

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

In the Matter of)	
)	
B N)	OAH No. 16-0272-SAN
_____)	Agency No.

DECISION

I. Introduction

The Office of Children’s Services (OCS) has alleged that Master Sergeant B N engaged in inappropriate sexual touching with his stepdaughter, K T, over a period of months leading up to August of 2015. K was then twelve years old. OCS has substantiated a finding of sexual abuse against Sgt. N. This substantiation, if upheld, would place him on the confidential central registry of perpetrators of abuse or neglect established under AS 47.17.040(a). Sgt. N has appealed.

Sgt. N’s case came before me for a *de novo* hearing on June 13, 2017, shortly after he had been acquitted in a court martial of five criminal charges based on the same allegations.¹ He was ably defended by counsel, and at the close of the evidence I felt the evidence against him fell short of the preponderance of evidence standard required to uphold the substantiation, because I was led to believe that K’s accounts of the abuse were inconsistent and incredible. However, these recorded accounts were not actually played at the hearing, but rather were submitted to be heard later in chambers. After I was able to review in detail, and in context, the recorded statements and testimony made by K and her brother, my view of the overall balance of the evidence shifted.

II. Evidence Admitted

The burden of proof in this hearing lies with the Office of Children’s Services. Evidence was admitted under the standard set out in 2 AAC 64.290(a)(1), which permits the Administrative Law Judge to consider evidence upon which a reasonable person might rely in the conduct of serious affairs.²

¹ All five charges relating to K were brought under Article 120 of the Uniform Code of Military Justice (U.C.M.J.). Seven other charges in the court martial (of which Sgt. N was also acquitted) related to alleged events in other states involving other people. N Pre-Hearing Brief, App. B.

The parties’ desire to have this case trail the military prosecution is the primary reason that the hearing was deferred until 2017.

² This case is not governed by the Administrative Procedure Act, AS 44.62.330 *et seq.*, and the restriction on use of hearsay found in that statute does not apply.

The parties concurred in the admission of the numbered agency record (items 1-76, including video recordings of two forensic interviews at item 75 and a separate audio recording of court martial testimony given by K at item 76), as well as a DNA report designated N Exhibit A. The only live testimony at the hearing came from OCS assessment worker Q J (who had interviewed K and others shortly after the allegation was made) and from David Ruskin (who had conducted a polygraph examination at the behest of Sgt. N). The agency record documented witness interviews with K's mother and aunt.

III. Factual Background

In the summer of 2015, S and B N had been married for ten years. The couple had moved to Alaska the previous October, living first in City A and then moving to City B in July of 2015. The household at all times included two biological children of S N: H (16) and K (12). S's third, older biological son, F was also present in City A at least some of the time, but was gone by the time of the move to City B.³ S's sister, N J, lived in the home as well.⁴

On approximately August 25, 2015, an evening when B and S N, K and H were in the home, K's mother caught her sending texts to a boy in Oregon (an online friend) that the mother felt were inappropriate.⁵ K was not allowed to have relationships with boys, and her mother "blew up," in the words of her brother H.⁶ Later that evening, S N visited K in her bedroom and, during an emotional conversation, K described instances of her stepfather touching her breasts and groin and (to a limited extent) exposing himself.⁷

S N believed her daughter, and she expelled Sgt. N from the house, divorcing him shortly thereafter. She reported the matter to law enforcement.

K was interviewed on August 28, 2017 at No Name Facility, a forensic interviewing facility operated by the No Name Resource Center in City B. OCS worker Q J conducted the interview, observed remotely by army detectives, a forensic nurse from City B Hospital, and No Name Facility staff.⁸ The interview was recorded on video and will be discussed at length below. A video-recorded interview was also conducted with H T.

³ Agency Record (A.R.) 5; A.R. 76, file 2. An older step-sibling is also listed in the OCS record of household members, but it seems clear from the children's interviews that she was not typically present.

⁴ A.R. 15.

⁵ A.R. 9; A.R. 75 (H interview); A.R. 76, files 1 and 2. K had become acquainted with the boy (or the person she thought to be a boy) through X-Box gaming and had been texting him for about two weeks. He was not a boyfriend and they had never met in person. The nature of the texts is not in evidence.

⁶ A.R. 75 (H interview); A.R. 76.

⁷ A.R. 9; K T interview.

⁸ Testimony of Q J.

Sgt. N did not allow OCS to interview him during its investigation, and no firsthand statement from Sgt. N is in the record. However, Sgt. N privately arranged to take a polygraph exam from David C. Ruskin, an emeritus professor of psychology who was quite prominent in the polygraph field at one time. Conducting the exam on September 16, 2015, Dr. Ruskin recorded that Sgt. N denied sexual touching and sexual acts with K. He opined that the denial of sexual acts was truthful with “confidence [that] . . . exceeds 90%.”⁹ Dr. Ruskin’s brief written report was shared with OCS.

Based primarily on the August 28 interviews, OCS substantiated a finding of sexual abuse against Sgt. N. Sgt. N promptly appealed. However, the matter was stayed for some time pending court martial proceedings, culminating in a trial and not-guilty verdict in the first quarter of 2017. Notably, K testified at the court martial, and a recording of her testimony (including cross-examination) is part of the record in this case.

During the interim between the filing of this case and the court martial trial, the U.S. Army Criminal Investigation Laboratory reported results of examination of a fitted sheet and comforter from K’s room and from one of her shirts and bras. The lab found no semen from any source on these items. There was some male DNA (from a source other than semen) on the inside front bottom of the shirt, but it was not Sgt. N’s. The amount of genetic data was insufficient to further pursue the origin of that DNA.¹⁰

IV. Discussion

A. Legal Framework

This appeal arises from OCS’s investigation and substantiation of alleged child abuse or neglect under the “Child Protection” provisions of AS 47.17. It relates to whether Sgt. N’s name should appear on the “central registry” of those who have been substantiated for committing child abuse or neglect, established under AS 47.17.040.¹¹

The Child Protection provisions include references to related “Child in Need of Aid” (CINA) provisions in AS 47.10. However, Chapter 47.17 and Chapter 47.10 each have a different focus: AS 47.17 seeks to determine whether a person (typically an adult) has abused or neglected a child, while AS 47.10 seeks to determine whether a child is a “child in need of aid.” These questions are often, but not always, two sides of the same coin. This decision is a

⁹ A.R. 19.

¹⁰ Ex. A.

¹¹ Appeal to the Office of Administrative Hearings is provided under 7 AAC 54.255(b)(7).

determination of whether B N committed sexual abuse of K T in 2015, not a determination of whether K is a child in need of aid.

In the Child Protection provisions of AS 47.17, the Legislature included specific statutory definitions that govern the handling of reports of alleged child abuse or neglect. The first and most important of these sets out the definition of “child abuse or neglect,” as that term is used throughout AS 47.17, and sexual abuse is included under that definition wherever it occurs “under circumstances that indicate that the child’s health or welfare is harmed thereby.”¹² While the statute does not go on to define “sexual abuse,” it has not been disputed in this case that the conduct alleged, if it occurred, would be sexual abuse, nor has it been disputed that K’s health or welfare would be harmed. The dispute is over whether the conduct occurred.

B. K’s Account

This case grew out of the videotaped interview at No Name Facility, which first focused on an incident that K said had happened two days before, and then explored a longer history of interactions with her stepfather. This summary of her account will proceed in a different order, starting with the overall pattern and then describing each of the individual incidents that were brought out in the interview.

K described a course of interaction running from early the previous winter, when the family was living in City A, until the incident in City B just two days prior. She said the events occurred three or four times a week. They involved Sgt. N touching her with his hands both over and under her clothes, often in the chest area and sometimes in the groin area.¹³ There was also touching with his mouth, over and under clothes, in the chest area. K said that Sgt. N would engage in these activities when no one was near her door or when her brother was engaged in video games with his headphones on, and that once the family had moved into their City B house where she had a door, her stepfather would always close her door. He would tell her the more he touched her breasts, the bigger they would grow. He would shush her and tell her not to tell anyone, and slip money (\$5-\$20) into her bra. Sometimes when she told him “no,” he would take away her X-Box and attribute it to not doing her chores. She said he would try to get her to touch his private part on occasion, but she always successfully pulled away.

¹² AS 47.17.290(3).

¹³ While she alleged occasional touching under the clothes in the groin area, she said there was no penetration.

With the partial exception of incident 4 below, K did not suggest that Sgt. N disrobed during these incidents. However, she said he did have a practice of calling her to his bedroom door when he was naked (she would avert her eyes and ask what he needed), and that he would sometimes walk around the house naked when only he and she were present.

Six specific incidents were described, numbered below for ease of reference:

1. K said the first incident was at the beginning of winter in City A. She had no door at the time, just a curtain, but her mother was in another area of the house. When he came into her room, she was in “short” clothes because the house was overheated. He just said “Shhh” and started touching her over her chest over her clothes. There was no particular event that made him stop.

2. Another incident was when K had been sleeping and was in a drowsy state. She said Sgt. N pulled up her shirt and bra and touched her breast area with his hands and mouth, both over and under her clothes. The interviewer did not pin down where this occurred.

3. On another occasion, K described a party to celebrate the purchase of a go cart. Sgt. N was drunk. K was in the living room under a blanket, but everyone else was outside or elsewhere in the house. She said her stepfather came in and tried to put his hand through a hole in the blanket to touch her over her clothes. She successfully refused; soon afterwards he texted asking if she was going to “be like that.”

4. K said that about a month before the interview, Sgt. N opened her door at a time when she was just in her underwear and bra, because the house was so hot. She said her door was locked and she does not know how he got in. Sgt. N told her it was okay to be naked. She said he started to pull down his pants, and he appeared to have no boxer shorts on, although she ducked under her hood and does not seem to have seen the pants come all the way down. She first fled into her closet, then ran to a drawer and put on a short dress, which was the first thing that came to hand. She said he later tried to pull up the dress, but by that time his pants were pulled up.

5. K said the most recent incident that involved touching her groin area was about a week before the interview. She was playing games in her room with her headphones on, and her stepfather surprised her and touched her back, chest, and groin over her clothes, saying “Shhh.” Her cat then ran away and she went after it, ending the incident.

6. K described the last incident, two days before the interview, as being touching of the chest over the clothes. She said he “would try” to pull her shirt up from below or down from

above, suggesting that one of those things happened on this occasion, but the details were not explored in the interview. As he was doing this he said he had “two things” for her “to do,” which she understood to be a reference to her breasts. She said the incident occurred at 5 or 6 p.m., while her aunt and brother were in the kitchen and she was in her room, on her bed.

C. K's Credibility

The videotaped interview is highly convincing in itself. K presents as matter-of-fact in the way some preteens are, betraying emotion only as the interview delves deeper into the more embarrassing or frightening incidents. She does not appear prone to exaggeration, often firmly denying invitations to describe conduct in ways that would be more damning to Sgt. N. She readily volunteers that the incidents generally happened when others were in the house. She does not try to conjure scenarios where she and Sgt. N were alone, or otherwise minimize surrounding circumstances that might make her account harder for the listener to believe. The overall account is not lurid, but rather is a story of a stepfather who manipulated and crossed boundaries over a long period, but kept the inappropriate interactions brief and, often, a little bit ambiguous. It would take an extraordinarily worldly and clever child to fabricate such an account. There is no evidence that K was such a child; no other males in her life to that point seem likely candidates to have given her such a range of experiences. Notably, the boy whose texts got her in trouble was someone far away whom she knew only through online gaming.

The interview was conducted in a rather wandering fashion, and the six numbered incidents above can only be seen as examples of a longer history that would include additional incidents. No real attempt was made to exhaust K's memory.

A key element of the defense in this case has been the contention that K's account has been inconsistent, with her court martial testimony differing dramatically from her interview with Q J. Before examining this claim, it is important to note that the court martial was a year and a half later, which is a long time in a middle-schooler's life. Also, the cross examination in the court martial was conducted in a manner calculated to confuse the witness, jumping around among incidents and telling the witness she had omitted things in the forensic interview that, in fact, she had not omitted.¹⁴ Finally, it is clear from her reactions that testifying at the court martial was terrifying to K. This is understandable: she had been flown up from Texas to testify

¹⁴ At 16 minutes into the cross-examination, defense counsel in the court martial led K to believe she had told Q J that the incidents never happened anywhere other than her bedroom. This was a gross mischaracterization of the interview *as a whole*, but K seems to have accepted that it must be true that she had failed to mention events outside the bedroom (though she did not abandon her testimony that molestation had also occurred in the living room).

in front of Sgt. N and a roomful of army officers. No special arrangements seem to have been made on account of her youth, with the presiding officer apparently expecting her to testify like an adult.

At the hearing in this case, counsel for Sgt. N suggested through cross-examination that, in the forensic interview, K was able to describe incident number 1 above in precise detail, and yet in her court martial testimony she could not remember the event at all.¹⁵ It is true that, at the court martial, the first substantive question K was asked was whether she remembered the first time Sgt. N molested her, and she said she did not. Moments afterward, however, she described the first incident she could *remember*, and her description was basically consistent with incident 1.¹⁶

Likewise, it was suggested that the accounts of incident 3 were inconsistent. But in fact, the description of incident 3 between the two accounts differs only in how many details are given—in 2017 K described Sgt. N yelling at her and sending text messages after she rejected his drunken advances, whereas in 2015 she had mentioned only text messages and did not mention him raising his voice orally.¹⁷ The variation is not troubling given the passage of time and the fact that there seem to have been multiple incidents, including at least two in the living room, which could be confused in a child's memory.

A potentially more significant discrepancy was pointed out regarding incident 4. When K related this incident in the forensic interview, she described running to her closet and then, when Sgt. N opened the door, running to her dresser to grab a dress. The description at the court martial has her putting on the dress while still in the closet. It also mentions Sgt. N trying to get her to touch his penis through a hole in her blanket, something she did not mention in her description of incident 4 in the interview a year and a half before. The first discrepancy is a minor conflation of the order of events in an incident where she would have been panicked, and is not troubling. The second discrepancy would be difficult to explain, except when one recalls that she did say in the interview that her stepfather had tried to get her to touch his private part on occasion; the much later description is most likely simply a merging of two events in her mind.

¹⁵ Cross-examination of Q J. Ms. J had no basis to quarrel with this characterization, and counsel for OCS never revisited it.

¹⁶ A.R. 76, file 1, first 7 minutes.

¹⁷ The 2017 description is in A.R. 76, file 1, approx. mins. 7-10 (yelling) and 27:30 (texts). A different living room incident is described at minute 21-22. The 2015 description is in A.R. 75.

In neither telling did she indicate that she ever saw the penis when he would try to get her to touch it.

The most serious cause to doubt K's veracity comes from the circumstances in which she made her first disclosure to her mother. K had been sent to her room for texting a boy. When her mother came to the room, her mother "blew up" (in the words of K's brother) and began pulling K's hair.¹⁸ By all descriptions it was a highly emotional confrontation, and in the middle of it K broke down and started telling what her stepfather had been doing to her.¹⁹ One interpretation of this sequence is that K made up the allegations on the spur of the moment to divert her mother's anger. Another is that the extreme emotions of the moment finally broke the dam and let her spill what she had been holding inside. This is essentially the way K describes it, and she does so in quite a convincing way.

D. Corroborating Evidence

Several factors bolster K's truthfulness in this report. First, K's mother believed what K told her, even though the mother had a longstanding relationship with Sgt. N and even though believing the account made her feel very guilty for failing to protect her daughter.²⁰ Suggestions that the layout of the house, the nature of the sleeping arrangements, or the habits of the other household members made K's account inherently improbable are belied by her mother's acceptance that it was believable. Likewise, her Aunt N J, who also lived in the home, found the account credible. The OCS worker who interviewed Ms. J recorded the following:

Ms. J stated that looking back on everything, the warning signs were there and we missed them. When we were in City A, he made a comment about how much K was looking like a woman, he would state that she needs to keep looking like a woman. Another time, my sister bought her a razor, so she could shave her legs. Mr. N commented that she could shave other parts of her body. [Ms. J] stated that she knew this was weird, but she didn't want to cause any friction with her opinions.²¹

Ms. J felt Mr. N "intimidated" the children.²² She noted that K had been withdrawn, hiding behind her hair, but in the ten days after Mr. N left, she had begun to show her face and be more outgoing.²³

¹⁸ A.R. 75, H T interview, minute 7; A.R. 76, Parts 1 and 2.

¹⁹ A.R. 75, H T interview, minutes 7-8.

²⁰ *E.g.*, A.R. 14.

²¹ A.R. 15.

²² *Id.*

²³ *Id.*

Finally, one must turn to K's brother H, who was interviewed at length on videotape. Sgt. N's counsel relied strongly on a contention that H did not believe his sister. This is not a fair characterization of H's interview as a whole. One can cherry-pick statements by H to support an argument that he felt his sister was lying, and it is true that he questioned whether her account was true.²⁴ But two themes emerge from the hour-long interview: (1) that H is deeply upset and (2) he is upset, not because he thinks the allegations are false, but because he thinks they are probably true.

E. Credibility of Sgt. N's Denial

Sgt. N refused to make a statement or to be interviewed (with or without counsel present) in connection with the OCS investigation,²⁵ and he did not testify in this proceeding. However, a denial was taken into evidence through a report from Dr. David Ruskin, a polygraph expert based in Homer, Alaska.²⁶ OCS objected neither to admission of Dr. Ruskin's report nor to live testimony in which Dr. Ruskin reiterated the contents of the report.

Dr. Ruskin conducted the polygraph exam in private. OCS and other law enforcement personnel were not invited to participate in the formulation of the questions nor to observe the exam. The fact that a polygraph was being conducted was revealed only after the fact.²⁷

Dr. Ruskin did not obtain details of the alleged conduct before conducting the exam, limiting his question to four: "[1] Did you ever touch K for a sexual purpose? [2] Did you ever touch K's breast? [3] Did you ever touch K's genitals? [4] Did you ever engage in any sexual act with K?"²⁸ He obtained "no" answers to all four. He generated a very high score for truthfulness, opining with confidence that "exceeds 90%" that Sgt. N "was truthful when he denied having engaged in any sexual act with K T".²⁹

²⁴ E.g., minute 9: "I don't know if it was delirium, just the way she was saying it, that was really hitting me, but, for a while, I, I didn't want to—I didn't believe her, you know."

²⁵ A.R. 16.

²⁶ A.R. 18-19. Beginning about ten years after receiving his Ph.D in 1963, Dr. Ruskin published extensively in the polygraph field. This continued until about 2000. He has remained somewhat active thereafter, though not as prolific with publication. He was a professor of psychology at the University of Utah until 1995, and is currently an emeritus professor of that institution. A.R. 20-63.

²⁷ This places the case in sharp contrast to *In re John Smith*, OAH No. 06-0049-DHS (Comm'r of Health & Soc. Serv. 2007) (<http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS060049.pdf>). In that case, the respondent voluntarily subjected himself to a polygraph conducted by the police department, rather than by someone selected and paid by himself, and the exculpatory report was given some weight in the ultimate determination of whether to substantiate abuse.

²⁸ A.R. 19.

²⁹ *Id.* This opinion matches up to question 4. It does not encompass the other three questions, which are the ones more aligned with the allegations K had made.

Dr. Ruskin made a similar finding of very high confidence in vouching for the truthfulness of denials by another alleged sexual offender in the recent Alaska case of *State v. Griffith*, described in the opinion issued in its companion case, *State v. Alexander*.³⁰ Mr. Griffith subsequently failed a polygraph exam administered by a different examiner, and pleaded guilty to sexual abuse of a minor under 13, a Class B felony.³¹

The Alaska Superior Court, affirmed by the Court of Appeals, has declined to consider polygraph evidence unless the accused also submits to examination by a state expert *and* submits to cross-examination.³² The Commissioner of Health and Social Services, the final decisionmaker in this case, has held—in the context of a polygraph administered by a friendly examiner, as in this case—that polygraph evidence is “inherently unreliable.”³³ I concur with these assessments: in a case where the accused has submitted only to a self-arranged, private polygraph examination on limited questions, and has declined to be cross-examined, I am unable to accord much weight to the opinion of the examiner.

F. DNA Evidence

The lab report Sgt. N submitted regarding DNA testing was of almost no value in confirming or undermining the allegations. The lack of semen on the tested items is consistent with K’s account of the abuse. With respect to testing for other DNA residues, one swab seems to have been taken from the inside front bottom of the shirt K was wearing during alleged incident 6. Had this shown DNA from Sgt. N, it would slightly corroborate K’s account, although there are many ways for DNA from others in the household to get to that location. The absence of Sgt. N’s DNA is not really inconsistent with K’s description—it is not clear that she was saying Sgt. N’s hand went under the bottom of her shirt on that occasion, and the lab does not seem to have tested the outside of the shirt, where she did clearly indicate he had felt. The presence of a very small amount of unidentified male DNA on the inside front bottom of the shirt might be of interest if there were a credible theory that K was having sexual experiences with another male, but none of the circumstances of this case suggest that at all. There was another male in the house who could be the source of this DNA fragment.

³⁰ 364 P.3d 458 (Alaska App. 2015).

³¹ *State v. Griffith*, No. 3SP-11-00103CR (Alaska Superior Court). Dr. Ruskin characterized the case as involving many charges, with Griffith pleading to a “minor one.” Cross-exam of Ruskin. In fact, there were three charges, and his plea was to the most serious.

³² *Alexander*, 364 P.3d at 471.

³³ *In re B.C.J.*, OAH No. 15-0630-SAN (Comm’r of Health & Soc. Serv. 2016) (<http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN150630%20appeal%20pending.pdf>).

G. Effect of Acquittal

As mentioned in the introduction, earlier this year Sgt. N was acquitted in a court martial of charges of committing lewd acts, having sexual contact, and taking indecent liberties with K T.³⁴ That decision was made under a requirement of proof beyond a reasonable doubt, however.³⁵ The acquittal establishes only that the alleged conduct has not been proved beyond a reasonable doubt, and has no effect in a proceeding, such as this one, where the burden of proof is at the lower standard of preponderance of the evidence.³⁶ A finding that the allegations in this case have been established by a preponderance of the evidence is not inconsistent with a not guilty verdict under the criminal standard of proof.

H. Overall Impression

The strong credibility of K's videotaped account and recorded testimony, coupled with the corroborating evidence from family members, greatly outweighs the contrary evidence. I am persuaded that it is more likely true than not true that incidents 1-6, described in Part IV-B above, happened essentially as K alleged, and that additional incidents of improper touching also occurred.

V. Conclusion

OCS established by a preponderance of the evidence that B N committed sexual abuse of K T. The finding to that effect entered on December 2, 2015, in connection with Protective Services Report 0000000, is affirmed.

DATED this 9th day of November, 2017.

By: Signed
Christopher Kennedy
Administrative Law Judge

³⁴ Exhibit B to Sgt. N's prehearing brief. This item was not formally offered or admitted in the present case, but will be considered because it was discussed and treated as though it had been admitted without objection.

³⁵ U.C.M.J. Art. 51.

³⁶ *Avery v. State*, 612 P.2d 872 (Alaska 1980).

Adoption

The undersigned, on behalf of the Commissioner of Health and Social Services and in accordance with AS 44.64.060, adopts this Decision and Order as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Rule 602 of the Alaska Rules of Appellate Procedure within 30 days after the date of this decision.

DATED this 5 day of December, 2017.

By: Signed _____
Name: Erin Shine
Title: Special Assistant, DHSS

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