Clerk of the Superior Court
*** Electronically Filed ***
12/04/2019 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2019-000306-001 DT 12/03/2019

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
J. Eaton
Deputy

PHILLIP B

ADITYA DYNAR

v.

GREGORY MCKAY (001)
ARIZONA DEPARTMENT OF CHILD SAFETY (001)
MIKE FAUST (001)

JUDGE GERLACH
OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

MINUTE ENTRY

A Motion for Stay of Agency Decision was filed on behalf of appellant Phillip B. The motion would have the court stay the Arizona Department of Child Safety's decision to place Phillip's name on the Central Registry. The court has considered the motion, the response filed on behalf of the Department,[1] and the reply submitted in support of the motion. The court has decided to deny the motion for the reasons explained below.[2]

Rule 3(b) of the Rules of Procedure for Judicial Review of Administrative Decisions establishes the standard that must be met to warrant a stay. Without the benefit of applicable authority,

[1] The appellees are both the Department and its director, Mike Faust, to whom references are made here collectively as the Department.

[2] The motion requests oral argument. Phillip's attorneys have had two opportunities to submit briefs. Accordingly, there is no reason to think that the issue presented has not been fully briefed, and oral argument is not an opportunity to raise issues or urge arguments that have not been briefed. Therefore, the court has concluded that oral argument will not assist a decision, and the request is denied.

the motion would have the court ignore that rule and, instead, apply a different standard that was superseded when the Arizona supreme court adopted Rule 3(b). This court declines to do so.

Rule 3(b) establishes four criteria that are relevant to stay motions, *viz*., "[t]he strong likelihood of success on the merits," "[t]he irreparable harm if the stay is granted," "harm to the requesting party [that] outweighs the harm to the opposing party," and "public policy [that] favors granting of the stay." As applied, not all four criteria must be established. Instead, the moving party must "establish either 1) probable success on the merits and the possibility of irreparable injury; or 2) the presence of serious questions and [that] the balance of hardships tip[s] sharply in favor of the moving party." *Smith v. Arizona Citizens Clean Elec. Comm'n*, 212 Ariz. 407, 411, ¶10, 132 P.3d 1187, 1191 (2006) (applying preliminary injunction criteria to stay requests in appellate matters (citation and internal quotation marks omitted)).[3]

A. Probable Success on the Merits.

The motion maintains that the Department's decision is flawed for two independent reasons: the supporting evidence was insufficient, and the procedure that led to the decision violated Phillip's constitutional rights. To succeed, the motion need not establish probable success on both scores: one is sufficient.

1. **The Evidence.**

To prevail on the insufficiency of the evidence claim, Phillip will be required to show that, despite a view of the record "in the light most favorable to upholding" the Department's decision [*e.g., Lewis v. Arizona St. Pers. Bd.*, 240 Ariz. 330, 334, ¶15, 379 P.3d 227, 231 (App. 2016)], "no substantial evidence" supports that decision [*e.g., Smith v. Arizona Dep't of Transportation*, 146 Ariz. 430, 432, 706 P.2d 756, 758 (App. 1985)]. Evidence is substantial if it is sufficient to support a conclusion "even if the record also supports a different conclusion." *JHass Group L.L.C. v. Arizona Dep't of Financial Inst.*, 238 Ariz. 377, 387, ¶37, 360 P.3d 1029, 1039 (App. 2015) (citation omitted); *Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 409, ¶35, 79 P.3d 86, 96 (App. 2003) (stating that "[s]ubstantial evidence exists if either of two inconsistent factual conclusions are supported by the record").

[3] JRAD 3(b) was based on *Smith*. Greg Harris & Patricia Seguin, *What Litigants in Arizona Need to Know About the New JRAD Rules*, Arizona Attorney (October 2018) at 31; see also Motion at 5 (conceding the same). The reply's contention (at 7) that, when adopting JRAD 3(b), the state supreme court disregarded separation of powers principles is incorrect. *See e.g., Seisinger v. Siebel*, 220 Ariz. 85, 89, ¶¶8-9, 203 P.3d 483, 487 (2009) (recognizing that the legislature and the supreme court "both have rulemaking power, but that in the event of an irreconcilable conflict between a procedural statute and a rule, the rule prevails"); see also Department's response mem. at 9 (collecting relevant cases).

The motion fails to show a probable success on the merits, even if it is assumed that probable means "any probability worth taking seriously." See *United States v. Loughner*, 672 F.3d 731, 769 (9th Cir. 2012). When deciding the merits of this case, the court does not decide what testimony or other evidence is credible and what is not; evaluating the credibility of witnesses is the agency's prerogative. *Lathrop v. Arizona Bd. of Chiropractic Examiners*, 182 Ariz. 172, 181, 894 P.2d 715, 724 (App. 1995); *Anamax Mining Co. v. ADES*, 147 Ariz. 482, 486, 711 P.2d 621, 625 (App. 1985). *Cf. In re Estate of Zaritsky*, 198 Ariz. 599, 601, ¶5, 12 P.3d 1203, 1205 (App. 2000) (recognizing that trial courts must determine credibility issues); *Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48 ¶ 13, 972 P.2d 676, 680-81 (App. 1999) (stating that it is the function of trial courts to determine "witnesses' credibility and the weight to give to conflicting evidence"); *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 287, 681 P.2d 390, 439 (App. 1983) (stating that "[t]he weight to be given conflicting evidence is for the trier of fact, not a reviewing court"). Thus, the agency, as the trier of fact, is permitted to accept all, some, or none of what any witness says [*Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993)] and decide what weight, if any, to give to any other item of evidence [*United Cal. Bank*, 140 Ariz. at 287, 681 P.2d at 439].

It is beyond fair dispute that eyewitnesses reported seeing Phillip grab a child by his shirt and hold him for 2-3 minutes, at times in a way that made it difficult for the child to breathe. [Admin. Law Judge Decision (7/1/19) at 1, para. 5; 2, para. 8; 4, para. 20] That there may be evidence to counter what those eyewitnesses said is beside the point: the Department, and not this court, decides what weight to give to those eyewitness reports, and as such, they qualify as substantial evidence to support the Department's decision. In other words, the motion fails to establish any probability worth taking seriously that, on the merits, Phillip will be able to show the absence of substantial evidence.[4]

2. The Procedure.

The motion maintains (at 6-9, 11) that Phillip was subjected to (i) an impermissible probable cause standard of proof, (ii) an "unconstitutional concentration of investigatory, prosecutorial, fact-finding, and judging powers in one agency or official," and (iii) a "deprivation of his right to confront and cross-examine witnesses."

[4] "A decision supported by substantial evidence may not be set aside as arbitrary and capricious." *Callen v. Rogers*, 216 Ariz. 499, 508, ¶34, 168 P.3d 907, 916 (App. 2007). The arbitrary and capricious standard and the abuse of discretion standard are the same. *Meditrust Fin. Servs. Corp. v. The Sterling Chems., Inc.*, 168 F.3d 211, 214-15 & n.8 (5th Cir. 1999) (numerous citations omitted); *Canseco v. Construction Laborers Pension Trust*, 93 F.3d 600, 605 (9th Cir. 1996) ("We have equated the abuse of discretion standard with 'arbitrary and capricious' review").

a. Probable Cause.

A probable cause standard of proof warrants no concern here because the Department's decision was based on a preponderance of the evidence standard.

Although many different definitions of probable cause have been recited in many different cases, they all seem to center on the existence of a reasonable belief or conclusion. *E.g., Gonzales v. City of Phoenix,* 203 Ariz. 152, 155, ¶13, 52 P.3d 184, 187 (2002) (grounds and circumstances "sufficient to warrant an ordinarily prudent man in believing" (citation and internal quotation marks omitted)); *State ex. rel. Collins v. Superior Court*, 132 Ariz. 479, 647 P.2d 177 (1982) (reasonable belief); *Rahn v. City of Scottsdale,* No. 1 CA-CV 15-0767, 2016 WL 7508085, at *3, ¶17 (Ariz. App. Dec. 30, 2016) (similar); *In re Shaheen Trust*, 236 Ariz. 498, 501, ¶12, 341 P.3d 1169, 1172 (App. 2015) (reasonable conclusion); *In re Estate of Stewart*, 230 Ariz. 480, 485, ¶16, 296 P.3d 1089, 1094 (App. 2012) (same); *Chalpin v. Snyder*, 220 Ariz. 413, 420, ¶25, 207 P.3d 666, 673 (App. 2008) (reasonable belief); *In re $24,000.00 U.S. Currency*, 217 Ariz. 199, 202, ¶11, 171 P.3d 1240, 1243 (App. 2007) (reasonable grounds to believe). A preponderance of the evidence standard is something more. Preponderance of the evidence means that a fact is more likely true than not true. *E.g., Gila River Indian Cmty. v. Dep't of Child Safety*, 238 Ariz. 531, 536-37, ¶23, 363 P.3d 148, 153-54 (App. 2015).

The plain language of the Department's decision establishes that it is based on a preponderance of the evidence standard. The decision (at 2) recognizes that standard and (at 1) effectively adopts it by stating that "[t]he record *clearly* supports a finding that the Appellant abused [a] 13 year-old foster child." (Emphasis added). Moreover, there is no language in the decision suggesting that, reasonably construed, it was based merely on a probable cause standard.[5]

Neither the motion nor any authority of which this court is aware suggests that a preponderance of the evidence standard here is inappropriate. Thus, the motion fails to establish a probable success on the merits of the standard of proof claim.

[5] Like a judgment entered in a court action, the language of the decision is interpreted consistent with settled rules of statutory construction. *See e.g., Lopez v. Lopez*, 125 Ariz. 309, 310, 609 P.2d 579, 580 (App. 1980) ("The intention of the court must be determined from all parts of the judgment and words and clauses should be construed according to their natural and legal import"). Thus, the words of the decision must be interpreted to mean "what they plainly state." *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529 (1994); *see also Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 268, 872 P.2d 668, 672 (1994) (similar); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69, 73 (2012) ("Words are to be understood in their ordinary, everyday meanings" unless a technical sense that diverges from everyday meanings (i.e., a "term of art") is indicated).

b. Concentration of Powers.

The motion insists that the decision is fatally flawed because it is the result of an "unconstitutional concentration of investigatory, prosecutorial, fact-finding, and judging powers in one agency or official," i.e., the Department's director. To support that contention, the motion relies exclusively on a misapprehension of what transpired in *Matter of Pima County, Juvenile Action, No. 63212-2*, 129 Ariz. 371, 631 P.2d 526 (1981), and a misreading of *Horne v. Polk*, 242 Ariz. 226, 394 P.3d 651 (2017).

The motion (at 8) maintains that, in reaching the decision, the director impermissibly rejected the administrative law judge's determination regarding the credibility of testifying witnesses because, unlike the ALJ, the director did not see or hear those witnesses. The motion, however, overlooks that *Pima County*, on which the motion relies, "involved a juvenile proceeding in which the juvenile court referred the initial finding of delinquency to a referee pursuant to a statute then in effect . . . . That statutory scheme is distinct from the [Administrative Procedure Act]. Significantly, the relationship of the juvenile court to the referee was one of appellate review. See H.R. 2227, 33rd Leg., 2d Reg. Sess. § 2 (Ariz. 1978)." *Ritland v. Arizona State Bd. of Med. Examiners*, 213 Ariz. 187, 190, ¶9, 140 P.3d 970, 973 (App. 2006). *Ritland* went on to hold that the Board in its case was permitted to reject the ALJ's recommendation if the Board reviewed the record and found factual support for declining to adopt the ALJ's credibility findings. 213 Ariz. at 188, ¶1, 140 P.3d at 971. The motion neither attaches nor provides record citations to anything supporting a conclusion that the Department director here failed to review the record when deciding to reject the ALJ's credibility determinations.

Similarly, the motion's reliance on *Horne* is misplaced. *Horne* states that "[a] single agency may investigate, prosecute, and adjudicate cases, and an agency head may generally supervise agency staff who are involved in those functions." 242 Ariz. at 230, ¶14, 394 P.3d at 655. The process becomes problematic only when the "agency head makes an initial determination of a legal violation [and] participates *materially* in prosecuting the case" before making the final decision. *Id.*, 394 P.3d at 655 (emphasis added). The motion cites nothing in the record or elsewhere suggesting that the Department director had any role in making the initial determination or that he participated in prosecuting the case.

In short, the merits of the motion's contention regarding the purportedly unconstitutional concentration of power in the director turn on two facts, viz., the extent to which the director reviewed the record and the extent to which he participated in the investigation and prosecution of the case. Neither of those facts is the subject of support that is cited in the motion. As such, the motion's contention regarding the concentration of power in the director warrants no consideration. *See State v. One Single Family Residence at 1810 East Second Ave., Flagstaff, Ariz.*, 193 Ariz. 1, 2 n.2, 969 P.2d 166, 167 n.2 (App. 1997) (declining to consider facts stated in Appellant's brief

that were not supported by citations to the record); *Matter of Estate of Killen*, 188 Ariz. 562, 563 n.1, 937 P.2d 1368, 1369 n.1 (App. 1996) (disregarding appellant's statement of facts because it was not "supported by appropriate references to the record").[6]

c. Cross-Examination.

The motion maintains (at 8-9) that Phillip was denied due process because he was not permitted to cross-examine witnesses. To be sure, the denial of a request to cross-examine is a denial of due process. *Goldberg v. Kelly*, 397 U .S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses"); *Volk v. Brame*, 235 Ariz. 462, 469, ¶¶21, 24, 333 P.3d 789, 796 (App. 2014) (recognizing that due process rights are violated when a party is not permitted an adequate opportunity for cross-examination).

But, cross-examination, like other rights of due process, can be waived. *Coffin v. Sullivan*, 895 F.2d 1206, 1212 (8th Cir. 1990) (recognizing that the right to cross-examine is waived when no request is made); *see also Fotenot v. Colvin*, 661 Fed.Appx. 274, 276 (5th Cir. 2016) (concluding that due process claim regarding inability to cross-examine was waived because it was not asserted in trial court proceeding). The motion cites nothing in the record suggesting that, in the proceeding below, Phillip asserted his right to cross-examine. And, unless he did so, he has not preserved the issue for appeal. *E.g., Neal v. City of Kingman*, 169 Ariz. 133, 136, 817 P.2d 937, 940 (1991) ("Failure to raise an issue at an administrative hearing that the administrative tribunal is competent to hear waives that issue").

For purposes of the stay motion, the failure to show that Phillip attempted to cross-examine witnesses but was denied means that the motion has not shown a probable success on the merits of the claim regarding cross-examination.[7]

B. Irreparable Harm and Balance of Hardships.

The motion's attempt (at 9-10) to show that Phillip will experience irreparable harm unless a stay is granted or that he will experience harm outweighing any harm that the Department will experience unless the stay is denied is based entirely on a series of factual assertions that are unsupported by citations to anything, much less anything of evidentiary value. Unsworn and unsupported factual assertions in a legal memorandum prepared by a party's advocate warrant no

[6] If such evidence can be found somewhere in the record of this case, it is not the court's duty to assist the motion by searching for that evidence. *Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984); *Hubbs v. Costello*, 22 Ariz. App. 498, 501, 528 P.2d 1257, 1260 (1974).

[7] See note 6.

consideration. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App. 1991) (recognizing that an unsworn and unproven assertion in a legal memorandum is not a fact that a court considers (citations omitted)); *see also State v. One Single Family Residence at 1810 East Second Ave., Flagstaff, Ariz.*, 193 Ariz. 1, 2 n.2, 969 P.2d 166, 167 n.2 (App. 1997) (declining to consider facts stated in appellant's brief that were not supported by citations to the record); *Matter of Estate of Killen*, 188 Ariz. 562, 563 n.1, 937 P.2d 1368, 1369 n.1 (App. 1996) (disregarding appellant's statement of facts because it was not "supported by appropriate references to the record"). *Cf. State v. Puma*, No. 1 CA-CR 15-0010, 2015 WL 6549306, at *2,¶12 (Ariz. App. Oct. 29, 2015) (concluding that unsworn statements in a supplemental brief were insufficient); *Puglisi v. United States*, 586 F.3d 209, 216-17 (2d Cir. 2009) ("[A]n attorney's unsworn statements in a brief are not evidence") (citation and internal quotation marks omitted)).[8]

In short, the motion makes no factual showing that a denial of the stay will cause Phillip to experience harm or hardships, irreparable or otherwise. Because of that failure, neither of the two *Smith* prongs regarding the elements of harm and hardship has been shown. Thus, it is not necessary to consider whether the motion has established the presence of serious questions.

C. Conclusion.

The motion fails to make the required showing necessary to warrant a stay of the Department's decision.

IT IS ORDERED denying the Motion for Stay of Agency Decision that was filed on behalf of appellant Phillip B.

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.

[8] The motion gets a trifle carried away with itself when it asserts (at 9) that, unless a stay is granted, Phillip's "name will be entered on the Registry *and remain there* for 25 years." (Emphasis added) The only way that the denial of stay relief will result in Phillip's name remaining on the Registry for 25 years is if this case is allowed to linger for a quarter of a century, the likelihood of which is well south of far-fetched.