

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

In the Matter of:)

M. M.)

) OAH No. 08-0531-DHS
) OCS Case ID 000000
)

DECISION

I. Introduction

In this case, the Commissioner of Health and Social Services has been asked to review two substantiated child protection findings under the department’s recently-adopted appeal procedure in 7 AAC 54.215(a)(1) and (c). One finding is for “physical abuse” and one is for “neglect,” both growing out of a single incident shortly after midnight on June 14, 2008.¹ The Office of Children’s Services (OCS) formally substantiated both findings in a Closing Letter dated June 16, 2008.²

The details of the June 14 incident have not been proven for purposes of this decision, and they will not be recounted here. It suffices to know that the incident involved a physical struggle between Ms. M. and her 13-year-old son, M.

As discussed more fully below, the occurrence of physical abuse has been conclusively established through proceedings in the court system. The physical abuse finding should therefore be sustained. As to the finding of neglect, OCS has formally withdrawn the finding since this appeal was initiated, and it therefore requires no ruling by the Commissioner.

II. Summary Adjudication on Finding of Physical Abuse

Prior to the date set for a hearing, OCS moved for partial summary adjudication affirming the finding of physical abuse at issue in this case. The finding of neglect was not covered by the motion. After telephone conferences explaining to her the nature of the motion, Ms. M. responded by means of a short written argument attaching several exhibits.

¹ Record at [hereafter “R.”] 009-10, 0052-54.

² R. 0052. Although the finding letter is dated June 16, 2008, it is quite unlikely that it was written or mailed on that date. June 16 was the date the investigation was opened. Interviews continued at least through June 22. R. 0053. The letter, which states that it is based on the investigation, presumably was not written until the investigation was complete. The exact date of the letter is immaterial to this decision, however.

OCS’s practice of placing dates on letters that differ from the date the letter was generated has raised concerns in the past. *In re M.S.*, OAH No. 06-0112-DHS (Commissioner of Health and Social Services, adopted 2007), Decision & Order at 7 n.48.

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 this case, the central undisputed fact is that Ms. M. has been found guilty in a criminal proceeding. Certain legal consequences follow from that fact, including a legal bar from contesting other facts.

It is important to note that in moving for summary adjudication OCS did not set out to, and did not, establish a detailed history of what happened on June 14, 2008. The basis for OCS's motion is the single fact that a conviction occurred. OCS seeks to use that conviction to establish that "physical abuse" of some kind occurred of a nature that would sustain the finding.

The finding at issue has been made under Section 2.2.10.1 of the Child Protective Services Manual, which 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."⁵ To sustain the finding of physical abuse, therefore, OCS must show

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

Alaska Statute 47.17.290, in turn, defines abuse to include "physical injury . . . or maltreatment of a child under the age of 18 by a person under circumstances that indicate that the child's health or welfare is harmed or threatened thereby."

In seeking to fit within this definition, OCS established the following limited factual record through the motion. Ms. M. pleaded no contest on August 28, 2008 to a single count of "Child Abuse" growing out of the June 14, 2008 incident with her son M..⁶ She was adjudged guilty of child abuse under Anchorage Municipal Code § 8.10.030.B.2.⁷ Subparagraph

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 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. For additional discussion of the manual's status, see *In re M.S.*, OAH No. 06-0112-DHS (Commissioner of Health and Social Services, adopted 2007), Decision and Order at 2 & n.6.

⁶ OCS Exhibit 1 at 1.

⁷ *Id.*

8.10.030.B.2 provides that “[a] person commits child abuse if he intentionally, knowingly, recklessly, or negligently causes or permits a child to be . . . [t]ortured; cruelly confined; cruelly punished or physically injured.” There is an affirmative defense in the code for reasonable parental discipline.⁸ The guilty finding means that the court believed the elements of the offense to exist, in some combination, and that the affirmative defense had not been established. In the criminal proceeding, Ms. M. was represented by counsel and, by the nature of the proceeding, she had an opportunity for a full and fair hearing, although she elected not to have a hearing.

In Alaska, a plea of no contest to a serious criminal charge, under circumstances where there is the opportunity to obtain a full and fair hearing, bars the defendant from denying, in a later civil proceeding, any element of the offense that was necessarily established to obtain the conviction.⁹ In this case, therefore, it is conclusively established that in connection with her conduct toward M. in the early morning of June 14, 2008, Ms. M. caused or permitted M. to be tortured, cruelly confined, cruelly punished, or physically injured; and she did so intentionally, knowingly, recklessly, or negligently. These facts are sufficient to constitute physical “abuse” under Section 2.2.10.1 of the Child Protective Services Manual, which is the standard under which the substantiated finding at issue in this case was made originally and must be tested on appeal.¹⁰ Ms. M. has not argued otherwise; she effectively concedes that these facts, if taken as true, represent abuse.

Ms. M. has argued instead that she pleaded no contest only to spare her son from being “dragged through the court system,” attaching records that she believes demonstrate that she “did not attack and assault M. M.”¹¹ If this is so, her remedy is to return to court and to try to have the conviction vacated and her plea withdrawn. As long as the conviction stands, it conclusively establishes the facts of the crime, and Ms. M. is bound by it.

Because the facts necessary to substantiate physical abuse have been conclusively established, there are no factual issues to resolve in connection with that finding and OCS is entitled to summary adjudication on that finding.

⁸ A.M.C. § 8.10.030.E.

⁹ *Wilson v. McDonald*, 168 P.3d 887 (Alaska 1987).

¹⁰ Section 2.2.10.1 requires both abuse and “harm” for substantiation. Although “harm” is not an explicit element of the crime of which Ms. M. was convicted, harm is inherent in torture, cruel confinement, cruel punishment, or physical injury.

¹¹ Response to Motion (Dec. 10, 2008).

III. Withdrawal of Finding of Neglect

On December 11, 2008 OCS filed a pleading stating that “OCS hereby withdraws the substantiated allegation of neglect at issue in this matter.” Since the finding has been withdrawn, the hearing request is moot as to that finding, and there is no need for the administrative law judge or the Commissioner to review it.

OCS should ensure that its records clearly reflect that the neglect allegation is no longer substantiated.

IV. Conclusion and Order

Partial summary adjudication is granted to the Office of Children’s Services. The finding of substantiation of physical abuse in OCS Case ID 000000 is sustained. The finding of neglect having been withdrawn, the remainder of this case is dismissed as moot.

DATED this 17th day of December, 2008.

By: Signed
Christopher M. 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 14th day of January, 2009.

By: Signed
Signature
William H. Hogan
Name
Commissioner
Title

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