

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

In the Matter of the)
)
 K P)
_____)

OAH No. 12-0760-SAN

DECISION AND ORDER

I. Introduction

K P requested a hearing to contest a Substantiated Child Abuse or Neglect Finding. The matter was referred to the Office of Administrative Hearings for a hearing. While the case was still pending, the Office of Children’s Services (OCS) reversed its finding. The parties now agree that this appeal should be dismissed, but disagree on the form of the order for that dismissal.

The relief that Mr. P was seeking in his appeal implicitly included more than just having the finding reversed. He was also seeking that OCS not continue to report that the substantiated finding exists. Thus, he is entitled to an order that does more than just dismiss his appeal, but not an order as broad as the one he has requested.

II. Facts

On March 11, 2010, OCS made a substantiation finding against Mr. P. During 2011 and 2012, Mr. P sought to obtain a copy of his file and to appeal the finding. After intervention by the State Ombudsman in December of 2011 and again in April of 2012, as well as an additional request for appeal from Mr. P’s attorney on October 10, 2012, a case referral reached the Office of Administrative Hearings on October 22, 2012.

A notice of case planning conference was issued on October 24, 2012. This notice set the case planning conference for November 2, 2012, and noted that, by statute and regulation, the agency record was due within 15 days of the October 10 hearing request.

The agency record was not produced. Instead, on October 25, 2012, OCS submitted a notice withdrawing its substantiation finding. The case planning conference was held as scheduled to determine whether there were any issues in dispute.¹ Counsel for Mr. P indicated that she opposed a simple dismissal. She felt the need to request a more detailed order because,

¹ The conference was recorded.

she asserted, a prior client had been in a similar situation and even though the finding had been withdrawn, the finding was still being reported to potential employers by the Department during background checks.²

In response to the discussion during the case planning conference, an order was issued that stated in part

OCS had previously submitted a notice that it had withdrawn its substantiation finding. Counsel for Mr. P intends to submit either a motion or a stipulation requesting that Mr. P's name be removed from the listing of individuals against whom findings have been substantiated, and withdrawing the hearing request.^[3]

Mr. P did submit a proposed order. That proposed order stated

The Department's substantiated findings against K C. P were vacated. The Department of Health and Social Services, the State Attorney General's Office and its agents are herewith ordered to remove from all records, including but not limited to written and electronic, within their control or the control of their agents, any reference or suggestion that any allegation of abuse or neglect perpetrated by K C. P is or was substantiated. It is further ordered that this task shall be completed within sixty days of the writing of this order.^[4]

OCS has objected to this proposal as "overbroad, unnecessary, and unprecedented." OCS states

The Department did overturn the substantiation in its system on October 25, 2012. Since the finding has been overturned by the Department, Mr. P has received the relief that he was seeking at the beginning of this matter. The matter should now be dismissed.^[5]

III. Discussion

OCS maintains a "central registry" of all investigation reports.⁶ The information in this registry is confidential, and may only be reported to other governmental agencies, or in "connection with investigations or judicial proceedings involving child abuse, neglect, or custody."⁷

² Two telephone calls were placed to counsel for OCS, and one to her assistant, at the time set for the hearing, but she was not available and did not participate in the case planning conference, and did not respond to these assertions.

³ Order dated November 2, 2012. Counsel for OCS did not respond to this order.

⁴ Proposed Order submitted on December 3, 2012.

⁵ Objection dated December 12, 2012.

⁶ AS 47.17.040(a).

⁷ AS 47.17.040(b).

There is also a “centralized registry.”⁸ The centralized registry contains, among other information, the names of individuals for whom there is a decision, order, judgment, or adjudication finding that he or she committed “abuse, neglect, or exploitation under AS 47.10, AS 47.24, AS 47.62, or a substantially similar provision in another jurisdiction[.]”⁹ Information contained in this registry may be released to employers during a background check.¹⁰

The record does not disclose which registry Mr. P’s name is on. However, adverse results can flow from having one’s name on either list. Thus, an appeal is available either through AS 47.05.0330(j) for findings on the centralized registry, or through 7 AAC 54.215 for findings on the central registry.

Mr. P, through his attorney, has asserted that there are occasions when a person’s name remains on one or more registries even after a finding has been reversed. No evidence has been taken on that issue, and no finding is made concerning its accuracy. However, it should go without saying that the Department should not be reporting a substantiated finding in any manner after that finding has been withdrawn. Obtaining a favorable result through a hearing is illusory if the Department continues to report that a finding of abuse or neglect was substantiated. The Department is not harmed in any way by having an order state explicitly a requirement that unquestionably exists. In this case, the requirement is that the Department stop using a finding that has been withdrawn.

OCS argued that the Office of Administrative Hearings has no authority to issue an order that does anything more than dismiss the appeal. In at least some prior cases, a simple order closing the case file has been issued after a substantiated finding has been withdrawn. In those cases, there was no request for a broader order, and no concern was raised as to whether OCS would take appropriate action to fully implement the withdrawal of the finding being appealed. In this case, that concern has been raised. Moreover, the incomplete record that has been gathered in this case suggests that OCS has not been diligent in the past in giving Mr. P the relief he is entitled to in a timely way.

The Office of Administrative Hearings may not have authority on its own to direct OCS or any other division to take a particular action, but the Commissioner or his delegate does have that authority. A proposed decision pursuant to AS 44.64.060(e) may and often does contain

⁸ AS 47.05.030.

⁹ AS 47.05.330(b)(1)(A). *See also* 7 AAC 10.955 (provisions for centralized registry).

¹⁰ AS 47.05.330(h).

more than just rulings of law and factual findings. Proposed decisions may also contain orders that direct future action. It is then up to the final decisionmaker to adopt or modify the proposed order.¹¹

What happens after a finding is withdrawn involves both legal issues and policy questions. Since the parties to this action dispute the wording of the final order, it is appropriate to issue a proposed decision for consideration by the Commissioner or his delegee.

OCS also asserts that the proposed order submitted by Mr. P's counsel is overbroad. OCS is correct. It is not appropriate to remove all traces of the withdrawn finding. As just one example, the case file in this matter shows that a finding once existed. That case file cannot be modified to remove all references to the fact that a substantiated finding once existed. What is appropriate is the removal of Mr. P's name from any list that would suggest the substantiated finding continues to exist, and that could be used to his detriment in the future.

IV. Conclusion and Order

The substantiated finding against Mr. P has been withdrawn. Thus, any Report of Investigation or other finding that indicates a substantiated finding of abuse or neglect by Mr. P shall be corrected to show that the allegation or allegations were not substantiated. In addition, Mr. P's name shall be removed from any list or registry maintained by the Department on which he is listed as a person for whom there is a substantiated finding of abuse or neglect. These changes shall be made within 10 days¹² of the effective date of the final decision in this matter, and OCS shall submit a notice to Mr. P or his attorney notifying him that these changes have been made within ten days of making those changes.

DATED this 13th day of December, 2012.

Signed

Jeffrey A. Friedman
Administrative Law Judge

¹¹ See AS 44.64.060(e) for proposed decision, proposal for action, and final adoption or modification process.

¹² The finding was withdrawn on October 25, 2012. These changes should already have occurred during the normal course of business. Accordingly, giving OCS an additional ten days to accomplish this task should be sufficient.

Non-Adoption Options

B. The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e)(3), revises the enforcement action, determination of best interest, order, award, remedy, sanction, penalty, or other disposition of the case as set forth below, and adopts the proposed decision as revised:

1. The department has formally withdrawn its finding of substantiation.
2. The Office of Administrative Hearings lacks the authority to direct the Division (OCS) to take specific action.

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.

DATED this 14th day of January, 2013.

By: Signed _____
Name: Ree Sailors
Title: Deputy Commissioner, DHSS

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