

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL  
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of )  
 )  
 B. C. ) OAH No. 08-0343-ALH  
 dba NO NAME ASSISTED LIVING )  
 \_\_\_\_\_ )

**DECISION ON SUMMARY ADJUDICATION**

**I. Introduction**

The Department of Health and Social Services, Division of Public Health, Certification, and Licensing (“the division”) notified the respondent that it was revoking the respondent’s license to operate an assisted living facility. Upon appeal by the respondent, the division moved for summary adjudication, asserting that the respondent was not eligible for a license as a matter of law.

Based on the undisputed facts, the respondent is currently ineligible to hold an assisted living facility license. Summary adjudication is granted in favor of the division, and the division’s decision to revoke the respondent’s license is affirmed.

**II. Facts**

The division provisionally licensed the respondent to operate an assisted living home on March 21, 2007. In her initial application for licensure, the respondent answered “no” on August 1, 2006, to a question asking whether she had “ever been found by a court or agency of this or another jurisdiction to have neglected, abused or exploited a child or vulnerable adult under Children in Need of Aid (AS 47.10), Protection of Vulnerable Adults (AS 47.24) or Office of the Long Term Care Ombudsman (AS 47.62) or a substantially similar provision in another jurisdiction.”<sup>1</sup> The division granted the license partly in reliance on this representation.

The respondent did not disclose on her application that on April 4, 1998, the Alaska Department of Health and Social Services (DHSS) had filed a Petition for Adjudication of Children in Need of Aid and for Temporary Placement of the respondent’s minor daughter. Referring to the respondent’s daughter in the petition, DHSS “allege[d] that the minors named above are children in need of aid under AS 47.10.010(a)(1),(2).”<sup>2</sup> The petition recited the history of the case and summarized the alleged facts supporting the petition. Among the facts

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<sup>1</sup> Agency record at 236.

<sup>2</sup> Exhibit 3, page 1.

alleged in support of the petition was that the respondent and the child's other parent "refuse to have the child return to their home."

On May 11, 1998, the Superior Court entered an order entitled "Findings and Order for Temporary Custody."<sup>3</sup> The court made a finding of fact that "probable cause exists to believe that the minor named above is a child in need of aid as alleged in the petition. However, in stipulating to probable cause, the parents do not admit any of the facts alleged in the petition." Based on this finding, the court committed the minor to the temporary custody of DHHS.

An adjudication hearing was never held on the petition. The child emancipated while in the temporary custody of DHSS, and the case was then dismissed.

After receiving complaints about the respondent's facility, the division began an investigation under AS 47.32.090. During the course of this investigation, the division learned of the earlier CINA case. The division issued a report under AS 47.32.120, stating that it intended to revoke the respondent's license.

### **III. Discussion**

Summary adjudication is appropriate when there are no material issues of fact in dispute.<sup>4</sup> There is no disagreement about the facts relevant to resolution of this case, and an evidentiary hearing is therefore unnecessary to resolve the matter.

The division asserts that it does not have the authority to issue the respondent a license to operate an assisted living facility because a court or agency had found that the respondent neglected a child under AS 47.10. While the respondent concedes that the court found probable cause to believe that the respondent had neglected a child, she argues that the court never held a hearing on the matter and therefore never made a finding as to whether there had been neglect. The division replies that regardless of whether the court ultimately made a finding, the agency had found that the respondent had neglected her child, thereby rendering the respondent ineligible for a license to operate an assisted living facility.

Alaska Statute 47.05.310(c)(1) provides in part that

The department may not issue or renew a license or certification for an entity if an individual is applying for a license, license renewal, certification, or certification renewal for the entity and that individual has been found by a court or agency of this or another jurisdiction to have neglected, abused, or exploited a child...under AS 47.10....

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<sup>3</sup> Exhibit 4.

<sup>4</sup> 2 AAC 64.250.

Thus, if the respondent has at some time in the past been found by a court or agency to have neglected a child under AS 47.10, the Child in Need of Aid or “CINA” statute, the division “may not” issue the license. The division is correct that, if the finding has been made, issuance of the license is not a matter of discretion; the division would be prohibited from issuing. The only exception to this prohibition is if the applicant has successfully applied for a variance from the Variance Review Committee under AS 47.05.310(f) and 7 AAC 10.930-935. Ms. C. has not obtained a variance.

The division initially argued that “a court of this state” had found that the respondent had abandoned and refused to authorize necessary medical services for her minor child, based on the court’s finding that the child was a child in need of aid under AS 47.10. When the respondent pointed out that the court had not entered a finding of more than probable cause to believe that she had neglected her child, and that the respondent had not made any admissions except to acknowledge probable cause, the division replied that the statute refers to findings made by a court or by an *agency*. Since DHSS is an agency, the division asserts that by alleging that the respondent had neglected a child, the agency had made such a finding.

It is clear that DHSS had alleged “neglect.” DHSS alleged that the respondent failed to provide shelter and necessary attention for her daughter, by refusing to allow her daughter to come home and refusing to authorize needed medical attention. Although at the time the CINA case was initiated there was no statutory definition of “neglect,” one was adopted a short time later: “neglect” means the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child.<sup>5</sup> This definition appears intended to clarify the meaning of the word “neglect” as it was being used in the statute, not to alter or expand the meaning of the existing statute. It is clear that in the CINA case DHSS was alleging “neglect” as the word is used in the current version of 47.05.310(c)(1).

One may question whether by alleging neglect in the CINA petition DHSS, the agency, had “found” that the respondent had engaged in neglect. The CINA statute does not appear to include a provision for the agency to formally make “findings,” at least using that term. Because AS 47.05.310(c)(1) states that a person is not eligible for an assisted living license if the person has been “found” by an agency to have neglected a child under the CINA statute, the “finding”

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<sup>5</sup> AS 47.17.290(10) (1997).

of neglect by the agency is necessarily made by means other than by a formal administrative procedure.

According to Child in Need of Aid Rule 6, after taking emergency custody the agency must notify the court and file a petition alleging that the child is a child in need of aid, “if the Department determines that continued custody is necessary to protect the child.” Thus, the agency did not merely allege neglect and refer the matter to the court to make a finding one way or another. The CINA emergency custody process cannot begin until the agency has made a determination, finding that the child is in fact a child in need of aid. The agency’s allegation in the CINA petition was thus the result of the agency having found that that continued custody was necessary because of neglect.

It is unnecessary to examine whether the CINA court’s finding of probable cause to conclude neglect had occurred constituted a finding of neglect. DHSS, an agency, found that the respondent had neglected her daughter under AS 47.10 before it filed a petition to the court alleging neglect. Because the agency found that the respondent had neglected a child under AS 47.10, the Child in Need of Aid statute, the respondent is not eligible for a license to operate an assisted living facility.

If the department concludes, after an investigation under AS 47.32.140, that there is reasonable cause to believe that a violation of an applicable statute or regulation has occurred, the department must notify the license holder of its intent to take any of the enforcement actions allowed under AS 47.32.140(d). After its investigation, the department concluded that the respondent’s license was issued in violation of 47.05.310(c)(1). The department properly notified the respondent that it intended to revoke the license, an enforcement action specifically provided for by AS 47.32.140(d)(6) when there has been a violation of an applicable law.

#### **IV. Conclusion**

There are no material issues of fact in dispute. Before she applied for a license to operate an assisted living facility, an agency had found that the respondent neglected a child under AS 47.10, the Children in Need of Aid statute. The respondent is therefore ineligible to hold a license to operate an assisted living facility, and the respondent has not applied to the Variance Review Committee for an exception. The division is entitled to revoke a license that was issued in violation of law.

Because the respondent is not eligible for a license to operate an assisted living facility, the division's decision to revoke the respondent's license is affirmed.

DATED this 30th day of January, 2009.

By: Signed  
DALE WHITNEY  
Administrative Law Judge

### **Adoption**

The undersigned, on behalf of the Commissioner of Health and Social Services and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 26th day of February, 2009.

By: Signed  
Signature  
William H. Hogan  
Name  
Commissioner  
Title

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