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NCLA Challenges Constitutional Flaws in Arizona Dep't of Child Safety's Administrative Process

Phillip B. v. Mike Faust, in his official capacity as Director, and the Arizona Department of Child Safety

Washington, DC (April 15, 2020) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed a [reply brief](#) today in Maricopa County Superior Court on behalf of client Phillip B. NCLA's brief exposes inherent problems with DCS's (Arizona Department of Child Safety) unconstitutional administrative-review scheme, which violates due process by stacking the deck in the agency's favor.

Mr. B. (whose name has been redacted to preserve his anonymity under court rules) had an untarnished reputation working with troubled youth until 2018 when he found himself falsely accused of child abuse by one of the teens in his care. According to the record, Mr. B. "placed his hand on the boy's shoulder and admonished him to calm down" after the troubled teen became distressed. An administrative law judge (ALJ) from the Office of Administrative Hearings, which is independent of DCS, heard eyewitness testimony and made credibility determinations. She then concluded that probable cause did not exist to support a finding of abuse and cleared Phillip B. of the charge.

Despite the ALJ's conclusion, state law allowed DCS to appeal the decision to its own Director, who rejected both the ALJ's factual and credibility assessments. The Director substituted his own judgment in place of the independent ALJ's based on third-hand testimony, which was thoroughly impeached during the trial. Based on this contrived record, the Director then ordered that Mr. B.'s name be placed on the Arizona Department of Child Safety Central Registry of child abusers for 25 years. He is appealing to the state trial court to clear his good name.

NCLA is challenging the following aspects of Arizona's administrative process, each and all of which deprive Mr. B. of liberty and property without due process of law under the U.S. Constitution and Arizona Constitution or violate the state constitution's separation-of-powers doctrine.

- Both the state and federal constitutions mandate the use of a standard of proof at trial that is higher than probable cause. DCS, however, uses that impermissibly low standard to place people's names on the Central Registry.

- While the ALJ conducts the trial using well-established Rules of Evidence and Civil Procedure, there are important exceptions under the OAH procedure, including permitting the admission of “hearsay” statements by children and allowing the “reporting source” or the DCS caseworker who creates the initial report to avoid testifying and being subject to cross-examination.
- Whenever the DCS is dissatisfied with the ALJ’s decision, it can appeal to its own Director, who then acts as a judge in DCS’s own case.
- The DCS Director, without personally observing witnesses testify, and who operates without following the rules of evidence and civil procedure, is allowed to reject or modify the ALJ’s findings of fact and credibility determinations.
- On appeal, the Superior Court is then required to defer to the Director’s fact-findings and credibility determinations, contained in the altered administrative record, despite the fact that the Director had no firsthand knowledge of the proceedings and had no ability to assess the credibility of witnesses.

Mr. B. asks the court to declare this unfair process to be unconstitutional. NCLA is also challenging DCS’s decision to place Mr. B.’s name on the Central Registry before he had exhausted state-court appeals.

NCLA released the following statements:

“It is unconscionable that DCS should have the power to ruin a man’s life based on hearsay and fabricated allegations. Arizona courts have set the trend in independently interpreting the state constitution as protecting civil liberties to a greater extent than the federal constitution. In keeping with Arizona’s enviable tradition of judicial independence, impartiality, and non-acquiescence, we have asked the Court to vacate the DCS Director’s decision.”

—**Adi Dynar, Litigation Counsel, NCLA**

“Fairness must be a hallmark of all judicial and quasi-judicial proceedings. To think that a DCS Director can “delete” the factual findings of an ALJ in order to find a person “guilty” is the height of unfairness. This situation is made worse by the OAH’s refusal to allow Mr. B. to cross-examine his accusers. All in all, the Director’s decision must be reversed to protect the reputation of a man who has spent his decades-long-career taking care of troubled youth.”

—**Harriet Hageman, Senior Litigation Counsel, NCLA**

For more background on this case visit: <https://nclalegal.org/phillip-b-v-gregory-mckay-and-arizona-department-of-child-safety/>

ABOUT NCLA

NCLA is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar Philip Hamburger to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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