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

In the Matter of:	)	
	)	
K.S.	)	
	)	OAH No. 07-0600-DHS
	)	

DECISION AND ORDER GRANTING SUMMARY ADJUDICATION

I. Introduction

This case arises from a request for hearing filed by K.S. Ms. S. challenges a substantiated child neglect finding made on August 24, 2007 regarding an incident on March 27, 2007. Ms. S. is alleged to have neglected 19-month-old S.S., a child formerly in her foster care whom she had adopted.

At the time of the incident in question, Ms. S. was involved in a deteriorating relationship that she was seeking to end, but one that had not previously involved physical abuse against her. The incident itself entailed a loud argument that may have occurred in S.S.'s presence, and a physical altercation that occurred after S.S. had been put to bed in another room. OCS substantiated a finding of "neglect" on the basis of the mother's "failure to seek safety that evening, despite having both time and alternatives, combined with [her] own physical behavior toward [her] then partner."[1]

Because the conduct alleged by OCS does not constitute neglect of S.S., Ms. S. in entitled to a summary adjudication withdrawing the finding.

II. Summary Adjudication

At the case planning conference in this matter, counsel for OCS stated that the case might be resolvable by motion and Ms. S., though unfamiliar with motion practice, stated her own view that it might be possible to resolve the case in Ms. S.'s favor solely based on the law, even if one assumed all of OCS's factual allegations to be true. Because of Ms. S.'s unfamiliarity with motions, OCS cooperatively agreed to initiate an effort toward summary resolution. OCS filed a

[1] Administrative Record (R.) 0015. The document is an e-mail in which OCS retracted a prior finding, explained its reasoning to Ms. S. for making a new finding of "neglect," and stated that "a new letter of finding" would be issued (R. 0016). If such a letter was ever issued, it is not in the record. However, OCS confirmed at the case planning conference that the sole finding at issue is a finding of "neglect." Digital Recording, 10/26/07, at 3:30.

motion for summary adjudication and Ms. S. responded and cross-moved for summary adjudication in her own favor.[2]

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[3] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. If facts that are undisputed establish that one side or the other must prevail, the evidentiary hearing is not required.[4] In evaluating a motion for summary adjudication, if there is any room for differing interpretations, all facts are to be viewed, and inferences drawn, in the light most favorable to the party against whom judgment may be granted.[5]

This case has some factual disputes as to details, but they are not important to the outcome. This is because even if the facts are taken in the light most favorable to OCS, the finding must be vacated because the facts do not fit the legal definition of "neglect."

III. Facts in Light Most Favorable to OCS

In March of 2007, K. S., her domestic partner K.O., and 19-month-old S.S. lived in the same Anchorage residence. Although the two adults had, at least to some degree, been raising S.S. together, he was the adoptive son of Ms. S. but not Mr. O.[6] Prior to March 27, 2007, Mr. O. had not been physically abusive to Ms. S.[7] There is no allegation or evidence that Mr. O. had been abusive or neglectful in any way to S.S. in the past.

On the evening of March 27, 2007, Mr. O. and Ms. S. became involved in a heated argument.[8] During part of the first phase of the argument, according to Mr. O., Ms. S. "followed

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[2] After the cross-motion arrived, OCS did not seek to respond to it. No specific procedures had been set up in the case planning conference for such a response to be made, although certainly OCS could have filed one in accordance with OAH's general regulation on motions, 2 AAC 64.270. The materials OCS submitted in its own motion are considered here by way of opposition to Ms. S.'s cross-motion.

Had Ms. S. not filed a cross-motion and simply denoted the response an "opposition" to the original motion, this case would likely have been a candidate in any event for summary adjudication against the nonmoving party. When the available facts and issues are fully ventilated in the briefing of one party's motion for summary judgment, a court (and, by extension, an administrative body applying the standard for summary adjudication) may grant summary disposition to the *nonmoving* party, if the papers show that that party is entitled to prevail. *E.g., Dickeson v. Quarberg,* 844 F.2d 1435, 1444 n.8 (10th Cir. 1988); 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d* § 2720; *see also Rockstad v. Erikson,* 113 P.3d 1215, 1222 & n.19 (Alaska 2005).

[3] *See, e.g., Schikora v. State, Dept. of Revenue,* 7 P.3d 938, 940-41, 946 (Alaska 2000).

[4] *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

[5] *Samaniego v. City of Kodiak,* 2 P.3d 78, 82-83 (Alaska 2000).

[6] R. 24.

[7] *E.g.*, R. 41, R. 4, R. 21 (the reference in R. 21 to choking is a reference to the March 27 incident).

[8] R. 35.

me around the house, shouting, while carrying [S.S.]." Though disputed by Ms. S.,[9] this allegation will be assumed as true for purposes of the present motion. It is undisputed that the baby was then put to bed in his room.[10]

A second phase of the altercation occurred after S.S. was in bed. There are essentially two versions of how it transpired. According to Mr. O., after some further arguing he attempted to leave the apartment, and Ms. S. blocked his way out and struck him on the leg with a closed fist. He says that he wrapped her in a bear hug and she continued to "pummel" him. He did not strike her and eventually he was able to leave the apartment.[11] Ms. S. describes a physical altercation in which she tried to get past Mr. O., he called her an obscene name, she slapped him, he held her from behind and put pressure on her windpipe so that she feared she would choke, and she punched him over her shoulder in order to escape.[12] Both accounts, which are in fact quite similar, relate a single and brief violent episode. In both accounts, Mr. O. then left the apartment. Ms. S. and S.S. subsequently left as well with friends, who took them to another place for the night.[13]

IV. The OCS Finding

About two months later, OCS received a report that S.S. had witnessed domestic violence.[14] OCS interviewed Mr. O., Ms. S., the friends to whom each of them had gone after the incident, and a Catholic Social Services worker (the last had interviewed both partners about the incident because they were foster parents for that agency).[15] The investigator concluded that "neglect to [S.S.] by [K.] O. and [K.] S. is substantiated."[16] For reasons that are unclear, the finding was entered as "mental injury" rather than "neglect" in the summary table of the Investigation Summary[17] and on a closing letter dated May 27, 2007.[18]

On August 24, 2007, OCS Staff Manager Philip Kaufman met with Ms. S.. In an e-mail to her summarizing the meeting, he stated: "I do agree with you that the current findings of

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9 Ms. S. denies that she carried S.S. in her arms during the argument, and her account places him in his bedroom asleep for part or all of the non-physical portion of the dispute. R. 26; S. Ex. A at 4.

10 R. 0035; R. 0003. He apparently slept through the remainder of the incident. R. 0046.

11 R. 0035-36

12 S. Ex. A at 5-6; R. 0019.

13 R. 0023, 0036; see also S. Ex. A attachment 1

14 R. 0024.

15 R. 0019-23, 0003-4.

16 R. 0004.

17 R. 0003.

18 R. 0007. The date that appears on an OCS closing letter may not be the date the letter was sent. See *In re M.S.*, OAH No. 06-0112-DHS, Decision & Order at 7 n.48. It is clear that this letter was sent prior to August 10. R. 0015.

'mental injury' do not apply."[19] In place of the mental injury finding, he made an "OCS decision to substantiate 'neglect.'"[20] He indicated that the investigation report and findings would "need to be amended and corrected to accurately reflect the correct findings of 'neglect.'" The basis for the finding was "your failure to seek safety that evening, despite having both time and alternatives, combined with your own physical behavior toward your then partner."[21] OCS has stipulated that Mr. Kaufman's August 24 finding is the sole remaining finding against Ms. S. regarding the March 27 incident and is therefore sole finding at issue in this proceeding.[22]

V. Analysis

For some time, it has been the policy of the Office of Children's Services (OCS) to conclude investigations of alleged child abuse or neglect with a determination that the allegation is "substantiated" or "not substantiated." Substantiated findings have been used in connection with other important decisions affecting the child or the person determined to be the perpetrator, including decisions about child custody.

In the past, OCS did not offer an accused perpetrator a formal hearing to contest the substantiation of alleged abuse. In 2005, a federal lawsuit entitled *Ruby v. Gilbertson*[23] led to a settlement in which the agency agreed to adopt regulations for a procedure to review such substantiation findings that would comport with due process requirements. A regulation, 7 AAC 54.215, has since been adopted to follow up on this agreement. This is a proceeding under 7 AAC 54.215. The regulation permits a person against whom an abuse or neglect finding has been substantiated to "have the finding reviewed" in one of two ways, including a hearing "through the Office of Administrative Hearings as provided in AS 44.64." It does not otherwise address the scope of the review.

Without citation, OCS contends that a person disputing a finding in a proceeding under 7 AAC 54.215 must "show that OCS failed to apply or misapplied a necessary policy or procedure, **and** that act or omission led to an erroneous finding of substantiation."[24] In other words, OCS believes that the person subject to a finding of substantiation has the burden of proof to show that the abuse or neglect alleged in the finding did not occur. Further, OCS believes that

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19 R. 0015.
20 R. 0016.
21 R. 0015.
22 Digital Recording, 10/26/07 at 3:30.
23 No. A-05-171 CI (JWS) (D. Alaska).
24 Motion for Summary Judgment at 6 (emphasis added).

it is not enough for the person to show that the abuse or neglect did not occur; the person, in OCS's view, must also prove that OCS made an error of "policy or procedure" in the process of considering the allegation.[25] Hence the agency would have the commissioner perpetuate a finding shown to be wholly false, provided the agency took the right procedural steps along the way.

It is not necessary to address the issue of burden of proof in the present order because the facts as alleged by OCS are being assumed, whether proven or not, so long as they are supported by some evidence.[26] As to the dual showing that OCS seeks to place on the person challenging the finding, there is simply no support in 7 AAC 54.215 or prior DHSS adjudications for such a requirement. The purpose of a hearing under 7 AAC 54.215, according to the text of the regulation, is to review "the finding," not the investigation. The single task the regulation sets is thus to determine whether the alleged abuse or neglect took place. While the department's adherence to its investigation procedures may have some bearing on that determination (by helping to show whether the investigation was complete, fair, and reliable), it is neither logical nor required by any law or policy that an untrue finding would be perpetuated simply because the department made no procedural error.

At issue in this case, therefore, is only the truth of the single substantiated finding of neglect, not the process leading up to the finding. The finding was made under section 2.2.10.1 of the Child Protective Services Manual, which supplies a definition of what must be shown to support such a finding. Accordingly, the single ultimate question at a hearing would be whether the facts support substantiation under the standard in section 2.2.10.1.

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[25] The position taken by counsel in this litigation can also be seen in advice an OCS supervisor gave to Ms. S. when informing her of her appeal rights. R. 0013. For the reason discussed in text below, such advice to the public is incorrect.

[26] The ruling on summary adjudication would be the same in this case regardless of where the burden of proof lies. Notably, however, in past substantiation hearings that OAH conducted for the Commissioner of DHSS, OCS conceded that it should have the burden and the Commissioner placed the burden on OCS. *In re M.S.*, OAH No. 06-0112-DHS; *In re M.R.*, OAH No. 06-0049-DHS.

The standard of proof that has been applied in past cases is proof by a preponderance of the evidence. In this proceeding, OCS has argued that the evidence needed for it to make substantiation finding is much less than a preponderance, even falling below the "substantial chance" standard for civil probable cause in a CINA proceeding. Motion for Summary Judgment at 14; *cf. In re J.A.*, 962 P.2d 173, 176 (Alaska 1998). Again, it is unnecessary to rule on this contention in the present case.

The cumulative effect of OCS's legal positions in this case would be that OCS could make a substantiated finding of abuse or neglect even if there were less than a "substantial chance" that abuse or neglect had occurred, and the recipient of the finding could not have the finding withdrawn even upon proof beyond doubt that it was factually false, unless the recipient also proved that OCS had made a procedural error.

One should note parenthetically that the manual's definition is not, itself, a law. A finding that the definition has been met may or may not be a valid or useful element on which to base other decisions made by OCS, by other agencies, or by the courts; this may depend on the context and on the role played by the finding in the other decision. The present proceeding simply tests, without addressing any legal consequences, whether the definition has been met.[27]

Section 2.2.10.1 of the Child Protective Services Manual states that **"**[a] substantiated finding is one where the available facts indicate a child suffered harm as a result of abuse or neglect as defined by AS 47.17.290.**"** The facts needed to sustain a finding of "neglect" are, therefore,

- that a child suffered harm and
- that the harm occurred as a result of neglect as defined in the cited statute.

The statute cited in the manual provision defines "neglect" as

> the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child [.][28]

The evidence in this case supports neither of the two necessary prerequisites bulleted above.

First, there is nothing in the record to indicate that the child "suffered harm." Indeed OCS did not evaluate the child, did not interview the witnesses about effects on the child, and did not conclude that any harm had occurred. Instead, the agency stated in its final determination e-mail that "[a] child does not need to be harmed or injured by domestic violence to be a victim of child neglect, they only need to be in proximity to the violence."[29] The trouble with this reasoning is that Section 2.2.10.1 of the Child Protective Services Manual states that **"**[a] substantiated finding is one where the available facts indicate a child *suffered harm*" (emphasis added). One cannot sustain a "substantiated finding" under Section 2.2.10.1 without evidence that it meets that particular criterion.

Second, no version of the events of March 27 can fairly be said to fit the definition of neglect, which is "failure . . . to provide necessary food, care, clothing, shelter, or medical attention." Of the five items listed in that definition, the only one Ms. S. could arguably be said not to have provided is "care:" The OCS theory is that she did not attend adequately to her child's safety.

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27 *See In re M.S.*, OAH No. 06-0112-DHS (Decision and Order at 2 & n.6).
28 AS 47.17.290(10).
29 R. 0016.

This case involves a child who did not witness the physical altercation, was in the home for only a single episode of violence rather than a pattern of violence, and was not himself endangered by the violence because it occurred in another room. It does not present the more complex issues of whether failing to prevent a child from actually witnessing, or being in the same room as, physical abuse between parents constitutes neglect by one or both parents, or whether leaving a child in a situation where abuse has already occurred constitutes neglect.[30] The question is whether Ms. S. committed child "neglect" by (1) allegedly having her child in her arms while shouting at a partner who, up to that time, had never engaged in any form of physical abuse, and (2) without the child present, slapping her partner in response to an insult (her version) or striking him on the leg to prevent him from leaving (his version), and then engaging in a brief physical struggle with him. An Alaska Supreme Court decision sheds some indirect light on whether a single incident of this kind rises to the level of child neglect.

In *J.F.E. v. J.A.S.*,[31] the Supreme Court reviewed a trial court finding of "neglect" based in part on the father, on one occasion, allowing his child under two to stand "in a slippery bath tub . . . jumping in a way that could cause her to fall and severely injure herself" and, on another occasion, placing her in a glass bowl on a stove in order to take "'cute'" photos.[32] The higher court discounted the finding of neglect, observing that "the incidents were too distant in time and isolated in character to be indicative of any general tendency toward insensitivity . . . to child safety issues."[33] This suggests that for a finding of "neglect" based on lack of care to maintain safety, the court would look for conduct serious or ubiquitous enough to show a "general tendency toward insensitivity . . . to child safety issues."[34] Indeed, the facts of this case are far-

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30 In a Florida case applying Florida's definition of neglect (which is somewhat broader than Alaska's), it was found to be neglect *by the father* where under his supervision his daughter "usually watched" *his* physical and verbal abuse against the mother. *D.D. v. Dep't of Children and Families,* 773 So. 2d 615 (Fla. App. 2000). Not inconsistent with this holding, but illustrating the other side of the issue, is *Nicholson v. Williams,* 203 F. Supp. 2d 153 (E.D.N.Y. 2002). In a heavily researched 57-page decision, U.S. District Judge Jack Weinstein (perhaps the most revered federal trial judge now sitting) decided that New York's policy of bringing civil neglect proceedings against "a woman for neglecting her child when she has done nothing but suffer abuse at the hands of another" violated constitutional principles. *Id.* at 252.

31 930 P.2d 409 (Alaska 1996).

32 *Id.* at 410-411.

33 *Id.* at 412.

34 *See also In re Stacey,* 305 N.E.2d 634 (Ill. App. 1973) (a few instances of sending children to daycare dirty and without proper clothing did not rise to level of civil child neglect), *cited with approval in Matter of S.D.*, 549 P.2d 1190, 1195 n.12 (Alaska 1976); *Nicholson v. Scoppetta,* 820 N.E.2d 840, 847 (N.Y. 2004) ("Conceivably, [civil] neglect might be found where . . ., for example, the mother acknowledged that the children knew of repeated domestic violence by her paramour and had reason to be afraid of him, yet nonetheless allowed him *several times* to return to her home, and lacked awareness of any impact of the violence on the children . . . or where the children were exposed to regular and continuous extremely violent conduct between their parents, *several times* requiring

removed from the examples to be found in Alaska's caselaw of situations where "neglect" was established.[35]

If Ms. S. held her infant in her arms while shouting at her domestic partner, she may have committed a parenting mistake. When she struck her partner and struggled with him while the child was asleep in another room, her conduct may have been foolish or wrongful in other ways. Whatever else they may be, however, the undersigned finds that these events do not rise to the level of child neglect.

In arguing for a different result, OCS nowhere cites its own definition of "substantiated finding" that appears in its manual, nor the referenced definition of "neglect" in AS 47.17.290. Instead, it argues from the standard for obtaining temporary custody under the Child In Need of Aid (CINA) statutes.[36] The standard for obtaining temporary custody based on the possibility that a child is in need of aid is different from the definition of "substantiated finding" in Section 2.2.10.1 of the Child Protective Services Manual—for one thing, a CINA finding does not require a showing that harm has already occurred[37]—and to apply it here would be a departure from the agency's own published methodology.

Because there is no evidence that S.S. "suffered harm" from the events on March 27, and because the conduct of K.S. on that evening did not constitute child "neglect," the finding of neglect under Section 2.2.10.1 of the Child Protective Services Manual is not substantiated.

VI. Order

Summary adjudication is granted to K.S. The finding of substantiation of child neglect in OCS Case ID 922893 is withdrawn.

DATED this 3rd day of December, 2007.

By: Signed
Christopher Kennedy
Administrative Law Judge

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official intervention, and where caseworkers testified to the fear and distress the children were experiencing as a result of their long exposure to the violence . . . .") (emphasis added).

35 *See Municipality of Anchorage v. Simas,* 2007 WL 3408578 (Alaska App. unpub. disp. 2007) (home strewn with garbage, bong in 13-year-old's room); *Peggy L. v. State, DHSS,* 2007 WL 2685219 (Alaska App. unpub. disp. 2007) (rotting food, drug paraphernalia, filth, etc); *Velasquez v. Velasquez,* 38 P.3d 1143, 1147-8 (Alaska 2002) (hiding from children for weeks and avoiding regular visitation for nine months was "so extreme as to constitute child neglect"); *J.J. v. State, DHSS,* 38 P3d 7 (Alaska 2001) (left 4- and 2-year-old home alone while going to liquor store; children wandered out).

36 Motion for Summary Judgment at 11-16.

37 *See* AS 47.10.011(8)(B).

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 7th day of January, 2008.

By: ___Signed_____
Signature
_Karleen Jackson_____
Name
__Commissioner_____
Title