IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT KENAI

U H,	)	
	)	
Appellant,	)	
	)	
v.	)	
	)	
STATE OF ALASKA, DEPARTMENT OF HEALTH AND SOCIAL SERVICES, OFFICE OF CHILDREN'S SERVICES	)	
	)	
	)	
Appellee.	)	
_____	)	Case No. 3KN-14-00000 CI

ORDER ON APPEAL

I. BACKGROUND

A. Factual History

The information provided herein is based on the findings of fact made by the Deputy Commissioner of the Department of Health and Social Services.[1]

In 2011, K H was seventeen years old and living with his parents in No Name, Alaska. K had special needs. He was diagnosed with ADHD when he was fourteen and had significant limitations in communication and social functioning with underlying emotional difficulties.[2] On the night of February 24, 2011, K was "bickering" with his younger brother E in the family's garage and threw something into a trashcan.[3] Mr. H heard the commotion and asked K what happened.[4] K said it was nothing. Mr. H instructed K to sit

[1] Exc. 00001 - 00009.
[2] Exc. 00002 - 00003.
[3] Exc. 00004.
[4] Exc. 00004.

down and talk about what happened but K did not listen. Eventually, Mr. H told K that if he did not sit down and discuss what happened, Mr. H would get his belt and punish him.[5] Eventually, Mr. H got his belt and an altercation between the two ensued.[6] They pushed each other and Mr. H struck K between 6 and 8 times on the legs, causing bruising.[7] Mr. H then shoved K down into a chair.[8] In the course of the altercation K received a cut on the bridge of his nose, apparently from his glasses.[9]

B. Procedural History

The Office of Children's Service's (OCS) received a report of harm about the incident, investigated, and substantiated a finding of physical abuse by Mr. H.[10] Mr. H requested a review of the agency's finding and the OCS referred the matter to a hearing before the Office of Administrative Hearings (OAH). After the administrative hearing, a Deputy Commissioner of the Department of Health and Social Services (Department) issued a final decision upholding the substantiated finding on January 23, 2014.[11] Mr. H appealed the decision to this Superior Court.[12]

C. Issues Presented

In asking this Court to reverse the decision, Mr. H raises six issues in his appeal: 1) the Administrative Law Judge (ALJ) erred by issuing subpoenas for the production of documents; 2) the ALJ erred by issuing a protective order maintaining the confidentiality of the No Name Behavioral Health records; 3) the ALJ erred by admitting the No Name

[5] Exc. 00004.
[6] Exc. 00004.
[7] Exc. 00004
[8] Exc. 00005.
[9] Exc. 00005.
[10] Exc. 00014.
[11] Exc. 00009.
[12] Notice of Appeal and Statement of Points on Appeal, 3KN-14-00000CI.

Behavioral Health records into evidence; 4) the ALJ erred by admitting the testimony of Officer X into evidence; 5) the ALJ erred by not issuing subpoenas compelling the testimony of witnesses; and 6) the ALJ erred by violating U H's due process rights.

II. STANDARD OF REVIEW

Different standards are applied when reviewing an agency decision.[13] An appellate court applies its independent judgment to questions of law not involving agency expertise.[14] This includes whether the agency's procedures comply with due process.[15] A court reviews questions of law involving agency expertise using the reasonable basis test.[16] Had he appealed it, this would have included the department's determination that Mr. H's actions constituted the physical abuse of a child under AS 47.17.290. A court reviews an agency's application of its own regulations to the facts of a particular case for whether their decision was "arbitrary, unreasonable, or an abuse of discretion."[17] Mr. H has not appealed the department's application of their own regulations so this standard is not applicable. The court uses the substantial evidence test when reviewing questions of fact raised at an administrative hearing.[18] Substantial evidence is evidence that a "reasonable mind might accept as adequate to support a conclusion."[19] When an agency "chooses between conflicting determinations and there is substantial evidence in the record to support either conclusion" the court will affirm.[20]

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[13] *State, Dep't of Health & Soc. Servs. v. No Name Hosp.*, 280 P.3d 575, 579 (Alaska 2012).
[14] *West v. Municipality of Anchorage*, 174 P.3d 224, 227 (Alaska 2007).
[15] *Smart v. State, Dep't of Health and Soc. Servs.*, 237 P.3d 1010, 1014 (Alaska 2010).
[16] *West*, 174 P.3d 224 at 226-27.
[17] *Alaska Exch. Carriers Ass'n v. Regulatory Comm'n of Alaska*, 202 P.3d 458, 461 (Alaska 2009) (quoting *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619, 623 (Alaska 2007)).
[18] *May v. State, Commercial Fisheries Entry Comm'n*, 175 P.3d 1211, 1216 (Alaska 2007).
[19] *Id*.
[20] *Morris v. State, Dep't of Admin, Div. of Motor Vehicles*, 186 P.3d 575, 577 (Alaska 2008).

III. DISCUSSION

A. It was harmless error for the ALJ to issue subpoenas for the production of documents.

On May 29, 2012, the department filed the agency record and included a privilege log listing that K's confidential behavioral health and neuropsychological evaluations were withheld.[21] Subsequently, Mr. H requested subpoenas for the production of K's records from No Name Behavioral Health and No Name Hospital, from the No Name Police Department's investigation of K's destruction of property in 2007, and for the employment records of his older son, A H.[22] The ALJ signed the subpoenas and Mr. H received the requested records.[23] Mr. H also requested that Dr. E V's report be admitted.[24] Dr. V's report was part of the No Name records.[25]

As explained below in section E, the department and OAH do not have subpoena authority to compel the production of records or the attendance of witnesses at administrative appeals of substantiated findings. While the subpoenas were issued in error, they were done so at the request of Appellant. Mr. H received the documents he wanted and provided them as evidence during the hearing. Appellant benefitted from the inclusion of said records, so he cannot now claim their production serves as grounds for overturning the **final** agency decision. Mr. H also did not make any persuasive supplemental arguments

[21] Exc. 00015 - 00016. Pursuant to 7 AAC 54.030(c) and 7 AAC 54.040(b), the department may not release protected health information without a court order.
[22] Exc. 00017 - 00022, 00023 - 00024.
[23] R. 000177 - 000258, R. 000737 - 759, R. 000866 - 000870.
[24] Exc. 00025 - 00029.
[25] R. 000187 - 000192.

at the oral hearing suggesting that the error caused Mr. H harm. Simply put, the error was harmless.

B. A protective order was appropriate to maintain the confidentiality of information contained within the agency record.

Alaska Statute 44.64.060(b) requires that when referring a matter the Office of Administrative Hearings, any information provided to the office that is confidential by law shall be identified by the agency as confidential and shall be kept confidential by the office.[26] When the department referred Mr. H's request for a hearing to the OAH, it noted that information contained in the referral was required to be kept confidential under AS 47.17.040.[27] The agency record also contained information which was to be safeguarded under AS 47.10.093[28] and 7 AAC 54.020[29] - .030.[30]

[26] AS 44.64.060(b).
[27] Exc. 00030. AS 47.17.040(b).
[28] AS 47.10.093(a) Disclosure of agency records. Except as permitted in AS 47.10.092 and in (b) - (g) and (i) - (l) of this section, all information and social records pertaining to a child who is subject to this chapter or AS 47.17 prepared by or in the possession of a federal, state, or municipal agency or employee in the discharge of the agency's or employee's official duty are privileged and may not be disclosed directly or indirectly to anyone without a court order.
[29] 7 AAC 54.020(a) Information to be safeguarded. (a) Child protection information to be safeguarded under 7 AAC 54.010 - 7AAC 54.150 by the department is information contained or described in the department's child protection files and includes the following (1) names and addresses of applicants and recipients of child protection services from the department; (2) information contained in applications, reports of investigations, evaluations, protected health information, correspondence and court reports, and other information concerning the condition or circumstances of any person about whom information is obtained, whether or not this information is recorded; (3) department evaluations of and action taken on the information; and (4) the identity of a person who reports child abuse or neglect.
[30] 7 AAC 54.030. Prohibitions against disclosure of child protection information. (a) The department will limit the use of all child protection information to purposes directly connected with the administration of child protection services programs. (b) The department will not disclose any child protection information obtained by a representative, agent, volunteer, or employee of the department in the course of discharging the child protection duties of the department to anyone outside of the department, other than in the administration of the child protection services programs and as provided in this chapter of AS 47.10.090 - 47.10.093. (c) The department may not use or disclose protected health information except as required or permitted by 45 C.F.R. Part 160, subpart C and Part 164, subpart E, revised as of October 1, 2004 and adopted by reference.

Mr. H consented to the issuance of a protective order covering the agency record at the status conference on June 11, 2012.[31] The ALJ issued a protective order on November 1, 2012.[32] Because ALJ's may order the parties to file confidential documents under seal and keep them confidential,[33] and because the agency record did in fact contain confidential information, it was not error for the ALJ to issue a protective order.

C. Dr. V's Report was properly admitted into evidence.

At an administrative hearing, the ALJ "may admit evidence of the type on which a reasonable person might rely in the conduct of serious affairs."[34] Appellant requested the production of K's No Name Behavioral Health records, including the evaluation made by Dr. V,[35] and subsequently offered the evaluation as an exhibit at the administrative proceeding.[36]

Dr. V's Report was dictated on 3/19/11 and transcribed on 3/20/11,[37] which explains the inconsistency in the dates used by the parties.[38] In other words, the report used at the hearing by Mr. H is one in the same as the report cited to in the decision. This report's diagnostic impression listed, among other things: "Asperger disorder;" "Parent child relational problem;" and "(Probable) physical abuse of a child."

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[31] Exc. 00031.
[32] Exc. 00032 - 00033.
[33] 2 AAC 64.950. Confidentiality. (b) An administrative law judge assigned to hear an administrative hearing, or to oversee or conduct alternative dispute resolution, may order the parties to file documents under seal and keep them confidential if confidentiality is required by law. An administrative law judge will close all or a portion of a proceeding to the public if necessary to prevent disclosure of confidential information, and may close all or a portion of a proceeding to the public to protect the privacy of a non-party witness.
[34] 2 AAC 64.290(a)(1).
[35] R. 000187 - 000192.
[36] Exc. 00026.
[37] R. 000192.
[38] Compare Exc. 00005 with Exc. 00026.

Mr. H placed K's mental health diagnosis, medical history, and treatment at issue. Accordingly, the report was relevant and evidence of a type which a reasonable person might rely in the conduct of serious affairs. Among all the medical records requested by Appellant, Dr. V's report alone was used to support the substantiated finding of child abuse; no other records were improperly relied upon in reaching this decision. For the same reasoning articulated above, Appellant cannot now argue that the report should not have been admitted into evidence or cited to in the decision, when he requested its admission in the first place.

D. Mr. H withdrew his opposition to the introduction of Officer X's testimony.

The fourth issue raised by Mr. H in his appeal alleged that the ALJ erred by allowing Officer X's testimony into evidence. Mr. H withdrew his opposition to the introduction of this testimony at oral argument on September 2, 2016. As such, this issue will not be discussed further in this order.

E. The ALJ properly denied Mr. H's requests for subpoenas compelling witness testimony.

Both Mr. H and the department requested subpoenas to compel the testimony of witnesses. However, at a status conference on March 4, 2013, the ALJ noted that the Administrative Procedure Act (APA) of AS 44.62 did not apply to a review hearing of a substantiated finding of abuse.[39] The ALJ, therefore, did not have authority under which to issue subpoenas, and acknowledged the subpoenas he earlier issued to Mr. H for the production of documents had been in error.[40]

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[39] The OAH issued a Notice of Assignment on April 19, 2011 identifying the statutes and regulations that applied to the administrative proceeding: AS 44.64.030 – AS 44.64.200, 7AAC 54.215 and 2 AAC 64.100 - 2 AAC 64.990.

[40] Status Hearing on March 4, 2013, tape 12-0099DHS at 26:00 - 33:56.

AS 44.64.030(b) provides that the OAH had jurisdiction over the hearing. The OAH has the power to set its own procedural rules and has done so at 2 AAC 64.100 - .370. The regulations require that parties be given "the opportunity to confront and cross-examine witnesses,"[41] but they do not grant either party the power to subpoena witnesses. An ALJ may only issue subpoenas requiring the appearance of witnesses and the production of evidence as provided in AS 44.64.040 or an applicable statute.[42]

AS 44.64.040 does not provide independent subpoena authority. An ALJ working for the OAH may, "in conducting an administrative hearing for an agency, exercise the powers authorized by law for exercise by that agency in the performance of its duties in connection with the hearing."[43] Thus, while an ALJ might exercise subpoena authority in a proceeding governed by the APA, this proceeding was not governed as such. Furthermore, in the absence of a specific statute granting an executive agency subpoena power, the APA cannot be used to create it.[44]

Second, there is no other applicable statute granting the department subpoena authority in this type of case. Only the Alaska legislature may grant an executive agency subpoena authority, which they have done in connection with: AS 47.07 (medical assistance); AS 47.08 (assistance for catastrophic illnesses and acute or chronic medical conditions); AS 47.25 (day care assistance, child care grants, general relief, adult public assistance, and food stamps); and AS 47.27 (Alaska temporary assistance program).[45] The

[41] 7 AAC 49.120(3)(c).
[42] 2 AAC 64.240(c).
[43] AS 44.64.040(b).
[44] *See* Charles Koch, Jr. Administrative Law and Practice, 1 Admin L. & Prac. Section 3.12 (3d ed.).
[45] AS 47.05.085(a).

purpose of the administrative proceeding in this case was limited to reviewing the agency's finding of child abuse under AS 47.17, which is not enumerated in AS 47.05.085.

For these reasons, the department, and consequently the ALJ, lacks subpoena authority and the ALJ properly denied the subpoenas requested by the parties. Mr. H admitted as such at oral argument on September 2, 2016.

F. Mr. H was provided due process.

"Due process of law requires that before valuable property rights can be taken directly or infringed upon by governmental action, there must be notice and an opportunity to be heard."[46] "Due process does not require any specific type of hearing. The opportunity to be heard depends on the nature of the case.[47] In turn, whether due process is satisfied depends on the consideration of three factors: 1) the private interest affected by the official action; 2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the fiscal and administrative burdens that additional or substitute procedural safeguards would entail.[48]

i. This proceeding does not involve a fundamental right.

The purpose of the administrative proceeding was to review an agency finding. Pursuant to AS 47.17.030(a), the department is required to investigate reports of child abuse and neglect. Upon concluding its investigation, the OCS documented the result as "substantiated." It is the intent of the Alaska legislature that reports of child abuse and neglect are investigated so that social services may be made available to prevent future

[46] *Heitz v. State, Dep't of Health and Soc. Servs.*, 215 P.3d 302, 305 (Alaska 2009).
[47] *Patrick v. Municipality of Anchorage, Anchorage Transp. Comm'n*, 305 P.3d 292, 299 (Alaska 2013).
[48] *Id*. (citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

harm to the child, safeguard and enhance the general well-being of children in Alaska, and preserve family life when possible.[49] Substantiated findings do not automatically evolve into Child In Need of Aid (CINA) cases, and the department did not intervene in Mr. H's family to supervise or assume custody of his children after the finding was made.

In addition, findings made in administrative proceedings are not controlling in child custody related proceedings. When adjudicating Mr. H's divorce and custody case, Superior Court Judge Carl Bauman clearly stated, "[a]lthough the court has respect for OCS determinations, determinations and discretionary decisions by OCS are not controlling in private custody disputes."[50] Judge Bauman issued findings of fact and conclusions of law with respect to child custody, property division, and a domestic violence protective order, on March 6, 2013.[51] The court's orders were based on its own findings and upon a separate record,[52] which Mr. H has appealed to the Alaska Supreme Court. Mr. H's right to direct the upbringing of his child, however, is not affected by any decision resulting from this appeal.

Mr. H has not identified a loss of liberty or property interest connected to the substantiated finding, nor has he alleged that he wishes to engage in some activity impeded by the finding. The injury Mr. H complains of is the result of a separate proceeding stemming from independent findings of fact and conclusions of law based entirely on a separate record. In other words, Appellant has not shown that he has suffered any tangible harm as a result of the agency's finding.

ii. The risk of erroneous deprivation is low.

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[49] AS 47.17.010.
[50] Exc. 00050.
[51] Exc. 00042.
[52] Exc. 00042 - 00068.

In 2005, the department agreed to create a procedure by which to review substantiated findings of child abuse or neglect that have not been subject to judicial review,[53] and the following year they adopted regulation 7 AAC 54.215.[54] Mr. H did not use the grievance process outlined under 7 AAC 54.215(a)(2). Instead, he requested a hearing with the OAH under 7 AAC 54.215(a)(1),[55] and the department referred Mr. H's request to the OAH on April 13, 2012.[56]

On June 1, 2012, the State of Alaska Ombudsman issued a report in which it recommended repealing 7 AAC 54.215 and abolishing the optional referral of cases to the OAH, stating that "[e]ither all cases should go to the OAH at a certain level, or none of them should."[57] Appellant incorrectly argues that this report supports his position that the grievance process was unfair. On the contrary, the report recommends the same process the department already provided to Mr. H i.e., a referral to a hearing before the OAH.

Additionally Mr. H made specific assertions regarding the individuals that he was unable to subpoena that denied him due process. In his initial brief, Mr. H claimed that the inability to subpoena T H, Mr. H's ex-wife, K, his son, and Dr. V caused him harm. Judging from the information filed in Mr. H's briefs, much of the information Mr. H was seeking to request from T H applied to past events outside of the scope of this narrow review of the substantiated finding by OCS. Additionally, forcing K to testify about alleged abuse that he received as a minor would be highly inappropriate and unnecessary in the light of the

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[53] *Ruby v. Gilbertson*, Sandoval and Gleason settlement, U.S. Dist. Ct. No. A-05-171 CI (JWS).
[54] 7 AAC 54.215. (Eff. 12/30/2006, Register 180; repealed 9/7/2013, Register 207). After 7 AAC 54.215 was repealed, the department referred all requests to review substantiated findings to the OAH. On May 16, 2015, the department revised Section 2.2.10.1 of the Child Protective Services Manual to provide an individual who disagrees with a department's substantiated finding of child maltreatment with the opportunity to request review by the OAH.
[55] Exc. 00069.
[56] Exc. 00030.
[57] Exc. 00070 - 00163, Ombudsman's Report at p. 40.

other evidence available to Mr. H at the hearing. Lastly, Dr. V's report was admitted into evidence, and his written opinion was considered by the ALJ. An inability to subpoena Dr. V did not cause substantial harm to Mr. H.

In Mr. H's reply brief, he states many other witnesses that he wished to testify that would allegedly provide information that was unavailable to the ALJ at the hearing. However, these witnesses were not discussed in Mr. H's initial brief, effectively abandoning his ability to raise this in his reply brief.[58]

Appellant was given notice and a hearing at which he was able to present evidence. Mr. H presented many exhibits, testified, and cross-examined the department's witnesses. The hearing was lengthy and the decision-maker was impartial. The risk of erroneous deprivation is low. Appellant has conflated his divorce proceeding and the CINA proceeding with his administrative hearing.

iii. Due Process does not require the ability to compel the attendance of witnesses.

State governments have a substantial, if not compelling, interest in protecting children from abuse and neglect.[59] However, OCS receives thousands of allegations of maltreatment each year and this puts a tremendous fiscal and administrative burden on the State. As such, mandating that every administrative appellant be permitted to subpoena documents and witnesses in every substantiation hearing is untenable.

The Alaska Supreme Court has recognized that an administrative appellant's lack of subpoena power does not violate due process. In *Copper River School District v. State*, the school district argued that due process was violated where the Department of Education

[58] *Rodriguez v. Alaska State Comm'n for Human Rights*, 354 P.3d 380, 387-88 (Alaska 2015); see also *Gates v. City of Tenakee Springs*, 822 P.2d 455, 460 (Alaska 1991) (concluding that *pro se* litigants abandon claims addressed only cursorily or not at all in appellate brief).
[59] See *Watson v. Colorado Dep't of Soc. Servs.*, 841 P.2s 299, 309 (Colo. 1992).

lacked subpoena power under which the appellant school district could request subpoenas.[60] The superior court found the school district was not denied due process and the Alaska Supreme Court affirmed, stating: "[m]oreover, not only does the Department itself lack subpoena power but we discern no case in which any court has concluded that due process somehow requires that an administrative appellant be accorded subpoena power."[61]

The absence of subpoena power is not a per se violation of due process.[62] The existing procedures adequately protected Mr. H's interests. Ultimately, the lack of additional compulsory procedures did not violate his due process rights.

G. OCS had a "reasonable basis" for determining that Mr. H's conduct was child abuse.

While Mr. H did not explicitly request the Superior Court to review whether OCS had a "reasonable basis" for determining that Mr. H's conduct was child abuse in his brief, he did implicitly bring up the issue at oral argument. As such, it will be briefly discussed. The "reasonable basis test"[63] is the appropriate standard of review for questions of law involving agency expertise, such as a substantiated finding of child abuse.

OCS is required to investigate reports of harm, and if an investigation is conducted, the office will determine whether the report was substantiated or not substantiated.[64] The office's written policy is to issue a substantiated finding when "the available facts indicate

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[60] See *Copper River Sch. Dist. v. State*, 702 P.2d 625 (Alaska 1985).
[61] *Id*. at 628.
[62] See *Warren v. S.E.C.*, 69 F.3d 549 (10th Cir. 1995) (unpublished decision) (denying applicant's argument that he was disadvantaged by inability to subpoena witnesses); *DeLong v. Hampton*, 422 F.2d 21, 24-25 (3d Cir. 1970) (lack of subpoena authority is not due process violation).
[63] *West v. Municipality of Anchorage*, 174 P.3d 224, 226-227 (Alaska 2007).
[64] Exc. 00006.

a child suffered harm as a result of abuse or neglect as defined in AS 47.17.290."[65] Prior to 2013, the interpretation of AS 47.17.290(2) required that in order to establish that child abuse had occurred in a case involving physical injury it was necessary to make a showing that the physical injury occurred under circumstances indicating that the child's health or welfare was harmed or threatened.[66] In 2013, a court determined that a finding of substantiated abuse will be sustained whenever a physical injury was incurred as a result of corporal discipline, on the ground that "parental discipline that causes any degree of physical injury is not reasonable and is, instead, an act of physical abuse."[67] The ALJ applied both standards in the Revised Decision, and Mr. H stated at oral argument on September 2, 2016 that he believed that only the prior interpretation should have been applied. Without deciding whether the ALJ erred in applying both standards, only the prior interpretation will be assessed to see if OCS had a "reasonable basis" for their substantiated finding.

OCS had a reasonable basis to find that K's mental health was harmed as a result of the physical injury. A week after the incident K was placed in a mental health treatment facility. It was reasonable for OCS to believe that this placement was due, in large part, to the conflict with his father over corporal disciplinary measures. Under the prior interpretation of AS 47.17.290(2), this finding would show that the physical injury occurred under circumstances indicating that the K's mental health was harmed. As such, OCS had a reasonable basis for their substantiated finding of child abuse.

[65] Exc. 00006.
[66] Exc. 00006.
[67] Exc. 00006.

IV. CONCLUSION

For the reasons stated above, IT IS HEREBY ORDERED the substantiated finding of physical abuse is AFFIRMED.

DATED in Kenai, Alaska, this 8th day of November, 2016.

Signed
ANNA M. MORAN
Superior Court Judge

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