

Neither party has made the document recording the finding a part of the record in this case. By consent, the question presented in this case is whether it is more likely than not that John Smith committed sexual abuse against his daughter, Amanda, in the course of a period that ended in late December of 1994. The parties agree that OCS has the burden of proof in the proceeding.

The evidence in this case is stale and difficult to test. Witness recollections, even on matters that ought not to be controversial, are dramatically divergent. It is not Mr. Smith's fault that the evidence is stale, and the resulting lack of certainty does not lessen the agency's burden for proof. As a practical matter, the long passage of time between the allegation and the hearing has made it more difficult for OCS to meet its burden.

This decision concludes that OCS failed to meet its burden of proof at the 2006 hearing.

C. Evidence Taken

The hearing required about a day and a half, with testimony from Amanda Smith, John Smith, Muriel Smith (Amanda's grandmother), Susan Smith (Amanda's mother), and Jane Smith (John's spouse in the 1990s). The testimony was recorded on a combination of tapes and a digital recording. There was some controversy regarding exhibits, and it may be helpful to summarize in one place how the various disputes were resolved:

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| Exhibit 1 | Offered only "as evidence of the circumstances of the first disclosure" and admitted without objection on that basis. |
| Exhibit 2 | Admitted with the stipulation that the first four pages are an <i>ex parte</i> order (<i>i.e.</i> , the other party to the order had no opportunity to respond). The police report attached to the order has intentionally been added to Exhibit 2, offered by OCS in the portion of the hearing recorded on tape 3A. |
| Exhibit 3 | Admitted over a relevance objection from Smith. Completeness objection withdrawn. |
| Exhibit 4 | Admitted over a relevance objection from Smith. Page 8 was removed by agreement before the exhibit was offered. |
| Exhibit 5 | Admitted over a relevance objection from Smith. Page 11 was removed by agreement before the exhibit was offered. |
| Exhibit 6 | Admitted over a relevance objection from Smith. |
| Exhibit 7 | Admitted after objection withdrawn. |
| Exhibit 8 | Admitted without objection (relevance objection apparently withdrawn). |
| Exhibit 9 | Not offered; returned at hearing. |

Exhibit A This deposition and its exhibits were offered, and admitted without objection, solely insofar they bear on the reliability of Amanda Smith's testimony at the hearing. The limitation is more fully discussed in an order dated April 5, 2006.

There is also a very limited agency record supplied by Chief Assistant Attorney General Stacie Kraly at the inception of the case, consisting of [REDACTED] partial records of a 2005 grievance review relating to this abuse allegation.

In the discussion below, evidentiary citations will be omitted for facts that were undisputed at the hearing.

II. Background Facts

Amanda Smith was born to John and Susan Smith, who were then married, in the spring of 1981. John and Susan divorced in 1983, and Susan moved to Otherstate with Amanda in 1984. Visits with John tapered off even before the move. Susan and Amanda moved back to Alaska in the mid-1980s, but there seems to be little question that Amanda did not see her father again until the early 1990s, after both of his sons had been born.⁴

In 1988, John Smith began a relationship with Jane Smith. The two were married in 1990, and they had two sons, Joe and Dan. John Smith was physically violent to Jane at times, and this occurred on occasion in the presence of the couple's children. Jane and John divorced after approximately ten years of marriage.

Amanda Smith was in the custody of her mother, Susan, between 1983 and 1995. She was physically abused in the home. Susan Smith acknowledged at the hearing that she had "an issue" with violence and that she beat Amanda with a belt, but maintained that she "only lost it a couple of times" and used the belt "only one time." Her demeanor when making these statements suggested that the violence may have been substantially more frequent. Amanda Smith testified that her mother beat her with a coathanger as a child. At age seven, Amanda was sexually molested by an older child.

In 1994, at age 13, Amanda ran away from home and her mother contacted John for assistance in finding her. John seems to have been instrumental in finding Amanda and returning her to her mother. This apparently led the two parents to discuss and arrange visits between John and Amanda. It is probable, but not certain, that these were the first visits between father and

⁴ Susan Smith placed the reestablishment of contact at various times, but seemed to recall meeting the two boys at the time she reestablished contact. This would put the date around 1993 or 1994. Jane Smith, a credible witness with no close ongoing connection to either party and the witness whose memory seemed the least foggy, placed the reestablishment of contact in 1994. Muriel Smith and John Smith testified likewise.

daughter since 1984. At least twice in late 1994, once for a weekend and once for a week around Christmas, Amanda stayed in Anycity with John and his wife, Jane.

In January of 1995, Amanda came to Anycity with her mother for an additional overnight visit while John was away hunting. In the presence of her mother, Amanda told Jane that she felt uncomfortable with the way her father had played with his very young son Dan under the covers. She did not describe the matter in detail. Jane did not think there was anything to be concerned about, and she said so. The January visit seems to have been relaxed and pleasant, and there was no discussion of possible abuse of Amanda.⁵

Also in early 1995, shortly before making the report at issue in this case, Amanda states that she was coerced into having sexual intercourse by a 13-year-old drug dealer.⁶

On March 3, 1995, while still 13, Amanda was admitted to the Providence Discovery Unit following a drug overdose. About ten days later, the following report was recorded in her hospital chart:

Pt. encouraged to have Pelvic. Pt. indicated she did not want the exam today since she is having flashbacks from previous sexual abuse. She agrees to have the exam prior to hospital D/C. Pt. discloses: Biol. Father in first two years of life would fondle her while changing diaper. She then was approached by him when she was 11 and coerced into having sex. This sexual abuse persisted – last episode Christmas 1994. She indicates that she initially loved him – hugging him – but now hates him. She has told this to no one before this admission. She feels her loving behavior caused his sexual abusing but we discussed that this thinking was incorrect[,] that his behavior was sick and wrong – not hers.⁷

The next day, Amanda wrote out the following account:

When I was a baby, my dad fingered me a couple of times when he was supposed to be changing my diaper; he was on visitation rights. When I was eleven I wanted to meet my father. When I did, he made me have sex with him. He did that again last Christmas. When I stayed the night one time, I was asleep in his son's bed, and he came into the room, pulled down my clothes, and started to finger me. I woke up in the middle of it, opened my eyes a little bit, and pretended that I was asleep. I had to keep my muscles loose; that way he wouldn't know that I was awake because if he knew he would force me to have sex with him.⁸

⁵ Both Jane Smith and Susan Smith describe this meeting in substantially the same terms.

⁶ Hearing testimony of Amanda Smith; Ex. A at 9.

⁷ Hearing Ex. 1. A medical provider named “ ” made the entry. This may or may not be the same person who heard Amanda's account. No medical personnel testified at the hearing, few medical records were offered, and little context was provided for Amanda's statement.

⁸ Hearing Ex. A (deposition) at deposition exhibit 8.

Two days afterward, a Department of Health and Social Services employee and an Anycity police officer interviewed Amanda. The officer made an audio recording, but this does not seem to have been preserved. According to a written summary of the interview, Amanda related that while visiting her father's house around Christmas of 1994 she had observed her father under a blanket "rubbing up close to" and kissing her sleeping half-brother Dan, who was wearing a diaper. She also related the "fingering" event in similar terms to the handwritten account, adding upon further questioning that her father also "had sex with me" and "was raping me while I was asleep" on the same night as the fingering and the incident with Dan. She said that the sexual abuse had happened before and that her father had also sexually abused her at one or two years of age.⁹

There was a brief police investigation coordinated by the Anycity Police Department. John Smith denied the allegation and agreed to take, and did take, a polygraph examination administered by the Othercity Police Department (OPD). No full report of the result of this examination, if any still exists, was offered at the hearing, but an exhibit offered by OCS and admitted without objection shows that OPD Detective Stone concluded "that John Smith was truthful during the exam, and that he did not have any sexual contact or penetration with Amanda Smith."¹⁰ At the time of the allegation, Amanda Smith had been erroneously diagnosed with hepatitis B, and the police also asked John to submit to testing for that disease (the basis for the testing was that, because the disease is potentially sexually transmitted, the result would be evidence of whether he had had sexual contact with his daughter). John Smith agreed to take the test. He tested negative. The police investigation subsequently ended without charges.

In June of 1995, DFYS found the allegation of sexual abuse to be "substantiated" and closed its own case on the matter.¹¹

III. Analysis of Whether the Rape Allegation is Substantiated

The OCS case for substantiation in 2006 relies almost entirely on the current testimony of Amanda Smith. In 2006, Amanda's account is somewhat different from the ones she gave in 1995. She now denies any recollection of abuse when she was a baby, and denies any

⁹ Hearing Ex. A (deposition) at deposition exhibit 6.

¹⁰ Ex. 2, 7th page (Anycity Police Dep't summary). Though commonly not admissible over objection in court, results of a polygraph examination may be admissible over objection in an administrative hearing where there is a good showing that the test was competently administered. *See, e.g., Motell v. Napolitano*, 588 N.Y.S.2d 452, 453 (App. Div. 1992). Here OCS offered the portion of Exhibit 2 summarizing the polygraph result (remarks of Ms. W., tape 3A), and counsel for Mr. Smith stated "I don't object to that." Since admission of the test result was stipulated, it may be considered even though there is minimal information about the way the test was administered.

¹¹ Regional Panel Review (April 6, 2005) (included in agency record).

recollection of having alleged that this took place. The recollections of more recent abuse of both Dan and herself have become a little more graphic. In the case of Dan, she is now quite explicit in alleging that she directly saw her father fondling the boy's penis and testicles and "jacking him off," whereas there is no evidence that in 1995 her account went beyond a concern that her father ought not to be under a blanket snuggling close to her diapered half-brother. In her own case, the 1995 accounts focused on "fingering" with more nebulous references, when pressed by her interviewers, to intercourse "while I was asleep;" in 2006 she is very clear that intercourse occurred, although she variously estimates the number of occasions at "like three"¹² or "at least six."¹³

The evolution of Amanda's account does not, by itself, establish that the account lacks basic truthfulness, but it invites further exploration of the details of the earlier versions and the circumstances under which they were offered. This is no longer possible: the people who heard them did not appear at the hearing, and the tape recording of the police interview seems likewise to have been lost to the passage of time.

OCS suggests that Amanda has never had a motive to lie and that it is implausible that she would have made up the allegations out of whole cloth. This argument has some force. We do know, however, that Amanda made the allegations at a time when she was a very troubled youth, subject to both physical and sexual abuse from other sources. She was also just reestablishing contact with her father after a long separation that she could have, perhaps correctly, blamed on his indifference. Looking back eleven years later with only the most limited information about the context of her allegations, there can be no certainty about the likelihood or unlikelihood of a false allegation.

OCS also places considerable reliance on a series of exhibits showing that John Smith was violent to his wives and to at least one other adult, sometimes even when children were present. Though offering no scientific evidence on the degree of correlation between violence with adults and sexual molestation of children, OCS asks that an inference be drawn that Mr. Smith lacks "impulse control" and that he is "unable to put anyone's needs before his own."¹⁴ The agency would then have this inference be used as corroboration that the sexual abuse of Amanda occurred. This chain of inference is too tenuous to be used in a legal proceeding.

¹² Ex. A at 5.

¹³ Hearing testimony of Amanda Smith, direct exam.

¹⁴ OCS Closing Argument at 14.

Against Amanda's account, John Smith's denial is bolstered by some corroborating elements. His willingness to take the hepatitis test to see if he was a carrier at a time when Amanda had been diagnosed with the disease suggests some confidence on his part that he had nothing to hide. The same is true of his willingness to take the polygraph exam. The conclusion of the OPD Detective administering the polygraph that John was essentially truthful also lends some support to the denial. Finally, Jane Smith, John's estranged wife who is by no means one of his admirers, saw no indications that Amanda was being abused and makes a credible assessment that John did not sexually abuse his other children.

On balance, OCS has not been able, more than a decade after the fact, to carry its burden of proof of demonstrating that John Smith raped or otherwise sexually molested Amanda Smith in 1994.

IV. Conclusion and Order

Because the preponderance of the evidence does not sustain it, the finding of substantiation of child abuse regarding John Smith's relationship with his daughter Amanda is withdrawn.

DATED this 5th day of January, 2007.

By: Signed
Christopher Kennedy
Administrative Law Judge

Adoption

The undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 11th day of February, 2007.

By: Signed
Signature
Karleen Jackson
Name
Commissioner
Title

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