services (DFS) conducted an investigation and substantiated an allegation of physical injury (abuse), including bruises and cuts, and served DeHesa with its written decision. DeHesa timely filed an administrative appeal, and the DFS Internal Agency Appeals Committee upheld DFS's substantiation of physical abuse involving a juvenile. Subsequently, DeHesa timely requested an administrative hearing.

At the hearing, DFS presented witness testimony that detailed the investigation, J.J.'s injuries, and how DeHesa's behavior fell below the appropriate standard and violated procedures for probation officers governing a shift change, which included securing a juvenile in his or her room prior to exiting the room. Before presenting witness testimony, DeHesa's counsel stated that because DeHesa did not have subpoena power, one of his witnesses declined his request to testify at the hearing. However, counsel did not request that the hearing officer issue a subpoena nor does

²We note that DeHesa did not file an incident report, but the record indicates that he informed the lead probation officer of the incident on the day it occurred. The lead probation officer also did not file an incident report.

the record show he undertook any additional efforts to ensure the witness's participation at the hearing. DeHesa's counsel also made no request for the hearing officer to issue a subpoena for relevant documents from DFS or the Clark County Department of Juvenile Justice Services. Nevertheless, DeHesa was able to call one witness, probation officer Kristian Duncan, a coworker at the detention center, who testified that the male probation officers and the juveniles would engage in horseplay and, contrary to DeHesa's approach, she would have filed an incident report if the juvenile had reported the incident to her. DeHesa also testified at the hearing that he was engaged in horseplay with J.J., but did not intend to injure him and thought not to dislocate J.J.'s "elbow or his shoulder." DeHesa eventually conceded that horseplay could be dangerous and might lead to an injury like the one that occurred.

The hearing officer upheld DFS's decision substantiating the allegation of physical abuse against DeHesa. The hearing officer found DeHesa credible in his testimony that the probation officers and juveniles engaged in horseplay and that DeHesa did not intend to injure the juvenile. However, the hearing officer's conclusions of law indicated, in relevant part, that DeHesa repeatedly pressing the door on the juvenile's arm was "nonaccidental" under NAC 432B.020. The hearing officer concluded that DFS's substantiation was based on substantial evidence and that DFS had proved, by a preponderance of the evidence, that DeHesa abused the juvenile.

DeHesa subsequently filed a petition for judicial review in the district court. DeHesa argued that the hearing officer violated DeHesa's constitutional right to procedural due process by denying DeHesa the power to issue subpoenas for witness testimony and relevant documents, as such

evidence would have demonstrated that DeHesa properly reported the incident and that J.J. was motivated to fabricate the allegations against DeHesa. Additionally, DeHesa argued that the hearing officer erred in finding that DeHesa's actions were "nonaccidental" under NAC 432B.020. The district court denied DeHesa's petition and found that DeHesa "did not frame and litigate the issue regarding issuance of subpoenas, as no order one way or the other was either sought or rendered." The district court also found that "nonaccidental" was defined by NAC 432B.020, and not the caselaw cited by DeHesa, because the regulation that was enacted eight years after the cited case controlled. Therefore, the district court found that DeHesa failed to show that the hearing officer's decision was in violation of constitutional or statutory provisions, arbitrary or capricious, and/or clearly erroneous.³ Although DeHesa has since resigned from his position, DFS placed DeHesa's name on the Nevada State Central Registry pursuant to NRS 432B.210, which may adversely affect him.⁴ This appeal followed the district court's denial of the petition for judicial review.

On appeal, DeHesa presents this court with three issues for consideration: (1) whether the district court erred when it found that an unintentional injury sustained during horseplay is a "nonaccidental" injury;

³Prior to denying the petition for judicial review, the district court remanded the matter to the hearing officer for further findings and conclusions related to whether the hearing officer considered DeHesa's intent to injure in upholding DFS's substantiation. The hearing officer concluded that intent was not a factor to be considered under NAC 432B.020 and upheld the DFS substantiation of physical abuse.

⁴The Central Registry is a database maintained by the State of Nevada, Division of Child and Family Services of substantiated reports of child abuse or neglect.

(2) whether the district court erred when it denied DeHesa's claim that he had the constitutional right to issue subpoenas for people and documents, and compel witnesses to testify at the DFS administrative hearing; and (3) whether the district court erred when it found that the decision of the hearing officer was not arbitrary or capricious and/or clearly erroneous. Conversely, DFS argues that: (1) the hearing officer did not err in finding the injury "nonaccidental" pursuant to NAC 432B.020 as DeHesa's lack of intent to cause injury was not relevant; (2) DeHesa's substantial rights were not prejudiced by not having subpoena power and that because DeHesa did not litigate the issue of subpoena power before the administrative hearing officer, the issue is thus waived on appeal; and (3) the hearing officer's decision was not arbitrary or capricious and/or clearly erroneous because there was no testimony before the hearing officer to demonstrate that DeHesa was held to a higher standard due to his position as a probation officer, but rather was held to the applicable standard pertaining to all probation officers. We agree with DFS and therefore affirm.

Standard of review

The standard on appeal "for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court." *Elizondo v. Hood Machine, Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013) (internal quotation marks omitted). Like the district court, this court reviews "an administrative appeals officer's determination of questions of law, including statutory interpretation, de novo." *City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011). This court reviews an administrative agency's factual findings for clear error or an arbitrary abuse of discretion, and it will not overturn those findings if they are supported by substantial evidence. *Id.* "Substantial evidence

exists if a reasonable person could find the evidence adequate to support the agency's conclusion" and "[t]his court will not reweigh the evidence or revisit an appeals officer's credibility determination." *Elizondo*, 129 Nev. at 784, 312 P.3d at 482 (internal quotation marks omitted). This court will "not give any deference to the district court decision when reviewing an order regarding a petition for judicial review." *Warburton*, 127 Nev. at 686, 262 P.3d at 718.

The injury was "nonaccidental" pursuant to NAC 432B.020

On appeal, DeHesa argues that the hearing officer erred in finding J.J.'s injury to be "nonaccidental" pursuant to NAC 432B.020 because DeHesa did not have the requisite intent to cause injury. DFS argues that the hearing officer did not err because NAC 432B.020 governs in child welfare issues and does not require the intent to injure. We agree with DFS.

We review statutory interpretation de novo. *Id.* "In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it." *Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 879, 362 P.3d 83, 85 (2015) (internal quotation marks omitted). This court's "duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function." *Williams v. United Parcel Servs.*, 129 Nev. 386, 391-92, 302 P.3d 1144, 1147 (2013). "These rules of statutory construction also apply to administrative regulations." *Warburton*, 127 Nev. at 687, 262 P.3d at 718.

In this case, NRS 432B.020(1) defines "[a]buse or neglect of a child" as, in relevant part, physical or mental injury of a nonaccidental nature "caused or allowed by a person responsible for the welfare of the

child under circumstances which indicate that the child's health or welfare is harmed or threatened with harm." "Nonaccidental" is further defined in NAC 432B.020, which provides that:

For purposes of NRS 432B.020, "nonaccidental" means arising from an event or effect that a person responsible for a child's welfare could reasonably be expected to foresee, regardless of whether that person did not intend to abuse or neglect a child or was ignorant of the possible consequences of his actions or failure to act.

Based on the plain language of NAC 432B.020, it is clear that a "nonaccidental" injury focuses on the foreseeability of an event, and the person's intent or ignorance of the possible consequences of his or her actions or failure to act are not factors to be considered. Because the regulation is clear and is not open to multiple interpretations, we conclude that intent to injure is not a factor to be considered.⁵ See *Valenti*, 131 Nev. at 879, 362 P.3d at 85.

Because NAC 432B.020 did not require DeHesa to have the intent to injure, the hearing officer did not err in her interpretation of NAC 432B.020. The record demonstrates that DeHesa observed J.J.'s arm between the door and the doorframe before repeatedly pressing the door against J.J.'s arm. DeHesa's testimony also indicates that he was worried about dislocating J.J.'s shoulder or elbow. Finally, DeHesa conceded that horseplay could be dangerous and may lead to an injury like the one that

⁵We are not persuaded by DeHesa's reliance on *Sanders* and *Catania* because these cases interpreted the word "accidental" in the context of insurance policies and not in the context of child welfare. See *Allstate Ins. Co. v. Sanders*, 495 F. Supp. 2d 1104 (D. Nev. 2007); *Catania v. State Farm Life Ins. Co.*, 95 Nev. 532, 598 P.2d 631 (1979).

occurred. Thus, the injury to J.J.'s forearm was foreseeable and, therefore, the injury was nonaccidental pursuant to NAC 432B.020.

DeHesa's constitutional right to procedural due process was not violated

DeHesa argues he was denied procedural due process in violation of the due process clauses contained in the United States and Nevada Constitutions when he was denied the ability to subpoena witnesses and evidence on his behalf. Specifically, DeHesa argues that one of his witnesses would have testified that he properly reported the incident, and that documents would have demonstrated that J.J. was motivated to fabricate portions of his allegations to avoid facing consequences for his inappropriate conduct. DFS avers that the record does not support DeHesa's contention that he requested a subpoena for witness testimony or for documents from the hearing officer and that the hearing officer considered and denied his request. We agree with DFS that DeHesa failed to properly raise the issue before the hearing officer and preserve any alleged error for appeal.

We specifically reject DeHesa's claim that the hearing officer denied his request to issue a subpoena for his witness or documents because the record demonstrates that DeHesa never made such a request to the hearing officer.⁶ See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d

⁶To the extent that DeHesa relies on *Gete v. INS*, 121 F.3d 1285, 1291 (9th Cir. 1997), to argue that the district court erred in denying his petition for judicial review on this ground, we note that the district court in this case did not dismiss DeHesa's claim for lack of jurisdiction like in *Gete*. Here, the district court's decision was consistent with its standard of review for petitions for judicial review, which it confined to the available record. See NRS 233B.135(1)(b) ("Judicial review of a final decision of an agency must be . . . [c]onfined to the record."). Thus, the district court did not err in concluding that DeHesa failed to preserve the issue for review.

981, 983 (1981) (explaining that issues not argued below are “deemed to have been waived and will not be considered on appeal”). But even if such request had been made, it would not have changed the outcome. The authority to issue a subpoena under NRCP 45 does not apply in administrative hearings. *See Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 713, 191 P.3d 1159, 1167 (2008) (noting that “the Nevada Rules of Civil Procedure do not apply to administrative proceedings”); *see also* NRCP 1 (“These rules govern the procedure in the district courts . . .”). Additionally, the hearing in DeHesa’s case was governed by NRS 233B, and the Nevada Supreme Court has previously held that NRS 233B does not grant administrative agencies subpoena power. *See Andrews v. Nev. State Bd. of Cosmetology*, 86 Nev. 207, 208, 467 P.2d 96, 97 (1970) (noting that the Legislature did not intend to grant subpoena power to all state administrative agencies under NRS 233B.123). Thus, had DeHesa made the request for a subpoena, which he did not, the hearing officer would have acted within her discretion to deny it.⁷

⁷We also note that DeHesa’s substantial rights were not prejudiced because the witness’s testimony that DeHesa sought would not have been material, as the record supports that the hearing officer upheld DFS’s substantiation of physical abuse because the injury was foreseeable and thus “nonaccidental” pursuant to NAC 432B.020, and not for the failure to report the incident. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (noting that “[t]o establish that an error is prejudicial, the movant must show that the error affects the party’s substantial rights so that, but for the alleged error, a different result might reasonably have been reached”). Additionally, DeHesa’s claim that the alleged documents he sought would have demonstrated that J.J. was motivated to fabricate the allegations of physical abuse is belied by the substantial evidence in the record that indicates that J.J. sustained an injury by abuse. *See Warburton*, 127 Nev. at 686, 262 P.3d at 718 (noting that the appellate court will only

The hearing officer did not abuse her discretion because she did not hold DeHesa to a higher standard due to his position as a probation officer

Finally, DeHesa argues that the hearing officer abused her discretion in making her findings because “the hearing officer inappropriately held Officer DeHesa to a higher standard due to his position as a probation officer” because “[i]t is unfathomable that, a parent engaged in horseplay with their child that results in a bruise would have an allegation of abuse substantiated.”⁸ Conversely, DFS argues that DeHesa’s claim that he was held to a higher standard due to his position as a probation officer is unsupported by the record.


Specifically, DeHesa contends that a parent engaged in horseplay with their child would not have had an allegation of abuse substantiated against them and therefore he was unfairly held to a higher standard. We note that although there is no evidence in the record to support DeHesa’s position, he made this argument at the hearing. The record, however, does support that DeHesa did not abide by the procedures pertaining to shift changes, including securing a juvenile in his or her room in a professional manner as required of all probation officers. Therefore, DeHesa was held to the applicable standard pertaining to a probation officer, and not to that of a parent. Thus, the hearing officer did not abuse

overturn the administrative agency’s factual “findings if they are not supported by substantial evidence”).

⁸DeHesa also argues that the hearing officer’s decision was arbitrary and capricious, not supported by substantial evidence, and contrary to established law because the evidence at the hearing showed that the injury to J.J. was an accident arising from horseplay. Based on our disposition that intent was not required for a finding of physical abuse, only foreseeability of injury, we decline to accept DeHesa’s argument in this context.

her discretion in finding that DeHesa violated the applicable standard for a probation officer based on substantial evidence presented at the hearing. *See Warburton*, 127 Nev. at 686, 262 P.3d at 718; *see also Nellis Motors v. State, Dep't of Motor Vehicles*, 124 Nev. 1263, 1269-70, 197 P.3d 1061, 1066 (2008) (noting that this court "will not reweigh the evidence, reassess the witnesses' credibility, or substitute the administrative law judge's judgment with [its] own"). Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁹


_____, C.J.
Gibbons


_____, J.
Bulla


_____, J.
Westbrook

cc: Hon. Mark R. Denton, District Judge
Brown Law Office
Clark County District Attorney/Juvenile Division
Eighth District Court Clerk

⁹Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.