

FILED BEFORE

FIRE PREVENTION AND BUILDING SAFETY COMMISSION

GRATEFUL CARE ABA,

Petitioner,

vs.

**WHITE RIVER TOWNSHIP FIRE
DEPARTMENT,**

Respondent.

**ADMINISTRATIVE CAUSE NO.:
DHS-2405-001267**

**RESPONDENT'S SUR-REPLY IN SUPPORT OF OBJECTION
TO NON-FINAL ADMINISTRATIVE ORDER**

The role of the Fire Prevention and Building Safety Commission ("FPBSC") in this case is simple: chose from one of the three options in Indiana Code § 4-21.5-3-29(b): (1) affirm the Non-Final Order, (2) modify the Non-Final Order, (3) or enter "an order remanding the matter, with or without instructions, to an administrative law judge for further proceedings." The FPBSC should chose option No. 2: modify the Non-Final Order and conclude that White River has met its burden to show that Grateful Care is an I-4 occupancy day care and that Grateful Care has not complied with applicable occupancy requirements.

Grateful Care says in its Response that White River "failed to meet its burden of proof, burden of production and produced no substantial evidence." [Response ("Resp.") at 2]. But the evidence says otherwise. If the FPBSC carefully reviews the evidence submitted to the ALJ, it should agree with White River.

The remainder of Grateful Care's Response discusses the parties' respective

burdens and the FPBSC's standard of review. This discussion inaccurately describes the law of agency adjudication under the Indiana Administrative Orders and Procedures Act ("AOPA") and sows confusion about the FPBSC's role at this stage of the case. Fundamentally, the FPBSC is not a trial court giving deferential, judicial review to an agency's decision. Rather, the FPBSC is the ultimate authority. It can review all the evidence *de novo* to render the final agency decision.

The FPBSC can enter any findings of fact it wishes, provided those findings are based "exclusively upon the evidence of record in the proceedings and on matters officially noticed in the proceeding" that is "substantial and reliable." Ind. Code § 4-21.5-3-27(d). And if the FPBSC disagrees with the ALJ's findings, it need only to explain the differences. That's it. Grateful Care's attempt to turn this case into a judicial review deviates from the plain and simple procedures outlined in AOPA.

REPLY ARGUMENT

A. White River Submitted Substantial and Reliable Evidence in Support of Grateful Care's Code Violations

Grateful Care incorrectly argues that White River "failed to submit any reliable evidence of its own addressing the bottom-line issues that needed to be addressed – Can an ABA treatment clinic be located in [a] 'B' rated building." [Resp. at 4; *see also id.* at 13 (noting White River's "lack of evidence on these relevant issues")]. The record says otherwise.

During the first hour of the evidentiary hearing, Fire Marshall Braden Prochnow and Building Commissioner Kenneth Seal described their inspections of Grateful Care's facility and why it met the Indiana Building Code's definition of an I-

4 occupancy day care facility. [Hearing Tr. at 23:20 to 52:22; Procedural History ¶ 5]. The parties also stipulated to admissibility of all exhibits [*Id.* ¶ 6 (citing Exs. A to L and Exs. 1 to 7)]. White River also asked clarifying questions of Grateful Care's witnesses. [Hearing Tr. at 1:26:50 to 1:34:54 (Derek Holman); 2:24:50 to 2:38:43 (Kimberly Chudzinski); 3:23:02 to 3:37:25 (Martin Myers)].

White River's evidence shows that Grateful Care serves clients who "receive custodial care for fewer than 24 hours per day by persons other than" relatives. 2014 IBC § 308.6 (emphasis added). White River's evidence shows that Grateful Care provides "assistance with day-to-day living tasks," that its occupants "evacuate at a slower rate and/or who have mental and psychiatric complications." 2014 IBC § 202, Definition of "Custodial Care," and that its clients are "incapable of self-preservation." With this evidence, White River satisfied its burden to show that Grateful Care is an I-4 occupancy day care facility under the Indiana Building Code.

Grateful Care says this evidence is "conclusory," and "circular," arguing the "entire focus of [White River's] argument is the similarities, even overlap, that a day care may have with an [Applied Behavioral Analysis (ABA)]" facility. [Resp. at 4, 9–13]. Not so. The evidence is simple and straightforward, but that does not make it conclusory or circular. "Custodial care," "assistance with day-to-day living tasks," "evacuate at a slower rate," and "mental and psychiatric complications" are plain terms that need little explanation to understand. Grateful Care's services are indistinguishable from day care services to the naked eye. There is nothing circular or conclusory with succinctly describing Grateful Care's services.

Grateful Care says White River is making a “legal argument” about the meaning of an I-4 occupancy day care and asking the FPBSC to defer to White River’s interpretation. [Resp. at 10–11]. But White River is not interpreting or construing ambiguous terms or giving “unqualified opinion on what the law means.” [Resp. at 11]. Rather, an I-4 occupancy day care is defined with simple, unambiguous terms.

Grateful Care argues that White River was supposed to explain “what a day care does,” what a physical layout of a typical day care looked like, and “what constituted day care curriculum” as part of White River’s case in chief. [Resp. at 4, 15, 16]. But White River did so. And the plain definition of an I-4 day care facility as applied to Grateful Care is clear enough. White River proved that Grateful Care rendered “custodial care,” by providing “assistance with day-to-day living tasks” to clients who “evacuate at a slower rate” and have “mental and psychiatric complications” without their parents or guardians present.

B. White River Is Entitled to Rely Upon Grateful Care’s Evidence to Support Its Objection to the ALJ’s Non-Final Order

Grateful Care appears to argue that White River cannot rely upon the sworn testimony of Grateful Care’s witnesses or its exhibits in its Objection. [Resp. at 13 (stating “White River’s entire argument is based on selections from Grateful Care’s evidence” and noting White River’s “own lack of evidence”), at 17 (“objection does not cite any evidence it produced”), at 18 (“Grateful Care’s testimony is the only evidence in support of this result”), at 19 (“Respondent presented less testimony and fewer exhibits than Grateful Care”)]. AOPA does not impose this restriction.

The testimony of White River’s witnesses and exhibits all support the

violations identified by White River. The FPBSC need only listen to the recording of the hearing at minute 23:20 to 52:22 and review White River's exhibits to confirm.

Grateful Care argues that White River's citation of Grateful Care's evidence in its Objection and Brief in support reflect an "attempt[] to shift their own heavy burden onto Grateful Care without having made an initial case." [Resp. at 10]. But that's wrong. As explained above, White River made its initial case before the ALJ at the hearing and in its post-hearing Brief. Further, White River has every right to cite to all evidence in the record to support its arguments.

White River cited Grateful Care's evidence in its Objection and Brief because this is the evidence the ALJ chiefly relied upon in its Non-Final Order. Citing this evidence was necessary to explain how the ALJ erred in relying upon it. AOPA does not bar White River from doing this.

C. The ALJ's Non-Final Order Is Not Entitled to Deference

As a legal matter, Grateful Care argues that the FPBSC must review the ALJ's Non-Final Order with deference under the substantial evidence standard just like a trial court must review a final agency action on judicial review. Grateful Care says that for both a trial court and the FPBSC "the standard on appeal [is] this same – [is] there 'substantial evidence' to support the findings?" [Resp. at 13; *see also id.* at 14 ("the Commission should look at each finding and determine if [a mere scintilla of evidence] is present to support the ALJ's findings and conclusion"); *see also id.* at 17 (if "reasonable minds might accept [the evidence] as adequate ... then the ALJ's Order meets the [reliable evidence] standard"). This is simply wrong.

The FPBSC is not a court reviewing a final agency action of the ultimate

authority. The FPBSC is the ultimate authority. It can review all the evidence *de novo* and make its own decision without any deference to the ALJ. It can even “exercise the powers of an administrative law judge to hear additional evidence” – though it is not required to. Ind. Code § 4-21.5-3-28(e)(3). Either way, the ALJ is not the only “finder of fact” as Grateful Care says. [See Resp. at 2, 14]. The FPBSC is not limited by the ALJ’s findings and conclusions. The FPBSC can decide this case as it chooses, provided it relies upon “substantial and reliable evidence” to support its findings and explain why it disagrees with the ALJ. See Ind. Code § 4-21.5-3-29(b).

If Grateful Care is right, and the FPBSC must show deference to the ALJ’s Non-Final Order and adopt it if there is a mere “scintilla” of evidentiary support, then the Grateful Care has, effectively, turned the ALJ into the ultimate authority in this case. And that simply cannot be.

D. Grateful Care’s Evidence Shows That It’s A Day Care

Grateful Care rehashes the evidence in support of its position that it does not render “custodial care” as a day care because all of its care is “the medical and psychiatric treatment of autism.” [Resp. at 4, 12–20]. It says “the Commission should look at each finding and determine if ... [a] ‘mere scintilla’ [of evidence] is present to support the ALJ’s” Non-Final Order. [Resp. at 14].

First and foremost, this case isn’t about whether Grateful Care renders medical care. No one disputes that it does. It is about the fact that Grateful Care meets the plain definition of an I-4 occupancy day care facility, as Grateful Care’s witness admitted:

Q: ... your position is that based on your review of Grateful Care, not anyone else, they could be a B or could be an I classification, either would work.

A: That is correct.

[Hearing Recording at 55:47 - 56:03; *see also* Respondent’s Exhibit 5 (email of Craig E. Burgess, classifying autism treatment facilities as I-4 day cares)].

Second, as noted in the previous section, the ALJ’s Non-Final Order is not entitled to deference. The FPBSC need not affirm and adopt the Non-Final Order just because Grateful Care says there may be a scintilla of evidence to support it.

Third, even if the ALJ’s Non-Final Order was entitled to deference, and the FPBSC stood in the same position as a trial court reviewing a final agency action, the Indiana General Assembly recently amended the judicial review statute to allow a court to grant relief from a final agency action if “a person seeking judicial relief” proves the action is “unsupported by a *preponderance of the evidence*.” Ind. Code 4-21-5-14(d)(5) (effective July 1, 2024) (emphasis added). This is a more stringent standard than the “substantial evidence” standard in effect before July 1, 2024. A mere “scintilla of evidence” is no longer sufficient to survive judicial review. Here, the ALJ’s Non-Final Order is not supported by a preponderance of the evidence and would not be sustained on judicial review.

E. Grateful Care Misstates the Procedural History and the Law

1. Grateful Care Incorrectly Summarizes the Procedural History, In Part

Grateful Care says that “there is some question” as to whether White River found Grateful Care violated the Indiana Building Code because “White River ... did

not designate any evidence or exhibits of violations found by White River, only the City of Greenwood’s October 24, 2023, Notice of Violation was designated.” [Resp. at 2–3]. But there is no question on this point. White River found violations. Grateful Care filed its Petition for Administrative Review on May 23, 2024, identifying the May 7, 2024 letter from White River as the Order on which it was seeking administrative review. [See Procedural History ¶ 1]. The Petition was granted by the FPBSC on May 30, 2024. [*Id.* ¶ 2]. The May 7, 2024 letter *is* the Order identifying the violations found by White River. It is in the record. There was no need to re-submit it as a hearing exhibit.

2. Grateful Care’s Land Rights Presumption Is A Red Herring

Grateful Care argues that “[t]he law requires that government interference with land rights must be viewed with great skepticism” and that White River must “eliminate any doubt about its interference with Grateful Care’s free use of the subject premises.” [Resp. at 4–5].

The undersigned is not aware of this so-called “presumption of use of land” in AOPA or the Building Code. Grateful Care appears to rely solely on zoning cases not code enforcement cases. [See *id.* (citing cases)].¹ Regardless, AOPA gives all the

¹ These cases say that “ambiguous zoning ordinances are construed in favor of property owners.” *Noblesville, Ind. Bd. of Zoning Appeals v. FMG Indianapolis, LLC*, 217 N.E.3d 510, 515 (Ind. 2023) (citations omitted). Even if this rule of statutory construction applied to building code enforcement, case law also states that “this rule cannot override specific language of an otherwise valid and unambiguous ordinance.” *Id.* at 516 (quoting *Story Bed & Breakfast, LLP v. Brown Cnty. Area Plan Comm’n*, 819 N.E.2d 55, 66 (Ind. 2004)).

protection that Grateful Care needs.

Under AOPA, White River “has the burden of persuasion and the burden of going forward with the proof” “at each stage of the proceeding.” Ind. Code § 4-21.5-3-14(c). This standard requires only that White River convince the FPBSC to issue findings that are supported by “evidence that is substantial and reliable.” Ind. Code § 4-21.5-3-27(d). These standards do not require White River to meet its burden by any other standard. The FPBSC should not complicate this case by imposing a presumption that is redundant of the procedural protections Grateful Care enjoys.

3. Grateful Care’s Discussion About White River’s Burden Distracts from the Core Issues

Grateful Care’s Response thoroughly discusses White River’s “burden of proof,” “burden of persuasion,” and “burden of production.” This discussion is beside the point. First, this tedious discussion of burden is a distraction from the plain terms of the definition of an I-4 occupancy “day care,” which is what this case is about. Second, as explained in the previous section, White River does not dispute that it has the burden of proof at this stage. Third, Grateful Care supports most of its argument with cases that have nothing to do with agency adjudication about Building Code, citing mostly cases involving disputes between private litigants² or tax litigation.³

² *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1982) (insurance coverage dispute); *First Bank & Tr. Co. of Clay Cnty. v. Bunch*, 460 N.E.2d 517, 518 (Ind. Ct. App. 1984) (personal injury dispute); *Hunnicut v. Boughner*, 231 N.E.2d 159 (Ind. Ct. App. 1967) (same); *D.H. by A.M.J. v. Whipple*, 103 N.E.3d 1119, 1127 (Ind. Ct. App. 2018) (dispute over various tort claims).

³ *Southlake Indiana, LLC v. Lake Cnty. Assessor*, 174 N.E.3d 177, 179 (Ind. 2021) (discussing Ind. Code § 6-1.1-15-17.2(b)); *Elkhart Cnty. Assessor v. Lexington Square*,

4. Grateful Care Incorrectly States the “Preponderance of the Evidence” Standard Applies At This Stage

Grateful Care also says that White River must meet its burden by a “preponderance of the evidence.” [Resp. at 6–7]. This is a moot point because White River has met its burden by a preponderance of the evidence.

Moreover, preponderance of the evidence comes into play only if this case is taken up on judicial review, as explained above. And that is not the procedural posture of this case at present. At this stage of the proceeding, AOPA says nothing about a “preponderance of the evidence,” only that White River must point to “substantial and reliable” evidence on which the FPBSC may issue its findings. Ind. Code § 4-21.5-3-27(a).⁴

Thus, to carry its burden of proof at this stage of the proceeding, “substantial and reliable evidence” is sufficient.⁵ Though, as noted above, for the FPBSC’s final

LLC, 219 N.E.3d 236, 241 (Ind. T.C. 2023) (same); *Blesich v. Lake Cnty. Assessor*, 46 N.E.3d 14, 17 (Ind. T.C. 2015) (tax proceeding under Ind. Code § 6-1.1-15-17.2(b)).

⁴ The words “preponderance of the evidence” appear only once in in Chapter 3 of Title 4, Article 21.5, and that’s only with respect to whether a party challenging agency action is entitled to attorney’s fees. *See* Ind. Code § 4-21.5-3-27.5(a)(1).

⁵ The only support Grateful Care cites for its “preponderance of the evidence” standard is *Peabody Coal Co. v. Ralston*, 578 N.E.2d 751, 754 (Ind. Ct. App. 1991). This case relates only to enforcement proceedings by the natural resources commission pursuant to the Indiana Department of Natural Resource (“DNR”) enforcement statute, which has since been repealed. *Id.* at 754 (citing Ind. Code § 14-3-3-22). But that unique process for DNR cases does not apply to all AOPA cases, and it does not apply here.

The only holding in *Peabody* relevant for this case is “the ultimate burden of proof on [party] defending charges of regulatory violations [by the agency] would be contrary to statutory mandate and principles of fair procedure.” *Id.* at 754. White River does not disagree. As explained above, it met its burden.

order to withstand judicial review after the July 1, 2024 amendments to Ind. Code § 4-21.5-5-14(d), the FPBSC's final order should be based on a preponderance of the evidence. For all the reasons explained above, White River has met this standard.

Grateful Care also argues that it has a “presumption of innocence” and no obligation to affirmatively refute White River's case that it violated the Indiana Building and Fire Code. [Resp. at 7–9]. Again, White River agrees it has the burden of proof. It has met that burden.

F. The FPBSC Should Admit White River's Exhibits

Grateful Care argues that the FPBSC should refuse to admit White River's Exhibits 8 and 9 because the exhibits were submitted after the hearing. [Resp. at 20–22]. White River rests on its prior briefing in this adjudication to support its argument that the FPBSC should admit these exhibits or take official notice of the facts contained therein. *See* Ind. Code § 4-21.5-3-26(f).

Grateful Care also argues it's too late for the FPBSC to take additional evidence under Indiana Code § 4-21.5-3-26. [Resp. at 21–22]. It is not. AOPA states that “the ultimate authority ... may: (3) exercise the powers of an administrative law judge to hear additional evidence under sections 25 and 26 of this chapter.” Ind. Code § 4-21.5-3-28(e)(3). FPBSC has the authority to receive Exhibits 8 and 9 into evidence.

CONCLUSION

The FPBSC should not adopt the Non-Final Order issued by the ALJ but should 1) correct clearly erroneous legal conclusions which are not supported by the factual findings or plain meaning of the application building and fire codes, 2) correct factual findings that are not supported by the weight of the evidence, and 3) admit

and consider Exhibits 8 and 9 in support of Respondent's opposition to Grateful Care's Petition. The FPBSC should enter a Final Order concluding that Grateful Care's facility is an I-4 occupancy and not a "B" occupancy and that the Greenwood Clinic does not comply with applicable requirements for an I-4 occupancy.

Date: April 23, 2025

Respectfully submitted,

KROGER, GARDIS & REGAS, LLP

/s/ Brian Bosma

Brian Bosma, Atty. No. 4180-49

Justin R. Olson, Atty. No. 31450-49

KROGER, GARDIS & REGAS LLP

111 Monument Circle, Suite 900

Indianapolis, IN 46204

Phone: (317) 692-9000

Email: bbosma@kgrlaw.com

jolson@kgrlaw.com

ATTORNEYS FOR RESPONDENT WHITE RIVER
TOWNSHIP FIRE DEPARTMENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *Respondent's Sur-Reply in Support of Objection to Non-Final Administrative Order* was served via service method indicated below on this 23rd day of April 2025.

Opposing Party:

Grateful Care ABA
c/o Jeffrey Bellamy
Attorney
Thrasher Buschmann & Voelkel, P.C.
8440 Woodfield Crossing Boulevard
Suite 310
Indianapolis, IN 46240
bellamy@indiana-attorneys.com
VIA EMAIL

Ultimate Authority:

Fire Prevention and Building Safety Commission
Indiana Department of Homeland Security
302 W. Washington Street, Room E-208
Indianapolis, IN 46204.
buildingcommission@dhs.in.gov
VIA EMAIL

Signature: /s/ Justin R. Olson
Served by: Justin R. Olson