COURT OF APPEALS
DECISION
DATED AND FILED

March 22, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP418 **Cir. Ct. Nos. 2014CV263**
2014CV1035

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

LATOYA WEBSTER AND REACH ONE TEACH ONE LEARNING CENTER,

PETITIONERS-APPELLANTS,

V.

DEPARTMENT OF CHILDREN AND FAMILIES,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. Latoya Webster and Reach One Teach One Learning Center (collectively referred to as ROTO unless the context otherwise requires) appeal a circuit court order affirming the Department of Children and Families' (DCF) decisions to refuse Wisconsin Shares payments, to revoke

ROTO's existing child care authorizations, and to require reimbursement for an overpayment of $19,339.45. For the reasons stated below, we affirm.

I. BACKGROUND

¶2 Webster was the licensee for ROTO, a group child care facility located in a former YMCA building. ROTO operated twenty-four hours a day with a maximum capacity of sixty-four children.

¶3 Children who attended ROTO were eligible for the Wisconsin Shares program. The program pays state subsidies to child care providers on behalf of low income parents and children. The Wisconsin Shares program is administered by DCF.

¶4 DCF employees made numerous visits to ROTO throughout 2011 and 2012 and documented many problems ROTO had with maintaining accurate daily attendance records and with properly tracking children. DCF issued multiple letters to Webster noting her noncompliance with the attendance record and tracking requirements. The violations continued.

¶5 DCF eventually hired a private investigator to conduct surveillance in an effort to verify the number of children arriving and departing from ROTO in November 2012. The following month, DCF auditors visited ROTO and collected its attendance records.

¶6 In March 2013, DCF issued a letter outlining several violations of statutes, administrative regulations, and administrative policies. Among other violations, the letter referenced sixty-three instances in which ROTO billed for more hours than children actually attended, which resulted in overpayments. The

letter informed Webster that she had the right to provide a satisfactory explanation for the noncompliance.

¶7 In April 2013, DCF notified Webster that it was refusing to make any further Wisconsin Shares payments and that it was revoking all existing child care authorizations. DCF explained that it found Webster's reasons for the various violations "unsatisfactory." DCF later informed Webster that she was responsible for an overpayment of $19,339.45.

¶8 An administrative hearing followed with the Administrative Law Judge (ALJ) issuing two decisions. One involved DCF's decision to refuse payments to ROTO from the Wisconsin Shares program and to revoke ROTO's existing child care authorizations. (ML-13-0110) The other involved the overpayment. (ML-13-0132) The ALJ made thirty-five factual findings that were common to both cases and supported by at least one exhibit in the record. As to the overpayment case, the ALJ made two additional factual findings, which were again supported by exhibits.

¶9 In ML-13-0110, the ALJ found that Webster "was put on repeated notice regarding her errors over the course of her licensure" and further, that "[s]he was unable to provide a credible rebuttal to any of the violations." The ALJ upheld DCF's determination that ROTO violated provisions of the Wisconsin Shares program and concluded DCF had properly exercised its discretion in refusing to make Wisconsin Shares payments to ROTO and in revoking ROTO's existing child care authorizations.

¶10 In ML-13-0132, the ALJ concluded that DCF's "case [for the overpayment] was persuasive and thorough." The ALJ accounted for Webster's defenses, which were "that she had made some mistakes but that there was no

intent to defraud the Wisconsin Shares system" and that the surveillance was faulty and therefore inadequate to show that her attendance and billing records were incorrect. Additionally, it addressed Webster's argument that DCF's overpayment computation should be adjusted downward for an "enrollment-based" child because she would have only gotten paid for the authorized hours, not what was overbilled. Ultimately, the ALJ concluded that DCF correctly calculated the overpayment.

¶11 ROTO then petitioned for review of the decisions in the circuit court, where the cases were consolidated. The circuit court affirmed both decisions. In so doing, the circuit court refused to consider the arguments that were not presented during the administrative proceedings. These included due process claims and allegations that DCF engaged in racial profiling. Additionally, ROTO made a *quantum meruit* argument and asserted DCF was unjustly enriched when it refused to make Wisconsin Shares payments.

II. DISCUSSION

¶12 On appeal, ROTO argues that DCF's findings of fact are not supported by substantial evidence in the record and that DCF exceeded its statutory authority. ROTO also renews its claims related to due process, racial profiling, *quantum meruit*, and unjust enrichment.

¶13 "'When an appeal is taken from a circuit court order reviewing an agency decision, we review the decision of the agency, not the circuit court.'" ***Lake Beulah Mgmt. Dist. v. DNR***, 2011 WI 54, ¶25, 335 Wis. 2d 47, 799 N.W.2d 73 (citation omitted). The findings of fact made by the ALJ are reviewed using

the "substantial evidence" standard, under which the findings must be upheld "if they are supported by 'credible and substantial evidence.'" *See* ***Brown v. DCF***, 2012 WI App 61, ¶11, 341 Wis. 2d 449, 819 N.W.2d 827 (citation omitted; one set of quotations omitted). We set aside an agency's findings of fact "'only when a reasonable trier of fact could not have reached them from all the evidence before it, including the available inferences from that evidence.'" *See* ***id.*** (citation omitted).

¶14 There are three levels of deference that courts use when reviewing administrative decisions, and they "'take into account the comparative institutional qualifications and capabilities of the court and the administrative agency.'" ***Id.***, ¶22 (citation omitted).

> The first level of deference, "great weight" deference, applies when: (1) the legislature charged the agency with the duty of administering the statute; (2) the agency's statutory interpretation is one of longstanding; (3) "the agency employed its specialized knowledge or expertise in forming the interpretation[";] and (4) "the agency's interpretation will provide consistency and uniformity in the application of the statute." The second level of deference, "due weight," applies "when the agency has some experience in an area but has not developed the expertise that places it in a better position than the court to make judgments regarding the interpretation of the statute." When due weight deference applies, we sustain an agency's interpretation "if it is not contrary to the clear meaning of the statute" or unless we determine "that a more reasonable interpretation exists." The third and lowest level of deference, *de novo* review, applies "where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented."

Id. (citations omitted).

¶15 ROTO details the varying standards of review but does not present a developed argument as to the one that we should apply. At one point, without citation, ROTO writes that we should reject the State's argument that great weight deference is appropriate and use our own judgment. It also summarily states that the calculation of the overpayment does not require special expertise. We are not convinced by ROTO's conclusory assertions as to the level of deference and instead adopt the State's position that great weight deference to DCF's decisions is warranted.[1] *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988) (This court declines to consider arguments that are unexplained, undeveloped or unsupported by citation to authority.).

¶16 We address each of ROTO's arguments in turn.

(1) DCF's findings of fact are supported by substantial evidence in the record.

¶17 ROTO argues that two findings of fact are not supported by substantial evidence. First, it challenges the finding that ROTO billed for children not in attendance, arguing that the surveillance only accounted for one entrance to

[1] In its reply brief, ROTO does not address the State's arguments regarding the level of deference. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted).

the building. Second, ROTO challenges the finding as to the amount of overpayment.

¶18 The former YMCA building where ROTO was located has three entrances: one on the west side, one on the south side, and one in the alley on the east side of the building. DCF's surveillance of ROTO only watched the main entrance: the west side door. ROTO, however, claims the back door to the alley was used and the internal hallways of the YMCA building allowed parents and children to move between a nearby school and the building's south side entrance. Consequently, ROTO argues that the surveillance was incomplete and unreliable. ROTO submits that $9691.92 of the $19,339.45 overpayment amount was determined by faulty surveillance and should be stricken.

¶19 ROTO's objections to the surveillance-based evidence goes to the weight that should be applied to the evidence, which was an issue for the ALJ to determine as the fact-finder. The ALJ concluded that DCF's witnesses "were credible and professional" and specifically noted that "the investigator who created [the surveillance videos] also created corroborating written reports of what she saw and testified credibly to them at hearing." We will not substitute our view of the credibility of the witnesses or the weight of the evidence for that of the administrative fact-finder. *See* ***State ex rel. Washington v. Schwarz***, 2000

WI App 235, ¶26, 239 Wis. 2d 443, 620 N.W.2d 414; *see also* WIS. STAT. § 227.57(6) (2013-14).[2]

¶20 Of the remaining $9647.52, ROTO claims that the majority is due to an a.m./p.m. malfunction with the DCF reporting software and DCF's unilateral change of "enrollment-based" authorizations to "attendance-based" authorizations. Under an "enrollment-based" authorization, a child care provider is paid for its authorized hours (usually on a weekly schedule), while an "attendance-based" authorization is payment for actual hours attended.

¶21 DCF established the amount of the overpayment through the testimony of its auditor and exhibits detailing its calculations. There was credible and substantial evidence to support the ALJ's findings. To the extent ROTO is challenging DCF's overpayment calculation as it relates to the specific type of authorization involved, we discuss this challenge in the following section.

(2) DCF acted in accordance with its statutory authority when it refused Wisconsin Shares payments and revoked ROTO's existing child care authorizations.

¶22 DCF had authority to refuse and revoke payments because Webster did not keep accurate attendance records.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶23 To participate in the Wisconsin Shares program, child care providers are required to "[m]aintain a written record of the daily hours of attendance·of each child for whom the provider is providing care under this section, including the actual arrival and departure times for each child" and retain these records for three years. WIS. STAT. § 49.155(6m)(a)-(b). The statutes direct DCF to establish policies and procedures to recoup payments made to providers, withhold payments to providers, and impose forfeitures on providers "if a child care provider submits false, misleading, or irregular information to the department or if a child care provider fails to comply with the terms of the program under this section." *See* § 49.155(7m)(a). In this regard, DCF regulations allow it to refuse to issue new child care authorizations, revoke existing child care authorizations, refuse to issue payments to the provider, recoup overpayments, and impose a forfeiture. WIS. ADMIN. CODE § DCF 201.04(5)(c) (Feb. 2016).

¶24 It follows then that DCF had the legal authority to refuse payment and revoke existing authorizations because Webster submitted "false … information" to DCF via inaccurate attendance records. *See* WIS. STAT. § 49.155(7m)(a).

¶25 ROTO attempts to explain away the false information it submitted by pointing to data entry errors and software problems. It argues that any errors were unintentional. However, there is no requirement of fraudulent intent. The statute uses the term "false … information" without any reference to intent to defraud. As the State points out, if the legislature wanted to include an intent element, it could have done so here. *See, e.g.*, WIS. STAT. § 946.41(2)(a) (criminalizing "knowingly giving false information to the officer … with intent to mislead the officer in the performance of his or her duty"). Judicial restraint dictates that courts "assume that the legislature's intent is expressed in the

statutory language" it chose. *See* ***State ex rel. Kalal v. Circuit Court for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110.

¶26 ROTO additionally challenges what it describes as DCF's unilateral refusal to pay for child care services actually delivered and documented. It submits that DCF incorrectly determined the amount owed for overpayment because it did not distinguish between "enrollment-based" and "attendance-based" authorizations. ROTO argues that the overpayment amount should be calculated based on the type of contract it had for each child.

¶27 There is, however, no requirement that DCF distinguish between the types of authorizations when imposing sanctions. *See* WIS. ADMIN. CODE § DCF 201.04(5)(b).[3] Insofar as DCF exercised its discretion in determining the nature of the sanctions to impose on ROTO, the scope of our review is limited: "[T]he court shall not substitute its judgment for that of the agency on an issue of discretion." *See* WIS. STAT. § 227.57(8); *see also* ***Bell v. DCF***, 2015 WI App 47, ¶38, 363 Wis. 2d 527, 867 N.W.2d 430.

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[3] WISCONSIN ADMIN. CODE § DCF 201.04(5)(b) (Feb. 2016) provides, in relevant part:

> A provider shall be responsible for an overpayment if any of the following conditions are met:
>
> 1. A provider received reimbursement based on attendance records that indicate more hours than a child actually attended. If attended hours were misrepresented by the provider, the provider is responsible for an overpayment of the difference between the reimbursed hours and the actual hours of attendance *regardless of the type of authorization under s. DCF 201.04(2g)(a).*

(Emphasis added.) "Enrollment-based" authorizations are established in WIS. ADMIN. CODE § DCF 201.04(2g)(a).

(3) ROTO forfeited its remaining claims by not raising them during the administrative proceedings.

¶28 ROTO also makes claims related to due process, racial profiling, *quantum meruit*, and unjust enrichment.

¶29 Our review of DCF's decision is "confined to the record." *See* WIS. STAT. § 227.57(1). Additionally, "[t]he general rule is that an appellate court will not 'consider issues beyond those properly raised before the administrative agency, and a failure to raise an issue generally constitutes a waiver of the right to raise the issue before a reviewing court.'"[4] ***Gehin v. Wisconsin Grp. Ins. Bd.***, 2005 WI 16, ¶108, 278 Wis. 2d 111, 692 N.W.2d 572 (citation omitted); *see also* ***Omernick v. DNR***, 100 Wis. 2d 234, 248, 301 N.W.2d 437 (1981) (Wisconsin law "requires that … constitutional issues be raised even though the administrative agency is without power to decide them.").

¶30 The State contends that ROTO never raised these issues during the administrative proceedings, and as such, she cannot pursue them now. In its reply brief, ROTO did not refute the State's argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed admitted). Consequently, we conclude that ROTO forfeited its remaining claims.

[4] As noted in ***State v. Ndina***, 2009 WI 21, 315 Wis. 2d 653, 761 N.W.2d 612, courts often use the terms "waiver" and "forfeiture" interchangeably, although they are two different concepts. ***Id.***, ¶29. ("Although cases sometimes use the words 'forfeiture' and 'waiver' interchangeably, the two words embody very different legal concepts. 'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted).

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.