IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

Roberta Sandoval and David Inman, Appellants, vs. State of Alaska, Department of Health and Social Services, Appellee.	)	Case No. 3AN-14-6513 CI

OPINION

Parties, Summary and Jurisdiction.

Roberta Sandoval and David Inman did business as Willow Creek Assisted Living Home.[1] In proceedings below, the Department of Health and Social Services accused Willow Creek of violating laws regulating operation of assisted living homes and sought to revoke its license. An administrative law judge found a violation of AS 47.33.300(a)(2) as a result of Willow Creek's use of a doorknob safety cover[2] on the inside of Willow Creek resident R.R.'s door. The knob cover, with concurrence of R.R.'s guardian, was placed to prevent R.R. from wandering about unsupervised during times she was supposed to be in her room. Specifically, use of the knob cover was authorized during bed time, time outs and nap times. The ALJ determined that the knob cover constituted a statutory violation because it infringed on the

[1] In this opinion, the individuals are referred to by name, the home and business as "Willow Creek."

[2] Such devices are most usually associated with preventing children from opening specific doors, part of what is commonly referred to as "child-proofing."

personal dignity of the resident. *Id.* The finding derived from the ALJ's observation that R.R. sometimes was pounding on her door when the day habilitation worker arrived at "about 9:00 a.m.," and "at other times." No other violation of law was found during extensive proceedings before the ALJ. In the recommendation for a sanction as a consequence of the violation, the ALJ employed "surrounding circumstances" involving allegations separate from the knob cover to impose the most serious sanction available: revocation of the home's license to operate.

Willow Creek timely appealed the final agency decision, which adopted without alteration the decision of the ALJ. The superior court has jurisdiction of this appeal. AS 22.05.020(d) and Alaska R. App. P. 601(b). For the reasons discussed following, the agency's decision is reversed.

Standard of Review.

Findings of fact are reviewed under the substantial evidence test. *State, Dep't of Commerce, etc. v. Wold*, 278 P.3d 266, 270 (Alaska 2012); *see* AS 44.62.570(c). The Department's interpretation of statutes that are peculiarly within the agency's expertise are entitled to deference in this appeal. *See Marathon Oil Co. v. State, Dep't of Natural Resources*, 254 P.3d 1078, 1082 (Alaska 2011). However, where the agency's interpretation of law does not call for such expertise, the court may substitute its judgment for the agency's. *Lackloey v. University of Alaska*, 157 P.3d 1041, 1046 (Alaska 2007). With respect to the sanction imposed for violation of a statute or regulation, the agency's selection of an appropriate sanction is subject to determine whether it "is reasonable and not arbitrary." *Caywood v. State, Dep't of Natural Resources*, 288 P.3d 745, 751 (Alaska 2012).

Discussion.

There was no dispute that Willow Creek placed the knob cover on R.R.'s door, or that the guardian concurred in that action. Exh. Q, Exc. 000309.[3] The dispute below was whether R.R.'s egress from her room extended to times other than "bedtime, during a time out and nap time." *Id.*

Facts and Proceedings.

The ALJ found that R.R.'s ability to leave the room was, in fact, outside such times. This finding was based upon testimony of Tina McCluskey and David McCluskey, who worked at Willow Creek for a relatively brief time from late 2004 to mid-2005. Ms. McCluskey testified that on those days she worked, "I'd get there at 9:00 [a.m]. I would get [R.R. and the other two residents] up and get them their showers . . . get them up and get them ready [for day hab]." When asked "what happened if [R.R.] wanted to leave her room," Ms. McCluskey responded, "[R.R.] would pound on the door, lay on the floor, stick her fingers out from under the door. Mostly pound and holler." There was no direct evidence from Ms. McCluskey that 9:00 a.m. was outside the "bedtime" parameter.

Ms. McCluskey was asked whether she was "aware of any restrictions on the movement of residents while you were at Willow Creek?" She answered, "Well, during the night they were locked in their rooms." Pertinent to the issue here, Ms. McCluskey was asked, "[W]hat happened if [R.R.] wanted to leave her room." The answer was, "[She] would pound on the

[3] The record references in this appeal are confusing, to say the least. This opinion will refer to the Bates numbers in the agency record for documents, and the transcript page numbers found in the upper right corner of each miniscript page.

door, lay on the floor, stick her fingers out from under the door. Mostly pound and holler." She then was asked what Ms. Sandoval and Mr. Inman would do "if R.R. was doing that?" to which Ms. McCluskey replied, "Well, when I'd come in in the mornings I – I guess they'd just be waiting for me to get there and go get her."

Dan McCluskey's testimony was not more helpful to the actual issue: whether the knob cover was used outside permissible times. When asked "What would happen if [R.R.] wanted to leave [her] roo[m]?" he answered, "Well, [she] would bang on the door." When that happened, R.R. would be let out of her room "if they wanted us to, I guess." The court presumes "they" is a reference to Ms. Sandoval and Mr. Inman, meaning that if it was appropriate for R.R. to be let out of her room during the middle of the day, one of Willow Creek's owners would give permission. This was because, "They liked her to take naps during the day, I guess, and things like that." Mr. McCluskey answered, "Yeah," to the question whether "[W]hen you arrived in the morning was R.R. ever banging on the door when you arrived?"

The ALJ also referred to a recording of O C's interview by investigating authorities. Exc. 48 at 4, n.27 and 17, n.152. Ms. C did not testify, the interview itself does not appear to be part of the excerpt of record, was not found in the agency record, and no transcript of the interview was available to the undersigned. The ALJ does not explain how or why an interview, clearly consisting of substantial hearsay, might be used in the decision without giving Willow Creek some opportunity to confront the evidence. Nevertheless, what can be gleaned from the summary of the interview in the agency investigation, together with the ALJ's brief references, shows any error in the ALJ's consideration of the interview was harmless, as explained below.

During the course of his recommendation, the ALJ observed, "R.R.'s mental health and behavioral problems were such that reasonable limitations on her freedom of movement within the facility were appropriate, and use of the cover within the limits of the authorization provided by R.R.'s guardian was a reasonable method of dealing with the behavioral challenges R.R. presented." The ALJ then went on to say that R.R. was confined to her room "after the assisted living facility's daily routine began, and at other times" which the ALJ must have believed was inconsistent with the "bedtime, time out and nap time" parameters contemplated by the guardian. The ALJ inferred, without direct evidence, that upon arrival at 9:00 a.m., it was already beyond "bedtime." However, Ms. McCluskey noted that upon her arrival in the morning – consonant with the beginning of Willow Creek's "daily routine," Exc. 48 at 17 – her first job was to get R.R. up and showered. The only logical inference that can be drawn from Ms. McCluskey's testimony is that "bedtime" extended to 9:00 a.m., since it was at that hour that Ms. McCluskey got R.R. up. Some mornings R.R. was apparently awake and pounding on her door before the end of bedtime. Other mornings, from Ms. McCluskey's testimony, R.R. was either quiescent or still abed at 9:00 a.m., whereupon Ms. McCluskey, as R.R.'s day habilitation worker, would get her up and started on her daily routine.

The response of the McCluskeys that R.R. would bang on her door "when she wanted out" is not particularly helpful since R.R. doing so would not be contrary to the permission granted by the guardian. Thus, for example, and drawing from the agency's summary of Ms. C's inadmissible interview as set out in the Report of Investigation & Notice of Violation, R. 19:

> Ms. C stated that when she came over to have dinner with [her daughter] K.T. she observed Mr. Inman tickling R.R. and then tell her it was nap time. Mr. Inman would

> take R.R. upstairs to her bedroom and when Mr. Inman returned she overheard R.R. pounding on the door. Ms. C believed Mr. Inman had locked R.R. inter her bedroom [as was] reported to her by her daughter.

The permission to have the knob cover in place included nap times so there was nothing untoward in Mr. Inman's actions as asserted by Ms. C. Ms. McCluskey for her part remarked upon R.R.'s agitation when it was time for her to take a nap. Mr. Inman appears to have used the sorts of techniques one might use with a child to sooth R.R. so that she could be put into her room for a nap. Perhaps, as would probably be so with a time out, R.R. felt she should not take a nap and that may have been so. Perhaps she even registered her displeasure by pounding on the door.[4] However, it is undisputed that Willow Creek was allowed by the guardian to place R.R. in her room with the knob cover in place for naps as well as time outs. That R.R., with what was described as a 4-year old's intellect, might want out of her room and pounded on the door in an effort to have her own way – in keeping with her intellectual disabilities – should not be surprising. However, that is not evidence that the knob cover was used outside of naps or time outs.

There was no evidence what the time parameters were that encompassed "bed time." By Ms. McCluskey's own description, bedtime ended upon her arrival since it was her task to get the residents up and showered. At those "other times" referenced by the ALJ that R.R. pounded on her door or extended her fingers beneath the door itself, there was no evidence such times were other than nap times or time outs. Simply put, the record is completely devoid of any evidence

[4]No testimony was offered as to how long R.R. pounded on her door. One would suppose that Ms. C would have remarked how great a distraction the pounding was if it had gone on for more than a very brief time.

by which one could link R.R.'s actions and the allegation of misuse of the knob cover. As correctly observed in Willow Creek's opening brief, "No one established the contours of 'bed time, time out and nap time' because it was not raised as an issue in the hearing." Appellant's Brief at 41. The agency never addressed that point in its own brief nor could it point to anything that actually did "establis[h] the contours of 'bed time, time out and nap time.'" In this context, the declaration, "The facts spoke for themselves," Agency Brief at 17, is well wide of the mark. In order to "speak," as it were, there first must be a fact.

The court appreciates that it is not allowed to re-weigh the evidence presented to the ALJ, Agency Brief at 7, but it is incumbent upon the reviewing court "to determine whether such evidence exists." *Blas v. State, Dep't of Labor and Workforce*, 331 P.3d 363, 370 (Alaska 2014), *citing Button v. Borough*, 208 P.3d 194, 200 (Alaska 2009). Simply put, while there was evidence to support a finding that R.R. pounded on her door, there was no evidence that such conduct occurred outside the parameters permitted by R.R.'s guardian.[5] Since the entire basis of the ALJ's finding of a statutory violation rested upon the premise that R.R. was locked in her room in a manner outside Willow Creek's permission to do so, the decision of the ALJ, and hence the agency, cannot stand.

Conclusion.

The Final Decision of the Department of Health and Social Services finding a violation of AS 47.33.300(a)(2) is not supported by the evidence, substantial or otherwise, and the revocation

[5]The court notes in passing that the ALJ did not adopt Ms. McCluskey's claim that the knob cover was heavily wrapped in duct tape and this court concurs that the assertion is not believable. No agency inspector made note of such condition, and no one else, including the guardian and Mr. McCluskey, corroborated the claim.

of Willow Creek's assisted living facility license is REVERSED. In view of this opinion, the other issues raised on this appeal need not be addressed.

It is so ORDERED this 18th day of November, 2015.

By: *Signed*
Superior Court Judge Charles W. Ray, Jr.

[This document has been modified to conform to the technical standards for publication.]