

Non-Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services and in accordance with AS 44.64.060(e), declines to adopt this Decision, and instead adopts the proposed decision as revised:

Having evaluated the record in this case, including the recording of the Glass Warrant telephone conversation between appellant and his stepson, I find that OCS met its burden of proof to establish that appellant sexually abused his stepson. In concluding that OCS had not met its burden of proof in this case, the proposed decision submitted by the administrative law judge weighed the evidence presented by the parties and accorded considerable weight to the polygraph examination report submitted by appellant after the hearing. The polygraph examination, however, is inherently unreliable as evidence; in addition, it incorporated a question posed to appellant that assumed that “sexual purpose” is required in order for a given act to constitute sexual abuse. As pointed out by OCS in its proposal for action, “sexual purpose” or “sexual intent” are not required under Alaska law in order for touching of genitals to constitute sexual abuse. Under AS 11.81.900(b)(59)(A)(i), all that is required is that the defendant “knowingly” touch the victim’s genitals; and under AS 11.81.900(b)(59)(B)(i), a touching that “may reasonably be construed to be normal caretaker responsibilities for a child” does not constitute sexual abuse.

Although this was a close call, the evidence in the Glass Warrant recording tipped the balance in favor of OCS. During that telephone conversation, appellant specifically denied certain things, such as his stepson’s allegations that appellant had watched him in the shower and had provided him with pornography. Yet he never denied his stepson’s masturbation allegations, instead only apologizing and stating that he never had any sexual intent. Appellant’s failure to deny the masturbation allegations and his apparent admission during the Glass Warrant recording tip the balance in favor of OCS. OCS proved, by a preponderance of the evidence, that appellant engaged in sexual abuse of his stepson.

The proposed decision also found that OCS also had not met its burden regarding the substantiated finding of sexual abuse of appellant’s daughter, primarily based on the proposed reversal of the finding regarding the stepson. However, I am affirming the substantiated finding as to appellant’s stepson today, and that finding provided legitimate support for OCS’s substantiation of the finding of sexual abuse of the daughter. Additional support was provided

by the daughter's disclosures to the OCS investigator. Based on a review of the evidence, OCS proved, by a preponderance of the evidence, that appellant engaged in sexual abuse of his daughter.

The substantiated findings of sexual abuse against appellant are hereby affirmed.

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 16th day of May, 2016.

By: Signed
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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

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

In the Matter of the)

B C. J)

OAH No.15-0630-SAN)

DECISION

I. Introduction

The Office of Children’s Services (OCS) made two substantiated findings that B J committed Sexual Abuse of a Minor. First, on August 26, 2013, OCS substantiated Mr. J for sexual abuse of his stepson, D, occurring in 2007 when D was 13 years old.¹ OCS based its finding on disclosures made by D, Mr. J’s statements in a Glass Warrant recording, and Mr. J’s subsequent arrest by the Anchorage Police Department.² Second, on January 1, 2015, OCS substantiated Mr. J for sexual abuse of his daughter, E, occurring in 2012 when E was 13 years old.³ OSC based its finding on disclosures made by E and OCS’s prior substantiation regarding D.⁴

Mr. J requested a hearing to challenge those findings. Mr. J’s hearing was held on two separate days, October 10, 2015, and November 25, 2015. Mr. J represented himself. Assistant Attorney General Diane Foster represented OCS.

Based upon the record and after careful consideration, this decision finds that OCS did not meet its burden of establishing by a preponderance of the evidence that Mr. J sexually abused D, or that Mr. J sexually abused E.

II. Facts

F J and B C. J were married in 1998. Consequently, Mr. J became stepfather to F’s son D, who was about 4 years old at that time. Shortly thereafter, Mr. and Mrs. J had twins, E and G, on 00/00/1999. They all lived together until May 2012, when D moved to Utah to live with his paternal grandmother. D returned to Alaska in April 2013.

¹ Closing Letter, R37 (references to the documentary record are denoted by “R” followed by page number).

² Initial Assessment Summary, R34; Ms. M Testimony.

³ Closing Letter, R8.

⁴ Initial Assessment Summary, R5-7; Mr. O Testimony.

A. Sexual Abuse of D

On April 30, 2013, 19-year-old D C disclosed to his mother, F J, that Mr. J had sexually abused D when he was 13 years old.⁵ D's revelation to his mother occurred on the same night that Mr. and Mrs. J had been fighting over money issues having to do with Mr. J's alleged embezzlement from a family business. Mrs. J filed a police report of sexual abuse against Mr. J,⁶ and on May 2, 2013, Officer N K conducted an initial interview with D. On May 8, 2013, OCS received a protective services report filed by D, regarding concerns that Mr. J may have sexually abused his younger siblings, G and E.

On May 9, 2013, Mrs. J brought E and G to No Name to be interviewed. Neither E nor G disclosed any abuse during their interviews.⁷ Mrs. J reported that both G and E had good relationships with Mr. J and described E at that time as being a "daddy's girl."⁸ OCS did not make a substantiated finding with respect to E and G. However, OCS did ultimately make a substantiated finding with respect to D.

In an interview with Detective K H, D alleged that the following occurred in the summer or fall of his eighth grade year when he was 13 years old:

1. Mr. J asked D to expose his penis; Mr. J showed D how to pull the foreskin back; and Mr. J fondled D's penis;
2. One month after the first incident, Mr. J asked D how frequently D masturbated and expressed concern that he was not doing it correctly. Mr. J then told D to expose his penis, Mr. J pulled D's foreskin back and masturbated D for ten minutes while rubbing his own penis through his clothing;
3. Two or three months after the second incident, Mr. J gave D some lubricant and pornographic materials to masturbate with and told D that the lubricant could be used in the shower. The next time D took a shower, Mr. J entered the bathroom, looked into the shower, and asked D why he wasn't masturbating. He then told D to masturbate; D masturbated for about five minutes while Mr. J watched. D also stated that there were probably two other incidents that occurred between the second and third incidents, but he was unable to recall the specific incidents or details.
4. One week after the third incident, Mr. J stated that he wanted to make sure D was masturbating correctly and demonstrated on a pill bottle he held near his

⁵ Mrs. J's testimony; APD Report, R39.

⁶ Initial Assessment Summary, R34.

⁷ Although the agency record includes a transcript of a May 9, 2013 interview of G at No Name, and there are notes confirming that E was interviewed at that time, the record contains no similar transcript or even notes of a May 2013 interview of E.

⁸ Initial Assessment Summary, R33-36.

genitals. Then Mr. J told D, “if you want to know what a blow job is, you can ask me, but it means your gonna spend some time on your knees too.”⁹

In that interview D stated that no other sexual incident occurred after the fourth incident. It follows that the abuse lasted approximately 3 or 4 months. However, during a second interview on May 10, 2013, D stated that there had been about ten total incidents of abuse, and that the abuse lasted the entire school year. D also told Detective H that he had first confided in his grandmother, K S, when he was living with her in Utah. He told her about the incidents after she saw “stretchmarks” on his body and asked if they were the result of Mr. J raping D.¹⁰

On May 12, 2013, Detective H obtained and executed a “Glass Warrant,” whereby he recorded a telephone conversation between D and Mr. J. The conversation lasted about 17 minutes, including several long pauses and periods of silence. When D referenced the incident where Mr. J showed him how to pull his foreskin back, Mr. J responded that D’s pediatrician had been concerned about D’s foreskin possibly growing shut, and he was only making sure that it was “doing what it was supposed to.” During the conversation, Mr. J denied giving D pornographic materials and watching him in the shower. When D brought up the comment made in the alleged fourth incident, Mr. J told him he didn’t recall making such a comment, and he further responded that if he had ever mentioned oral sex during a talk, it was only to “offer a moment of levity to a heavy conversation.” He further stated to D: “I would never expect that from my son. I’d eat a bullet first.”¹¹

Detective H testified that during the telephone conversation Mr. J admitted to teaching D to masturbate.¹² In the Glass Warrant recording, however, Mr. J’s comments in response to D’s allegations regarding masturbation are ambiguous—he never explicitly admits to masturbating D, and his comments to D during the conversation could be interpreted as admitting to only trying to confirm that there were no problems with D’s foreskin.¹³ Mr. J’s statements to D on the Glass Warrant recording included numerous adamant denials that there was any “sexual intent” in any of his actions with D. In his testimony later in the hearing, Mr. J also stated that he was

⁹ APD Interview with D C, R44-48.

¹⁰ Transcript of recorded interview, R58, 63.

¹¹ Glass Warrant recording.

¹² Detective H testimony.

¹³ Glass Warrant recording.

under the influence of prescription pain killers and had just woken up from a nap when the Glass Warrant telephone conversation took place.¹⁴

On May 13, 2013, Mr. J was arrested and interviewed by APD.¹⁵ He denied that sexual abuse had ever occurred. He stated that when D brought up sexual abuse during the phone call, he “had no idea how to react ’cuz it never happened.”¹⁶ He also said that when D came home approximately an hour or hour and a half after the phone call, he and D interacted and the conversation was not mentioned. He said it was as though the conversation had never taken place.¹⁷

In both the police interview and in his testimony at the hearing, Mr. J stated that he had only ever touched D’s penis once for about one and a half seconds. He stated that D had come to him after catching his penis in his zipper and told Mr. J that it had a red spot on it.¹⁸ Mr. J stated that he touched it briefly to make sure the foreskin was intact and that it was not bleeding. Mr. J also elaborated that D’s pediatrician had been concerned about D’s foreskin when he was about 13 years old.¹⁹

On August 26, 2013, Protective Services Specialist (“PSS”) D M of OCS substantiated Mr. J for sexual abuse of his stepson, D. Ms. M read Detective H’s report and discussed the case with him, but she did not re-interview D herself. Detective H told her that D’s disclosure seemed believable. She ultimately based the substantiation on D’s disclosures, Mr. J’s alleged “admissions” in the Glass Warrant call, and Mr. J’s subsequent arrest.²⁰ However, Ms. M did not listen to the Glass Warrant recording; instead she relied upon Detective H’s representation that it contained admissions by Mr. J regarding D’s masturbation allegations.²¹

On October 17, 2013, Mr. J took a polygraph examination where he denied (1) touching D’s genitals for a sexual purpose; (2) pulling D’s penis back and forth; (3) offering to give D a blow job; and (4) demonstrating masturbation on a bottle while holding it in front of his genitals.

¹⁴ Mr. J testimony.

¹⁵ Based on the record, it appears that Mr. J has been incarcerated continuously since his arrest in May 2013.

¹⁶ Detective H elicited Mr. J’s comments about the Glass Warrant telephone conversation without informing him that the conversation had been recorded. *See* transcript of recorded interview, R83.

¹⁷ Transcript of recorded interview, R83-4.

¹⁸ *Id.* at R76.

¹⁹ Transcript of recorded interview, R75-6; Mr. J testimony.

²⁰ Ms. M testimony.

²¹ *Id.*

The polygraph examiner's report²² stated that Mr. J's scoring in the examination "clearly indicates that he was truthful in answering the relevant questions" posed to him. The examiner expressed that "it is my scientific and professional opinion that B J was truthful when he denied all of the sexual allegations made by [D]," and that "the scientific evidence indicates that the confidence in these conclusions exceeds 90%."²³

B. Sexual Abuse of E

In September 2014, E disclosed to her mother that when E was in the seventh grade (in approximately May 2012), an incident had occurred between herself and Mr. J. Prior to the disclosure, Mrs. J had discovered a text message on E's phone which prompted discussion with E. E had sent a text to her boyfriend about an incident where she had grabbed him inappropriately. When Mrs. J asked E why she would do that, E did not want to talk about it, then she disclosed that Mr. J had previously touched her and made her touch him.²⁴

On September 8, 2014, Mrs. J filed a police report.²⁵ On September 10, 2014, E was interviewed at No Name by OCS PSS D L. Mr. L did not testify at the hearing.²⁶ However, N L N, a Family Nurse Practitioner at No Name who was part of the team evaluating E, did testify at the hearing. Although Ms. N was not present in the room when PSS L interviewed E, she was able to watch the interview with the rest of the team through a video monitor and was able to observe E's demeanor. When asked whether the team evaluates the truthfulness of a child's disclosures during such an interview, she stated that the interview gives the child an opportunity to tell his or her story, and that generally, the team's role is to believe children. She testified that in this case, she believed E's story.²⁷

At the interview, E told PSS L that the incident in question occurred on her graduation day in either the seventh or eighth grade; she then acknowledged, however, that Mr. J was arrested while she was in eighth grade.²⁸ (A review of the calendar indicates that Mr. J was already incarcerated by the end of E's eighth grade school year.) She stated that her mother,

²² Mr. J submitted the polygraph examiner's report after the conclusion of the hearing, when the record was kept open to allow him to attempt to obtain additional documents from his criminal defense attorney. OCS, however, did not pose any objections to the admission of the report or to its content.

²³ 10/17/13 report from Dr. E C. T, Ph.D., regarding polygraph examination of Mr. J conducted by Dr. T.

²⁴ R18 (No Name notes of pre-conference meeting with Mrs. J).

²⁵ *Id.*

²⁶ OCS's counsel indicated that Mr. L is no longer employed by OCS, and he failed to respond to phone messages and email requests that he make himself available to testify.

²⁷ Ms. N testimony.

²⁸ No Name, Case Summary R19.

grandmother, and brother were also in the home and that she went into Mr. and Mrs. J's bedroom at 10:30 p.m., where she gave Mr. J a hug and he asked her some questions. She alleged that he then began touching her, first over her clothes and then under them; that he touched her vagina with his fingers but no penetration occurred; and that he made her touch his penis. When asked whether Mr. J was erect when this occurred, E shrugged. When asked what Mr. J's hand was doing, E shrugged.²⁹ She could not recall what Mr. J's penis looked like, but when asked whether anything came out of his penis, she responded "Yes" and noted that the bottom of her shirt had been wet.³⁰

According to the interview, the incident lasted between thirty minutes and an hour and a half. E first stated that the incident ended because of the time. She recalled that at 11 p.m., they heard the garage door and Mr. J told her to go to bed. However, later when she was asked about that night, she stated that the incident took place from 10:30 p.m. to midnight.³¹

At the No Name pre-conference meeting, Mrs. J stated that E's personality had changed a few years back and that E had been suicidal about six months before she made the disclosure.³² She testified that E had always been a "daddy's girl," but around the time of the incident, E began to detest being called that.³³ E told PSS L that since April 2013 (about when D reported abuse by Mr. J), Mrs. J would ask her every couple of months whether something "had happened to her."³⁴

On January 1, 2015, PSS B O replaced PSS L on the case. Mr. O did not re-interview E or watch a recording of the interview, nor did he directly speak with Mr. L about the allegations; but he did read the written report and speak to Detective H about the case (although Detective H was not present to observe E's interview by L).³⁵ On January 9, 2015 Mr. O substantiated a finding that Mr. J had sexually abused E, based on the No Name report and the fact that OCS had made the prior substantiation against Mr. J regarding D.³⁶

²⁹ Ms. N testimony.

³⁰ No Name, Case Summary R18-21.

³¹ No Name, Case Summary R18-21.

³² No Name, Case Summary R18.

³³ Mrs. J testimony.

³⁴ No Name, Case Summary R20.

³⁵ Mr. O testimony.

³⁶ Initial Assessment Summary, R4-7; Closing Letter, R8; Mr. O Testimony.

C. Mr. J's Testimony

Mr. J participated in the hearing and testified via telephone; at the time of the hearing he remained incarcerated, awaiting trial, approximately two and a half years after he was first arrested. His testimony was consistent with his emphatic denials of D's allegations during the police interview discussed above. Mr. J testified that he was under the strong influence of prescribed pain medication at the time of the Glass Warrant phone call with D, and that he had just woken up from a nap when D called. He further testified that D's pediatrician had previously expressed a concern regarding potential problems with D's foreskin.³⁷

When asked why D would falsely accuse him of sexual abuse, Mr. J speculated that D's paternal grandmother, K S, may have encouraged him to do it. Mr. J testified that Ms. S on at least two previous occasions had made abuse complaints to OCS regarding Mr. J and D, neither of which was substantiated.³⁸

Mr. J also testified emphatically that he never sexually abused E in any manner. In that context, he testified that the story E told the No Name investigators in 2014 differed significantly from what he understood her to have told the grand jury;³⁹ the grand jury transcripts, however, were not made part of the record of this proceeding.

III. Discussion

OCS maintains a central registry of all investigation reports.⁴⁰ Those reports are confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.⁴¹ At the conclusion of an investigation, OCS may find that an allegation has been substantiated. When a substantiated finding is appealed, OCS has the burden of proving by a preponderance of the evidence that the finding should be upheld. Proof by a preponderance of the evidence means that the fact being proven is more likely true than not true. Meeting this burden only requires that the fact be slightly more likely true.⁴² Thus, in this matter OCS only needs to prove that it is slightly

³⁷ Mr. J testimony.

³⁸ *Id.*

³⁹ E told the No Name team that the incident took place in Mr. J's bedroom, but she apparently told the grand jury that it happened on the couch in the family's living room; Detective H's testimony appeared to confirm that E had in fact related the latter version at some point in the process. (H testimony, at approximately 49:40.)

⁴⁰ AS 47.17.040.

⁴¹ AS 47.17.040(b).

⁴² See *In re H.N.*, OAH No. 12-0715-SAN (Commissioner of Health and Social Services 2013).

more likely true than not true that Mr. J committed acts of sexual abuse involving his stepson D and daughter E.

A. D

OCS made its substantiated finding of abuse as to D, based on D's disclosures, Mr. J's alleged "admissions" in the Glass Warrant call, and Mr. J's subsequent arrest. D did not testify at the hearing, and his statements to the APD officers who interviewed him are hearsay. Hearsay evidence can be considered in OAH proceedings, as long as it is "evidence of the type on which a reasonable person might rely in the conduct of serious affairs."⁴³ Hearsay evidence, however, is accorded less weight than sworn testimony which has been subject to cross-examination.

In determining whether OCS met its burden of proving that Mr. J committed acts of sexual abuse against D, one must weigh the evidence presented by OCS against the evidence presented by Mr. J. First, OCS presented the written summaries and transcripts of D's disclosures and Detective H's testimony regarding those disclosures. Detective H's testimony was credible, but his testimony was simply an oral report of what D told him. The written summaries and transcripts, however, reveal inconsistencies in D's statements. During his interview with Detective H, he described only four incidents that took place over a three to four month period. During another interview, however, D indicated there had been about ten total incidents of abuse, occurring over the course of his entire eighth grade school year. Not having D appear to testify meant that Mr. J was unable to cross-examine him about these inconsistencies. As a general matter, this sort of problem is one reason why hearsay evidence is often given less weight than sworn testimony. In this case, D's disclosures are accorded less weight because the inconsistencies in his story could not be explored, and because neither the administrative law judge ("ALJ") nor Mr. J were able to observe his demeanor while making his disclosures.

In proving its case, OCS also presented Detective H's testimony regarding the recorded Glass Warrant telephone conversation between Mr. J and D. As mentioned above, Detective H testified that he believed Mr. J admitted to sexually abusing D during the recorded Glass Warrant telephone conversation with D; clearly, Detective H's perception that Mr. J made that admission was a significant factor in Mr. J being arrested and charged for abusing D. Ms. M, in turn, testified that OCS's substantiated finding was based in large part on the fact that Mr. J had been

⁴³ 2 AAC 64.290.

arrested and charged for abusing D, and on the alleged admission made by Mr. J (as related to her by Detective H, because Ms. M never listened to the Glass Warrant recording).⁴⁴ So the alleged admission in the Glass Warrant conversation played a very significant role in this substantiated finding of abuse of D.

Yet the alleged admission in the Glass Warrant recording is ambiguous at best. As discussed above, Mr. J's comments to D during the telephone conversation could be interpreted as Mr. J admitting that he had only been trying to confirm that there were no problems with D's foreskin. In fact, Mr. J's statements on the recording, and to Detective H, regarding his concerns about D's foreskin are corroborated by a transcript in the OCS record of an interview of D's pediatrician, Dr. K P. In the interview, conducted by Detective H and the prosecuting attorney in Mr. J's criminal case, Dr. P confirmed that D was brought by Mrs. J for an examination regarding a problem he was having with his foreskin in May 2007, just a few months before D stated that the incidents of alleged abuse took place.⁴⁵ It is reasonable to presume that Mr. J would have been aware of the issue with D's foreskin at the time.

Facing this set of evidence, being unrepresented by counsel, and testifying via telephone while shackled to a chair in a meeting room at the Anchorage jail, Mr. J testified credibly in his own defense. His testimony was consistent and concise throughout the hearing. He testified calmly and rationally, and his testimony was not glib or overly verbose. In addition, as mentioned above, his testimony that there was a concern in 2007 regarding D's foreskin was corroborated by Dr. P's confirmation of the office visit regarding a foreskin problem in May 2007, just a few months before D said the alleged incidents took place. All of these factors lead me to find that Mr. J testified credibly in denying that he sexually abused D.

The report of the polygraph examination administered to Mr. J corroborates his testimony and supports the finding that he testified credibly.⁴⁶ The polygraph examiner concluded that, in his "scientific and professional opinion," Mr. J "was truthful when he denied all of the sexual

⁴⁴ Apparently because Ms. M never listened to the Glass Warrant recording, OCS did not include the recording in the agency record of this matter, and it initially objected to a request to produce the recording for review by the ALJ. OCS did produce the recording after being directed to do so by the ALJ.

⁴⁵ Transcript of recorded interview, R136.

⁴⁶ The reliability and validity of polygraph examinations, and the evolving caselaw regarding their admissibility, are discussed in the criminal law context in a recent Alaska Court of Appeals decision, *State v. Alexander*, slip opinion no. 2481 (12/18/15). Although the polygraph is not dispositive on the issue of Mr. J's credibility, it is one piece of persuasive evidence that the ALJ will balance against the evidence presented by OCS.

allegations made by [D],” and that “the scientific evidence indicates that the confidence in these conclusions exceeds 90%.”⁴⁷ These conclusions were not challenged or questioned by OCS.⁴⁸

In summary, OCS’s case against Mr. J regarding D is based on (a) the hearsay statements of D, which contained inconsistencies, were not subject to cross-examination, and are given less weight than sworn testimony, (b) the ambiguous admissions by Mr. J in the Glass Warrant recording, and (c) the fact that Mr. J was arrested and charged for abusing D (which in turn was grounded on the alleged admissions). Balanced against that evidence are (a) Mr. J’s credible testimony denying that he ever masturbated or otherwise sexually abused D, (b) the corroboration provided by Dr. P’s confirmation of D’s office visit for problems with his foreskin in May 2007, and (c) the report of the polygraph results indicating “90% confidence” that Mr. J was truthful in his denials of abusing D. Based on this record, I find that OCS did not meet its burden of proving, by a preponderance of the evidence, that Mr. J sexually abused D.

B. E

OCS based its substantiated finding that Mr. J sexually abused E on the disclosures made by E and on the fact that OCS had previously made a substantiated finding against Mr. J regarding D.⁴⁹ Again, E did not testify in the hearing, thus Mr. J was unable to cross-examine her regarding her allegations. In fact, there was no sworn testimony in this hearing from anyone who interviewed E in 2014; only Ms. N testified about observing the interview via video from another room. Also, it must be noted that the agency record does not contain transcripts of E’s disclosures to No Name in 2014; it only contains summaries of those disclosures, prepared by PSS L and Ms. N. In addition, the record does not contain a transcript of her interview in 2013 (even though it does include a transcript of her brother G’s 2013 interview). A record of E’s 2013 interview would be an important document to review and compare to the records of her 2014 disclosures, because she denied that any abuse by her father had occurred when she was interviewed in 2013, only about one year after the alleged abuse incident took place, according to her 2014 disclosures.

As with D, there also were apparent inconsistencies in E’s disclosures in 2014. She stated during her No Name interview that the alleged incident of abuse took place in her father’s

⁴⁷ 10/17/13 report from Dr. E C. T, Ph.D., regarding polygraph examination of Mr. J conducted by Dr. T.

⁴⁸ As noted above, Mr. J submitted Dr. T’s report when the record was kept open after the conclusion of the hearing, but OCS did not object to its submission nor did it raise any questions or concerns regarding its content.

⁴⁹ Initial Assessment Summary, R5-7; Mr. O Testimony.

bedroom. But in a later statement, apparently to the grand jury, she said the incident took place on the couch in the living room. Because these disclosures were presented only through hearsay testimony, they are accorded less weight because the inconsistencies in E's story could not be explored, and because neither the ALJ nor Mr. J were able to observe her demeanor while making the disclosures.

Along with E's 2014 disclosures, OCS's substantiation regarding abuse of E was based on the fact of the prior substantiation regarding D. However, this decision has already found that OCS has not met its burden of proving that the substantiation as to D was appropriate. Therefore, that factor is accorded little weight in the analysis of whether OCS has met its burden as to E.

In response to OCS's substantiated finding of abuse as to E, Mr. J testified credibly in his own defense. He stated clearly and emphatically that he simply never touched E in a sexual manner. Balanced against his testimony are (a) the hearsay disclosures of E, unsupported by any testimony from anyone who actually interviewed her about those disclosures, and (b) the previous substantiation as to D, which is reversed by this decision and therefore given little weight. Based on this record, I find that OCS did not meet its burden of proving, by a preponderance of the evidence, that Mr. J sexually abused E.

IV. Conclusion

OCS has the burden of proof, and it did not show that it is more likely true than not true that Mr. J sexually abused his stepson D or his daughter E. The substantiated findings of abuse, therefore, are reversed.

DATED this 31st day of March, 2016.

Signed

Andrew M. Lebo
Administrative Law Judge

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