

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

In the Matter of:)
)
 B N M)
_____)

OAH No. 12-0361-SAN

DECISION

I. Introduction

Using a form provided to her by the Office of Children’s Services (OCS), B N M filed a request for a hearing. OCS referred the matter to the Office of Administrative Hearings, nominally for a hearing under 7 AAC 54.215 to contest an OCS substantiated finding. At a prehearing conference, and in subsequent status conferences, Ms. M asserted that she wished to contest not only a substantiated finding issued by OCS, but also any other circumstances that might constitute a barrier condition pursuant to AS 47.05.310.

OCS has withdrawn its substantiated findings. Because it has withdrawn all of the substantiated findings it made pertaining to Ms. M, OCS’s position is that the matter should be dismissed, and it has filed a motion requesting dismissal of the case.

The administrative law judge issued a proposed decision denying the motion to dismiss, treating it as a motion for summary adjudication, and recommending that the commissioner direct the responsible agency to remove any reference in the centralized registry to an administrative substantiated finding of abuse issued by OCS, and concluding that Ms. M’s name was properly placed in the registry based on a 1990 superior court finding of abuse. The commissioner returned the case to the administrative law judge to prepare a revised decision. This revised decision grants the motion to dismiss.

II. Facts

A. Procedural History

B N M applied for employment at No Name (No Name), which submitted a request for a criminal history check to the Department of Health and Social Services. On July 3, 2012, the Division of Health Care Services notified No Name of the existence of a barring condition that permanently barred Ms. M “as a[n individual] service provider.”¹ The notice informed No Name

¹ Supp. Rec. 19. AS 47.05.310(c) generally applies to an “entity” as defined in AS 47.32.010(b). See AS 47.05.390(6). Entities are not individuals; they are types of licensed facilities, such as assisted living homes. AS

that it could request further information regarding the barrier condition from the Division of Senior and Disability Services. The Division of Health Care Services also notified Ms. M of the outcome of the criminal history check, informing her that it had identified the existence of a barrier condition in the form of a finding by OCS under AS 47.10 that Ms. M had neglected a child.² Ms. M also applied for employment at Alaska No Name – No Name (No Name), which also submitted a request for a criminal history check. No Name and Ms. M were notified of the same barrier condition.³ In both cases, the notices refer to findings relating to January 9, 1989.⁴

Ms. M filed a request for a hearing using an OCS form. The request did not identify any particular substantiated finding as the subject of the appeal.⁵ The request stated:

I need this complaint straightened out. It is holding back employment for me. I have been a PCS [personal care attendant] after 1989. I need the charges as I know of none as far as me abusing or neglecting my children.

OCS referred the matter to the Office of Administrative Hearings on August 31, 2012. A hearing was scheduled for February 20, 2013. On the day prior to the hearing, OCS filed a motion to dismiss, asserting that it had withdrawn all substantiated findings of neglect for the dates January 1, June 1, and July 14, 1989, and it had thereby provided Ms. M “the relief available to her in this appeal.”⁶ In light of OCS’s action, the administrative law judge conducted a status conference in lieu of a hearing. Ms. M did not file a written response to the

47.32.010(b). However, individual service providers are also subject to the barrier condition. *See* AS 47.05.310(h). An “individual service provider” includes a public home care provider paid by the state or an entity contracted or funded by the state (AS 47.05.017), providers of home and community based waiver services financed under AS 47.07.030(c), and case managers (AS 47.07.530). *See* AS 47.05.390(7); AS 47.05.300(a).

² Supp. Rec. 13-18. The notice is dated July 3, 2012, on the first page, and February 4, 2013 on the subsequent pages. It is not identified as having been sent by certified mail. However, the record includes a copy of a return receipt for a certified letter sent by the Division of Health Care Services’ Background Check Unit and received by Ms. M on July 13, 2012. R. 20-21.

The basis for the reference in the notice to an OCS finding under AS 47.10 is unclear. Generally, under AS 47.10, the superior court (not OCS) issues findings of abuse and neglect. OCS may make a finding under AS 47.10 pursuant to 7 AAC 10.955(e), but notice of such a proposed finding must be sent to the subject before it is placed on the AS 47.05.330 registry.

³ Supp. Rec. 1-7. The record copy of the notice to Ms. M is dated August 12, 2012, on the first page and February 4, 2013, on all subsequent pages. *Id.*

⁴ Both notices state: “On 1/9/89, you were found by [OCS] to have neglected a child under AS 47.10.” This language appears intended to communicate that the finding was issued on that date, although it could be read to mean that the conduct occurred on that date.

⁵ The hearing request is dated June 11, 2012. No Name was provided written notice of the existence of the barrier condition on July 3, and Ms. M apparently received written notice on July 13. The record does not explain how it happened that Ms. M filed a request for a hearing before the written notice was sent.

⁶ Motion to Dismiss (February 19, 2013).

motion to dismiss, but at the status conference she objected to dismissal on the ground that withdrawal of OCS's substantiated findings would not remove the barrier condition.

On March 15, the administrative law judge issued an order granting in part OCS's Motion to Dismiss, with respect to "issues pertaining to the presence of information on the AS 47.05[.330] registry relating to a court decision, order, judgment or adjudication[.]" without prejudice. OCS was granted additional time to clarify the status of its records with respect to substantiated findings, and to provide notice of any other actions OCS would take or propose with respect to the withdrawn findings. OCS supplemented the record to establish that OCS had withdrawn all the OCS substantiated findings pertaining to Ms. M.

The administrative law judge conducted another status conference on March 27, 2013. Once again, Ms. M objected to dismissal on the ground that withdrawal of the OCS substantiated findings would not remove the barrier condition. Ms. M was permitted, over OCS's objection, to supplement the record to include a revised notice she had received from the Division of Health Care Services.⁷ That notice, dated March 8, 2013, informed her that based on a request for a background check submitted by No Name on July 31, 2012, the division had identified a barrier condition in the form of a January 8, 1990 superior court finding under AS 47.10 in a Child in Need of Aid (CINA) proceeding.⁸

On June 4, 2013, OCS renewed its motion to dismiss. The renewed motion was supported by evidence that as of April 26, the department's ORCA database had been updated to show the reports of harm concerning Ms. M as unsubstantiated, and that on May 20, the commissioner had granted Ms. M a variance authorizing her employment by No Name notwithstanding the January 8, 1990 superior court finding. Ms. M renewed her objection to dismissal, on the ground that the barrier condition remains in place for other potential employers, and that based on newly discovered evidence the superior court finding could be retroactively vacated. In reply, OCS asserted that Ms. M has filed a motion in the superior court to vacate the January 8, 1990 superior court finding.

⁷ OCS objected to the inclusion of that information in the record, on the grounds that (as OCS had argued in its motion to dismiss) issues pertaining to the AS 47.05.330 registry are outside the scope of this administrative proceeding, and the March 15 order dismissing those issues from the case precluded any further consideration of them in this proceeding. The administrative law judge overruled the objection on the grounds that (1) the dismissal was without prejudice, and (2) as an interlocutory order, the ruling did not preclude further consideration of those issues in light of further developments in the case.

⁸ Fax Transmittal, 3/27/2013.

B. Undisputed Material Facts

The Office of Children’s Services issued substantiated findings of neglect based on conduct by Ms. M that occurred on January 8, June 1, and July 14, 1989. Each of those substantiated findings has been withdrawn, and there are at present no OCS substantiated findings of abuse, neglect or exploitation by Ms. M.

On or about October 10, 1989, the Office of Children’s Service filed a petition to adjudicate B N M’s two children as children in need of aid under the then-current version of AS 47.10.010(a)(2)(C), (D) and (F).⁹ On January 8, 1990, the superior court found “in accordance with the stipulation that [Ms. M’s children] are children in need of aid under Alaska law.”¹⁰ The referenced stipulation includes Ms. M’s admission that the children were in need of aid under AS 47.10.010(a)(2)(F)¹¹ “on the basis of the facts regarding the housekeeping conditions in the home set forth in the petition on file in this case.”¹² As to those conditions, the petition asserted that Ms. M “has a pattern of not cleaning her residence[s] to the point that they become uninhabitable and possibly a health hazard” and that the current residence, while “not as bad as the previous residences” was “likely to worsen.”¹³

III. **Analysis**

The genesis of this case was B N M’s application for employment in a capacity requiring that she pass a criminal history check under 7 AAC 10.910-.915. The criminal history check revealed no barrier crime for Ms. M. However, a criminal history check also includes review of the AS 47.05.330 registry, “to determine whether a barrier condition exists for the individual who is the subject of the criminal history check.”¹⁴ A barrier condition is “a barrier to association under 7 AAC 10.900(b) that results from (A) a matter described in AS 47.05.330(b)(1)(A) involving the abuse, neglect, or exploitation of a child or vulnerable adult; and (B) the entry of that information in the [AS 47.05.330] registry [emphasis added].”¹⁵ The

⁹ R. 129-132

¹⁰ R. 98.

¹¹ AS 47.10.010(a)(2)(F), as in effect at the time the order was issued, provided that the superior court could find a minor:

(2) to be a child in need of aid as a result of...(F) the child having suffered substantial physical abuse or neglect as a result of conditions created by the child’s parent, guardian, or custodian.

¹² R. 101. Notably, Ms. M’s stipulation as signed did not include AS 47.10.010(a)(2)(D) and the other matters referred to in the petition, which had been included in a draft stipulation. *See* R. 117.

¹³ R. 106.

¹⁴ 7 AAC 10.915(a)(1).

¹⁵ 7 AAC 10.990(7).

matters described in AS 47.05.330(b)(1)(A) are “decisions, orders, judgments, and adjudications finding that the [person] committed (A) abuse, neglect, or exploitation under AS 47.10 [or other specified statutes].” Thus, as defined in the Department’s regulation, a barrier condition exists if there is a decision, order, judgment or adjudication finding that an individual committed abuse, neglect or exploitation under AS 47.10 and that information has been placed in the AS 47.05.330 registry.

Ms. M has been informed that there are two barrier conditions pertaining to her: first, a barrier condition in the form of an OCS finding of neglect under AS 47.10 on January 9, 1989, and second, a barrier condition in the form of a superior court finding of neglect under AS 47.10 on January 8, 1990, in a CINA case. Given the definition of a barrier condition in 7 AAC 10.990(7), the preponderance of the evidence in this case is that information pertaining to Ms. M with respect to both incidents has been placed on the AS 47.05.330 registry.¹⁶ Because OCS has withdrawn its substantiated finding of neglect, the first barrier condition no longer exists. Ms. M asks that the hearing process be continued in order to determine whether the second barrier condition exists.

The commissioner’s decision In Re B.B.¹⁷ establishes that a hearing nominally requested under 7 AAC 54.215 may address issues concerning placement on the AS 47.05.330 registry, including the propriety of placement on the registry based on a superior court finding in a CINA case. But it is not necessary to address those issues in a hearing requested under 7 AAC 54.215. The AS 47.05.330 registry is maintained by the Division of Health Care Services’ Background Check Unit, not by the Office of Children’s Services. Absent participation by the agency responsible for maintaining the AS 47.05.330 registry, the commissioner cannot make a fully informed decision regarding issues pertaining to the registry. Moreover, there is an alternative administrative remedy. In particular, under 7 AAC 10.955(f) a person must be provided the opportunity for a hearing before her name is placed on the AS 47.05.330 registry.¹⁸ The hearing

¹⁶ Information pertaining to a substantiated finding by OCS under AS 47.17 is maintained on a separate registry under AS 47.17.040(a). Whether the ORCA database is the registry maintained under AS 47.17.040(a), and whether there is a separate database that constitutes the AS 47.05.330 registry is unknown. Information on the registry maintained under AS 47.17.040(a) is confidential and is not subject to release to private parties. *See* AS 47.17.040(b). The notices to No Name, No Name and Ms. M of the existence of a barrier condition in the form of a finding under AS 47.10 by OCS were apparently based on the existence of an OCS CINA petition and a superior court finding of probable cause. *See* Pre-Hearing Memorandum, Attachment A.

¹⁷ In Re B.B., OAH No. 12-0206-DHS (Commissioner of Health and Social Services 2013). This decision can be found at <http://aws.state.sk.us/officeofadministrativehearings/Documents/DHS/DHS120206.pdf>.

¹⁸ *See* 7 AAC 10.955(e); In Re B.B. at 6-7, notes 29-33.

request must be submitted “to the department’s office responsible for maintaining the centralized registry[.]” that is, to the Division of Health Care Services, Background Check Unit. In this particular case, there is no indication in the record that Ms. M was ever notified by the department of an intent to place her name on the AS 47.05.330 registry for any reason. Absent prior notice, she retains the right to contest placement on the registry based by submitting a request for a hearing to the Division of Health Care Services’ Background Check Unit, specifying that she is requesting a hearing pursuant to 7 AAC 10.955.

IV. Conclusion

OCS’s motion to dismiss is **GRANTED**.

DATED November 14, 2013 .

Signed _____
Ree Sailors
Deputy Commissioner

Appeal Rights

This is a final decision for purposes of appeal rights. 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.

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