IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
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Ana Rydell,

Appellant,

v.

Clark County Department of Family Services,

Respondent.

Supreme Court Case No. 69929

RESPONDENT'S ANSWERING BRIEF

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Ana Rydell, Appellant, v. Clark County Department of Family Services, Respondent.	Supreme Court Case No. 69929

STATEMENT OF THE CASE

This is an appeal from a District Court decision denying Appellant's petition for judicial review, as well as a motion to reconsider the decision. On December 29, 2014, Appellant filed a petition for review of a final administrative decision of Hearing Officer Shell Mercer rendered on December 15, 2014 upholding a substantiation by the Clark County Department of Family Services (hereinafter DFS). (Vol. 1, JA 000176-JA000180). Ana Rydell was substantiated on a finding of Physical Abuse—Other pursuant to NRS 432B, NAC 432B, as well as the 2005 guidelines for substantiating physical abuse. (Vol. 1, JA000023-JA000028). On October 2, 2013, Ana Rydell made a request for agency appeal of DFS substantiated findings of Abuse and/or Neglect. (Vol. 1, JA000049-JA000050). However, it appears she took issue with her 2011 court substantiation first, and her 2007 agency substantiation second. (Vol. 1, JA000049). Her court substantiation

for abuse and/or neglect is not at issue in this appeal. On June 26, 2014, DFS issued an agency decision to uphold the finding of Physical Abuse—Other. This was subsequent to an internal agency review of the case investigator's decision. (Vol. 1, JA000030-JA000036). On July 7, 2014, Ana Rydell made a request for a Fair Hearing of Agency Decision. (Vol. 1, JA000052-000054).

On November 12, 2014, an Administrative Hearing was presided over by Hearing Officer Shell Mercer, who is not employed by DFS and is an independent attorney contracted with the county to hear administrative hearings. (Vol. 1, JA 000072-JA000174). On December 15, 2014, she issued a written decision. (Vol. 1, JA000023-JA000028). On December 29, 2014, Appellant filed a petition for judicial review of the administrative hearing. (Vol. 1, JA 000176-JA000180). On January 28, 2015, DFS filed a Statement of Intent to Participate. (Vol. 1, JA 000192-JA000193). DFS also filed an ex parte motion and order to seal court records, due to the confidentiality of DFS records. (Vol. 1, JA 000194-000197). DFS filed the record of the administrative proceedings on February 18, 2015. (Vol. 1, JA000019-000174). On May 14, 2015, Appellant filed a memorandum of points and authorities in support of the judicial review. (Vol. 1, JA000200-000226). On July 15, 2015, DFS filed their answering brief. (Vol. 2, JA000229-000256). On August 12, 2015, Appellant filed a reply memorandum. (Vol. 2, JA 000260-000274). Without filing a request for hearing within 7 days of filing the

reply memorandum, a hearing was held before the Honorable Nancy Allf on October 7, 2015. (Vol. 1, JA000001-JA000018). She denied the petition for judicial review on December 1, 2015. (Vol. 1, JA000295-JA000301).

On December 11, 2015, Appellant filed a motion for reconsideration, which DFS was not served with. (Vol. 2, JA000302-JA000318). On December 24, 2015, Appellant filed a supplement to the motion for reconsideration, which DFS was served with. (Vol. 2, JA000319-JA000321). On January 5, 2016, DFS filed an opposition to the motion to reconsider. (Vol. 2, JA000322-JA000341). On January 19, 2015, Appellant filed a reply to the opposition to the motion to reconsider. (Vol. 2, JA000342-JA000365). On February 5, 2015, the Honorable Nancy Allf denied the motion for reconsideration. (Vol. 2, JA 000366-JA000371). This appeal follows the finding of substantiation by DFS, the upholding of the substantiation of DFS by an internal agency appeal, the upholding of the substantiation by an independent hearing officer during an administrative hearing, the upholding of the substantiation by the Honorable Nancy Allf, and the denial of a motion to reconsider her decision.

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STATEMENT OF FACTS

On November 12, 2014, a hearing was held in which DFS called investigator Dare Peterson (hereinafter Dare) as a witness, and in which Ana Rydell presented no evidence other than her self-serving testimony. (Vol. 1, JA000072-JA000174). At the hearing, Dare testified she was an investigator with DFS and had been so employed for 17 years. (Vol. 1, JA000072-JA000073). She testified she had been assigned to investigate whether Appellant had caused injury to subject minor Elliott. (Vol. 1, JA000073). Dare testified on May 2, 2007, she spoke to Appellant and Appellant denied hitting her son in the face, and claimed the last time she hit him was over one year prior. (Vol. 1, JA000074).

Dare testified on May 2, 2007 she spoke to Elliott at his school. (Vol. 1, JA000076-JA000077). In speaking with him, she noticed he had a fading bruise on the corner of his right eye. (Vol. 1, JA000077-JA000078). At first, Elliot was reluctant to speak with Dare, stating he was not allowed to speak to strangers about the family business. (Vol. 1, JA000078). Eventually he told Dare his mother had slapped him on the face resulting in a mark on his face. (Vol. 1, JA000079). She further testified the mark she observed on Elliott was consistent with the report she was investigating. (Vol. 1, JA000078). During the interview, Elliott expressed he was afraid of his mother, and he would rather go with his father because the

repercussions of going home with mom would be that he would get hit again. (Vol. 1, JA 000079-JA000080).

Dare testified on May 2, 2007 she spoke to Elliott's sibling Ellen. (Vol. 1, JA000080). Ellen also disclosed she had witnessed her mother slap Elliott on the face with an open hand. (Id.) Ellen also expressed that when her mother found out she and Elliott spoke with CPS she would beat them. (Vol. 1, JA000081). After learning Appellant was not truthful according to the children's interviews, Dare contacted Appellant again. During this time, Appellant changed her story and admitted to slapping Elliott on the face. (Vol. 1, JA000082). Appellant further stated the children would be physically disciplined when they came home from school for breaking the family rules and telling DFS family business. (Vol. 1, JA000083). This admission was consistent with the children's expressed fears.

After confirming Appellant intended to physically discipline the children when they returned home from school, Dare placed the children with their natural father. (Vol. 1, JA000084). Dare instructed Appellant to begin anger management and parenting classes in order to have the children returned to her care. (Id.) Appellant told Dare she would sign the children over to their father. (Vol. 1, JA000085).

Dare further testified she spoke to the family counselor during the course of her investigation, and Appellant admitted to the family counselor she had slapped

Elliott. (Vol. 1, JA000085-JA000086). At the close of her investigation, Dare very clearly testified she substantiated physical abuse. (Vol. 1, JA000087). She testified she substantiated the allegation because there was a mark left on the child's face which is a high risk area, and the children were afraid of their mother. (Vol. 1, JA000088). Dare testified these reasons fit within the substantiation criteria for physical abuse. (Id.) She further testified throughout her investigation, she informed Appellant about the Nevada Revised Statute on physical discipline. (Id.)

The only evidence presented that the mark was there prior to Appellant slapping Elliott was Appellant's own self-serving testimony. (Vol. 1, JA000126). Appellant never told Dare she had previously seen the mark. Appellant states that "Dare Peterson's case notes from June 4, 2007 indicate that the children had been returned to Ana's care, and the family was aware that this case was closed and not substantiated." (Appellant's Opening Brief, page 4). However, the UNITY case notes admitted at the administrative hearing specifically state the case is closed as substantiated. (Vol. 1, JA000048) Further, the UNITY case notes specifically show that on August 17, 2007 a substantiation letter was sent to Appellant. (Id.)

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SUMMARY OF ARGUMENT

The decision of the District Court denying the petition for judicial review and thereby upholding the decision of the Hearing Officer should be upheld. Nevada Administrative Code, NAC 432B.170 is clear. It states "After the investigation of a report of the abuse or neglect of a child, an agency which provides child welfare services shall determine its case findings based on whether there is reasonable cause to believe a child is abused or neglected, or threatened with abuse or neglect, and whether there is credible evidence of alleged abuse or neglect of the child. The agency shall make one of the following findings: The allegation of abuse or neglect is substantiated; or the allegation of abuse or neglect is unsubstantiated." Here, DFS clearly made a finding of Physical Abuse—other, as required by NAC 432B.170. The agency made this finding after a seasoned investigator conducted an investigation into the alleged abuse of Elliott. In so conducting this investigation, she spoke to the alleged child victim, a sibling of the alleged child victim, the family's counselor, as well as Appellant herself twice. During the course of the investigation, Appellant proved not to be credible by first denying she slapped her son, and then later admitting she slapped her son after both her children disclosed she had done so. Appellant proved throughout the administrative hearing not to be credible and to be unreliable, so much so that the Hearing Officer could not give her testimony any weight.

ARGUMENT

A. It is clear the Hearing Officer made a decision that was supported by substantial evidence, was not arbitrary and capricious, and was not clearly erroneous and as such, the District Court denied the petition for judicial review.

"The standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court. Like the district court, we review an administrative appeal officer's determination of questions of law, including statutory interpretation, de novo. We review an administrative agency's factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." City of North Las Vegas v. Warburton, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011).

With regard to the standard for judicial review, NRS 233B.135 states judicial review of a final decision of an agency must be conducted by the court without a jury; and confined to the record...The final decision of the agency shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the court. The burden of proof is on the party attacking or resisting the decision to show that the final decision is invalid pursuant to subsection 3. The court shall not substitute its judgment for that of the agency as to the weight of evidence on a question of fact. The court may remand or affirm the final decision or set it aside

in whole or in part if substantial rights of the petitioner have been prejudiced because the final decision of the agency is in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion.

With regard to the standard for administrative hearings, Appellant argues that NRS 233B.125 provides the standard of proof for a contested administrative hearing, stating "Findings of fact and decisions must be based upon a preponderance of the evidence." (Appellant's Opening Brief, page 7). However, that language was changed in 2015 by Assembly Bill 53, which did not go into effect until July 1, 2015. Being that this administrative hearing was held on November 12, 2014, the language of NRS 233B.125 specifically stated "Findings of fact and decisions must be based on substantial evidence." Thus, at the time of the hearing, the hearing officer's decision was to be based on substantial evidence, and not that DFS must establish a preponderance of the evidence, as argued by Appellant.

With regard to DFS substantiating abuse and/or neglect, that is clearly governed by NAC 432B.170. It states "after the investigation of a report of the abuse or neglect of a child, an agency which provides child welfare services shall

determine its case findings based on whether there is reasonable cause to believe a child is abused or neglected, or threatened with abuse or neglect, and whether there is credible evidence of alleged abuse or neglect of the child." These are the appropriate standards to employ to review the decisions made at each and every level of this case.

Appellant argues the Hearing Officer's decision indicates in order to substantiate the Agency's finding of physical abuse under NRS 432B.020, the following two factors should exist:[1]

1. The child has sustained ...temporary disfigurement as defined in NRS 432B.090 ("physical injury" includes, without limitation...a cut, laceration...or...temporary disfigurement. NAC 432B.024 ("disfigurement" means "a mark, welt, abrasion, scar, bruise, condition or deformity that damages or impairs the physical condition of a person wherever it is located on the body of the person...)

   AND

2. The injury was inflicted by the parent...under circumstances that were not accidental in accordance with NRS 432B.020 ("abuse...of a child' means,...physical...injury of a non-accidental nature...or...maltreatment as set forth in NRS 432B.140, of a child caused...by a person responsible

[1] Appellant doesn't include the entirety of the Hearing Officer's decision, so it is included by DFS for clarity of argument.

for the welfare of the child under circumstances which indicate that the child's health or welfare is harmed or threatened with harm.")

The Hearing Officer then goes on to state "in this case, it is indisputable that on May 2, 2007, a faded brown mark existed on the right side of Elliott's right corner eye that didn't exist prior to April 30, 2007. Inasmuch as Elliott sustained a temporary mark on the skin next to his eye, the first factor is met." Appellant then goes on to state the record does not support this finding. The argument is wholly unsupported by the record.

During the course of the administrative hearing, Appellant actually testified she noticed the mark before she slapped Elliott. (Vol. 1, JA000126). However, she is the only person who testified the mark was on Elliott's face before the slap. Dare specifically testified "So his mother had slapped him on the face...resulting in a mark on his face." (Vol. 1, JA000079).

The Hearing Officer specifically found regarding Appellant's testimony: "Mom's testimony is more difficult to summarize. Inasmuch as her answers to questioning were self-serving, inconsistent and defensive, her testimony was not credible and it frequently contradicted and/or differentiated from the evidence that was recorded by Ms. Peterson in her UNITY Case Notes at or near the time of the investigation, approximately 7 ½ years ago." (Vol. 1, JA 000025). The Hearing

Officer can and should determine the credibility of all witnesses, and in this case found the credibility of Appellant to be none.

The fact that Dare testified, in response to direct and leading questions by Appellant's attorney, that the mark could have been obtained during a karate class (Vol. 1, JA000102) does not indicate this decision should be overturned. NAC 432B.170 is clear. It requires reasonable cause to believe a child is abused or neglected, or threatened with abuse or neglect, and credible evidence of alleged abuse or neglect. Here, DFS testified to credible evidence, and credible evidence was found by the Hearing Officer.

Appellant further goes on to state the Hearing Officer found all three individuals who were present at the time the mark was sustained stated Elliot's mother caused the mark when she slapped Elliott. Therefore the second factor is satisfied as well. While it is true that Dare did not testify that either Ellen or Ana said Ana caused the mark, Dare clearly testified that Elliott stated "So his mother had slapped him on the face...resulting in a mark on his face." (Vol. 1, JA000079). She further testified the mark was consistent with the allegation she was investigating. (Vol. 1, JA000078). Although the Hearing Officer never found Elliott, or Dare, to not be credible, she found over and over again Appellant was not credible (See Vol. 1, JA 000026 "she lost all credibility" "Mom's testimony was non-persuasive and/or not credible."). Being that it was the Hearing Officer's

job to determine credibility, and she did determine credibility, her decision is not arbitrary or capricious, is not clearly erroneous, and is supported by substantial evidence and should be undisturbed by this Court.

Whether or not there was a pattern of abuse established by DFS is wholly irrelevant to the case. To begin with, the Hearing Officer outlined the two factors that needed to be met in order to substantiate this case. Neither of those factors requires any "pattern of abuse." Further, in 2005, the guidelines for substantiating physical abuse were "In general, to substantiate physical abuse, both of the following factors should be present: Child has sustained permanent or temporary disfigurement as defined by NAC 432B.024 and NRS 432B.090 and the injury was inflicted non-accidentally by the parent or caregiver pursuant to NRS 432B.020." (Vol. 1, JA 000035). It is clear a pattern of physical abuse is not required under the law. What is also abundantly clear is the Hearing Officer did not rest her decision on whether or not there was a pattern of abuse. This argument is not relevant to the issues this Court must decide, and therefore should be summarily disposed of. The District Court specifically found "the Hearing Officer's finding that there was a pattern of abuse and fear is irrelevant to the substantiation of abuse in this case because a showing of a pattern of abuse is not one of the elements under NRS 432B.020. Thus, the Court declines to review whether it was sufficiently supported by the evidence and testimony." (Vol. 2, JA000299).

On May 2, 2014, Dare conducted an unannounced home visit with Appellant. During the home visit, Dare clearly recorded in her UNITY case notes "Ana adamantly denies striking her son in the face."[2] (Vol. 1, JA000043). Subsequently, the credible testimony presented at the hearing is as follows: "So did Miss Rydell change her story? Yes, she did. Okay. What did she say? She admitted slapping (Elliott) on the face." (Vol. 1, JA000082). Clearly, this indicates Appellant had at least on one occasion previously lied to Dare. The only evidence to the contrary is Appellant's own self-serving testimony she didn't lie.

To review what the Hearing Officer found about Appellant's credibility, "Mom's testimony is more difficult to summarize. Inasmuch as her answers to questioning were self-serving, inconsistent and defensive, her testimony was not credible and it frequently contradicted and/or differentiated from the evidence that was recorded by Ms. Peterson in her UNITY Case Notes at or near the time of the investigation, approximately 7 ½ years ago." "Mom's testimony was non-persuasive and/or not credible." (Vol. 1, JA 000023-JA000028). Therefore, it is

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[2] Appellant's entire argument that Dare testified Appellant denied causing the mark to Elliott's face and only testified, after a "leading question" and only after "the answer the DFS attorney was looking for was suggested in the question" that Appellant denied hitting Elliot in the face is completely belied by the record. It is clear Dare recorded in her case notes Appellant "adamantly denies striking her son in the face." (Vol. 1, JA000043). This is after Appellant's attorney solicited extensive testimony that case notes are entered, at most, two days after an interview takes place, (Vol. 1, JA 000098) and after Appellant's attorney clarified for the record the UNITY case notes would be entered by the Hearing Officer and read by the Hearing Officer. (Vol. 1, JA 000082).

not conceivable, as suggested by Appellant, that she was truthful when she said she was not asked whether she slapped her son. The UNITY case notes, which Appellant's attorney spent significant time soliciting testimony that are entered at most two days after an interview, and who also made sure they were admitted as an exhibit and the Hearing Officer could read them, belies that possibility all together. The District Court specifically found "the Hearing Officer found that Petitioner's testimony was 'self-serving, inconsistent and defensive' and determined Petitioner not to be a credible witness." (Vol. 2, JA000299). These findings are based on substantial evidence and need not be disturbed by this Court.

Appellant argues "The Hearing Officer Improperly Made up Imaginary Evidence to Support her Conclusion." (Appellant's Opening Brief, page 21). To support this rather offensive and unprofessional attack on the Hearing Officer, Appellant points to the portion of the decision which states "This Hearing Officer does not find merit in Appellant's argument that there is no evidence that Mom's slap actually "caused" the mark on Elliott's face. It logically follows that when Ms. Peterson spoke to Elliott at his school, she would have asked him, "what happened to your eye," "what caused that mark on your eye," or something similar, which inquiry would have preceded his response that his mother had slapped him with an open hand on his face." (Vol. 1, JA000025-JA000026). Dare's actual testimony was "So his mother had slapped him on the face...resulting in a mark on

his face." (Vol. 1, JA000079). It is clear the UNITY case notes do not reflect a word for word transcript of what Dare asked the child. It includes a summary of the interview of the child, entered; at most, two days after the interview took place according to Appellant's attorney's own questions. Whether the Hearing Officer concluded Dare asked those questions or not is simply irrelevant, because she testified Elliott said the slap caused the mark on his face. It is, however, reasonable to assume that in the 17 years Dare has been an investigator; she is competent to conduct investigations and would ask questions such as this to an alleged child victim during the course of the investigation.

B. The proceeding did not deny Appellant due process and the lower Court had no obligation to consider this argument.

Appellant did not raise a due process violation below and that failure waives all but plain error. Martinorellan v. State, 131 Nev. __, __, 343 P.3d 590, 593 (2015). Plain error review asks:

"To amount to plain error, the 'error must be so unmistakable that it is apparent from a casual inspection of the record.'" Vega v. State, 126 Nev. __, __, 236 P.3d 632, 637 (2010) (quoting Nelson, 123 Nev. at 543, 170 P.3d at 524). In addition, "the defendant [must] demonstrate [] that the error affected his or her substantial rights, by causing 'actual prejudice or a miscarriage of justice.'" Valdez, 124 Nev. at 1190, 196 P.3d at 477 (quoting Green v. State, 119 Nev. 542,

545, 80 P.3d 93, 95 (2003)). Thus, reversal for plain error is only warranted if the error is readily apparent and the appellant demonstrates that the error was prejudicial to his substantial rights." Martinorellan, 131 Nev. at __, 343 P.3d at 594.

Appellant concedes this standard applies, yet has never before raised the argument this rises to the level of plain error. That is simply because it does not. Appellant makes no new arguments regarding due process, only makes the same arguments which were presented at the District Court level.

Appellant states "Ms. Peterson's Notes styled 'Closing Summary' indicate, 'This is the last contact with this family. The family is aware that the case is being closed and not substantiated." What appellant utterly fails to acknowledge, is that at the end of that case note, it says the case is closed as substantiated. (Vol. 1, JA000048). Further, the UNITY case notes specifically show on August 17, 2007 a substantiation letter was sent to Ana Rydell. (Id.) This argument by Appellant appears to rest on the mistaken belief that the DFS worker, Dare Peterson, told Appellant this matter was being closed as unsubstantiated. However, there is absolutely no credible evidence Dare ever told Appellant this matter was being closed as unsubstantiated. The credible testimony shows at the close of her investigation, Dare very clearly testified she substantiated physical abuse. (Vol. 1, JA000087). She testified she substantiated the allegation because there was a mark

left on the child's face which is a high risk area, and the children were afraid of their mother. (Vol. 1, JA000088). Dare testified these reasons fit within the substantiation criteria for physical abuse. (Id.) She further testified throughout her investigation, she informed Appellant about the Nevada Revised Statute on physical discipline. (Id.)

Further, Appellant's attorney failed to ask a single question about whether the line from the UNITY case notes indicating the case as unsubstantiated was incorrect. He didn't ask a single question about the bottom of that same case note indicating the case was substantiated. He didn't ask a single question about the following case note indicating a substantiation letter was sent to Appellant. It begs the question whether this was purposeful, so that no clarification could be made. Counsel for DFS could have asked if Dare remembered telling Appellant the case would be substantiated, could have asked whether that was a typo in the note. No, rather he prefers to raise it in an appeal, when he utterly failed to raise it at the fair hearing.

The argument Appellant was wholly unaware DFS had characterized these allegations as substantiated is false. On August 17, 2007, Dare's direct supervisor sent a substantiation letter to Appellant. (Vol. 1, JA000048). Appellant's attorney asked the UNITY case notes be admitted so the Hearing Officer could read them. (Vol. 1, JA000082). Those UNITY notes clearly indicate a substantiation letter

was sent to Appellant, and her attorney clearly wanted to be sure the Hearing Officer read them, so the argument that the note is vague easily could have been remedied by a few questions. However, those questions were unasked by Appellant's attorney.

What is most troubling is the argument that Appellant had no opportunity to secure evidence and/or testimony helpful to her position. Appellant's attorney was sent a copy of the entire discovery relied on in the fair hearing on October 28, 2014 via certified mail, article number 9171999991703384507119. (Vol. 2, JA 000251). After receiving discovery, Appellant's attorney never made an attempt to contact DFS's attorney to ask if there was anything further or to complain that anything was missing that he needed to go forward. Dare was then and is still now employed by the DFS, and a deposition of her was never set, nor was a continuance of the hearing to allow time to take the deposition ever sought. The child in question, Elliott, lived at the time with Appellant. It could not have been very difficult to secure that testimony, if it would have been helpful to Appellant's position. However, that was not done. Appellant presented only her own self-serving testimony, nothing else.

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Assuming the discovery was consulted prior to the hearing, it would have very clearly shown the UNITY case note wherein it states a substantiation letter was mailed by a DFS supervisor. However, Appellant's attorney would rather argue to this Court he couldn't have known notice would be an issue until after all evidence had been presented. (Appellant's Opening Brief, pages 27-28). Except the UNITY case notes have not changed since 2007 so that information was available in discovery the month before the hearing. But again, Appellant's attorney failed to raise the argument at the fair hearing and instead raised it for the first time in an appellate brief, and then changed the argument again in this brief to allude it was plain error, when in fact he waived that very issue by his utter failure to raise it below.[3]

Appellant states "Ana actually did raise the issue of the lack of notice in 2007 in her 2013 request to challenge the agency determination, thus preserving and making the issue of the lack of notice part of the record on appeal." (Appellant's Opening Brief, page 24). Appellant writes on her request for agency appeal, "proper written notice of substantiation was not given." (Vol. 1, JA

[3] Appellant's attorney would like this Court to believe the smoking gun was the DFS attorney stating the hearing was held in 2014 because a tracking number for the letter could not be located. (Appellant's Opening Brief, pages 27-28). However, the UNITY case note clearly indicates a substantiation letter was sent. There is no statute at all that requires DFS send a letter via certified mail with a tracking number. Simply because DFS gave Appellant a courtesy in having a hearing 7.5 years after a substantiation because internally they couldn't locate a tracking number certainly does not amount to a plain error.

000049). So, which argument is correct, that Appellant's attorney could not have raised the legal/procedural issue of no notice prior to the closing of the evidence at the fair hearing, or that Appellant was well aware of the issue since 2013, the year before the fair hearing and her attorney should have addressed it at the fair hearing? How can DFS respond to this argument when it changes? Appellant must make it part of the record in order for this Court to address it, but must give an explanation for the utter failure to address it at the fair hearing. Thus, the reason both arguments are made.

Finally, the argument Appellant was denied employment in 2013 due to DFS making an internal determination she had engaged in an act of child abuse against her son in 2007, is only about 1/3 of the story. Appellant, in an attempt to show she had somehow been aggrieved by the 2007 decision, provided a letter from the Department of Health and Human Services, Division of Child and Family Services, indicating she has three substantiations of child abuse and neglect. One for negligent treatment substantiated on 10/28/11 and one for physical injury substantiated on 10/28/11. (Vol. 1, JA 000050). Neither of those substantiations, both of which are Court substantiations, are the subject of this appeal. The City of Las Vegas simply denied her for a failed background check. (Vol. 1, JA 000067). Even if this substantiation were overturned, she would still have two Court substantiations on her CANS history. She would still fail any background check

that was run in which she desired to work around children. The very idea this deprives her of employment before she could obtain it is preposterous; she never had the opportunity to obtain it in 2013 based on her two 2011 substantiations. Thus, there is no due process violation and certainly no plain error.

The District Court found "after review that Petitioner is procedurally barred from arguing that her constitutional due process rights were violated because she failed to argue it during the Fair Hearing." (Vol. 1, JA 000299). As such, Appellant was forced to concede the standard here is plain error. Yet, no arguments were forwarded that this amounts to plain error, because it does not. This Court should reject the argument.

CONCLUSION

The burden of proof is on the party attacking or resisting the decision to show the final decision is invalid. Here, appellant has utterly failed to show either the final decision of the agency is in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion. Because Appellant has the burden and has failed at proving her burden, this Court must uphold the Hearing Officer's substantiation of the abuse and/or neglect.

ATTORNEY CERTIFICATE

I hereby certify that I have read this brief and that to the best of my knowledge, information, and belief, this filing is not frivolous or interposed for any improper purpose, such as to harass or cause unnecessary delay or needles increase in the cost of litigation.

I further certify that this filing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font of the Times New Roman style.

I further certify that this petition complies with the page or type-volume limitations of NRAP 40, 40(b)(3)-(4), and NRAP 32(a)(4)-(6), because it is either proportionately spaced, has a typeface of 14 points or more and contains 5344 words and 544 lines of text.

DATED this 19th day of August, 2016.

STEVEN B. WOLFSON
Clark County District Attorney
Nevada Bar #001565

By: /s/ AMITY C. DORMAN
AMITY C. DORMAN
Chief Deputy District Attorney
State Bar No. 009316
Attorney for the State of Nevada

CERTIFICATE OF SERVICE

I hereby certify that service of the above and foregoing RESPONDENT'S ANSWERING BRIEF, was made this 19th day of August, 2016, by electronic mailing and/or facsimile and/or depositing a copy in the U.S. Mail, postage pre-paid, addressed to:

R. NATHAN GIBBS, ESQ.
5280 South Eastern Avenue, Suite D-2
Las Vegas, Nevada 89119
Attorney for Appellant

/s/ HEATHER AJOLO
HEATHER AJOLO
Employee for:
District Attorney - Juvenile Division