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

In the Matter of	)	
	)	
T T and	)	
S K	)	OAH No. 16-0594/0686-SAN
	)	Agency No.

DECISION

I. Introduction

The Office of Children's Services (OCS) has alleged that T T and S K neglected their five children during early 2016, through a combination of substandard home conditions and lack of care. The allegations grow out of Protective Services Report (PSR) Number 1. They were substantiated against both parents in letters issued on April 29, 2016.[1] Both parents have appealed.

There are two related cases in the Office of Administrative Hearings (OAH) involving the T/K household. OAH Case No. 16-0594-SAN was the first one filed and related solely to PSR 1, but it listed only Mr. T as a respondent. Case No. 16-0686-SAN was filed against Ms. K but, at least at the outset, was framed as a substantiation of a different PSR (2) regarding a discrete incident in December of 2015. It developed that the agency was pursuing substantiation against both parents on PSR 1, and the cases were consolidated.[2] A joint hearing on both sets of allegations began in Village A on October 5, 2017. By agreement, evidence was taken first on the case growing out of PSR 2, the 2015 incident; that record closed on the first day, and a separate decision has been issued. Evidence connected with PSR 1 was then taken in Village A and in a later telephonic proceeding, held by agreement on November 18, 2017.[3] This is the decision on the allegations growing out of PSR 1. For reasons explained in detail below, the substantiated findings related to that PSR are hereby overturned.

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[1] Consolidated Record (C.R.) 161, 185. The Consolidated Record is the renumbered record filed on September 19, 2016.

[2] There may have been a technical defect in Ms. K's appeal relating to PSR 1, but the agency agreed to waive that defect and let her contest those allegations.

[3] On behalf of himself and Ms. K, Mr. T agreed to scheduling the November 18 proceeding. When the hearing opened on that day, however, he requested a delay because he wanted to chop wood and attend a conference. The continuance was denied.

II. Allegations

In the investigation of PSR 1, both S K and T T were substantiated (1) for medical neglect of their baby M for failure to act on her medical needs, and (2) for general neglect of all five children "because the house is in no condition for small children to be playing and living in."[4] The allegations were substantiated in letters to the two parents dated April 29, 2016.[5]

III. Legal Standard for Neglect

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 Mr. T's and Ms. K's names should appear on the "central registry" of those who have been substantiated as having committed child abuse or neglect, established under AS 47.17.040.[6] The burden of proof in this *de novo* hearing lies with OCS.[7]

The Child Protection provisions of AS 47.17 include references to related "Child in Need of Aid" (CINA) provisions in AS 47.10. However, Chapter 47.17 and Chapter 47.10 have slightly different focuses: AS 47.17 seeks (among other things) to determine whether a person—generally 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 determination of whether S K and T T have neglected their children, not a determination of whether the children are children 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.[8] The statute then further defines terms such as "maltreatment," "neglect," "mental injury," and "sexual exploitation."[9]

The allegations in this case involve neglect.[10] For purposes of substantiation under the Child Protection chapter, "neglect" is statutorily defined as "the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a

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4 C.R. 28.
5 C.R. 161-163, 185-186.
6 Appeal to the Office of Administrative Hearings is provided under 7 AAC 54.255(b)(7).
7 *E.g.*, *In re K.C.G.*, OAH No. 13-1066-SAN (Comm'r of Health & Soc. Serv. 2013) (published at http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN131066.pdf).
8 AS 47.17.290(3).
9 *See* AS 47.17.290(9), (10), (11), (17).
10 C.R. 1, 7.

child."[11] Under this definition, therefore, the first question in this case is whether the parents failed to provide necessary food, care, clothing, shelter, or medical attention for the children. If they did, they neglected the children. This is not the end of the inquiry, however. To uphold a substantiated finding of neglect, it is also necessary to find that the child's health or welfare was "harmed or threatened" by the parents' conduct.[12]

IV. Evidence Taken

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.[13]

With respect to the case growing out of PSR 1, testimony was taken from Ms. K, Mr. T, and William Rogers, an OCS Protective Services Specialist who has visited their home in Village A. OCS also presented testimony from Dianna St. Vincent, a supervisor in the agency who had gathered some information about the medical history of the parents' youngest child, M. For their part, the parents offered testimony regarding Mr. T's good character from F G, who lived in Village A until 2013 and has met some of their children in the past.

The entire agency record (a replacement record filed on September 19, 2016, and consisting of pages 1-213) was admitted over objection.[14] The respondents' single exhibit, marked as "A," was admitted without objection.

V. Findings

A. Condition of the Home – All Children

At the hearing, OCS presented evidence to support the substantiation based on the condition of the home through only one theory: that physical conditions within the home posed a fire hazard.

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[11] AS 47.17.290(11). Of course, the person must have had the basic means and opportunity to do so; matters beyond the caregiver's control do not constitute neglect. *See, e.g.*, *In re K.S.*, OAH No. 14-1681-SAN (Comm'r of Health & Soc. Serv. 2015), at 9 (http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN141681.pdf).

[12] *See* AS 47.17.290(3). Despite this simple structure, OCS typically makes its neglect substantiation decisions in the first instance under the rubric of "child maltreatment," which requires importing concepts from a different chapter. Although this decision uses the definition for the alleged conduct—neglect—that is written right into the statute being applied, the result would not be different using OCS's more circuitous approach.

[13] 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.

[14] Mr. T objected on two grounds: that the record contains multiple copies of the same document, and that he believes it contains factual discrepancies. Because the presence of duplicate copies does not interfere with evaluating the merits of the dispute, and because he had the opportunity to point out any discrepancies and argue that parts of the record should be disbelieved, neither objection was a basis to exclude the documents entirely.

OCS Protective Services Specialist William Rogers visited the T/K home on April 19, 2016. He found the house to be cluttered with a number of distinct piles of clothes. There were paths to walk through the piles.[15] Although there is no independent confirmation of this, Mr. T has explained that the piles were old clothes that were to be used as fuel in the stove.

Mr. Williams is a former firefighter.[16] He testified at the hearing that the clothes represented a fire hazard, because they were close to a wood stove. However, he made no reference to fire hazard in his detailed, contemporaneous ORCA note from the visit.[17] Instead, he entered "No safety threats observed" and "No present danger."[18] He does not recall explaining, or even mentioning, the hazard to the parents,[19] and there is no evidence in this case that he did so.

Mr. Rogers visited the house again two weeks later. He found that the floors were cleared and the improvement was like "night and day."[20]

In summary, the evidence offered in this case showed that there may have been a fire hazard on April 19, 2016, but it must not have been a serious one because the OCS worker who observed it—a trained firefighter—wrote "No present danger" in his notes and apparently did not even point it out to the parents. The hazard, if there was one, was transient. The parents spontaneously corrected it by the time of the next visit.

It is extraordinary that OCS would ask me to substantiate for child neglect on this record. I cannot do so. OCS has not proved that there was a hazard, has not proved that the parents failed to care for the children by responding to it, and has not proved that it represented a significant threat to the health or welfare of the children.

B. Medical Neglect – M

The allegation of medical neglect regarding M presents a more troubling picture, but an incomplete one. This allegation grew out of the discovery in March of 2016 that M, then nine months old, was suffering from failure to thrive.

M was born in 00/00/2015 at 30 weeks' gestation, weighing about two and a half pounds.[21] She had lung problems associated with prematurity as well as multiple hemangiomas, a

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15 C.R. 201-202; Rogers testimony.

16 Rogers testimony.

17 C.R. 201-202. ORCA stands for "Online Resource for the Children of Alaska," and is the database that OCS workers use to memorialize their activities, observations, and contacts during an investigation.

18 C.R. 202.

19 Rogers testimony.

20 *Id.*

21 C.R. 53.

type of benign tumor.[22] She was also noted to have microcephaly, which could impede her development.[23] After her discharge from neonatal intensive care in September of 2015, she required follow-up outpatient care for the tumors (treated with propranolol), for potential eye problems, for small size, and for delayed physical and mental development.

There is no dispute that in the late winter of 2015-16 the family ran out of the propranolol and ran out of the special, fortified formula that M needed to help her grow. Neither of these items is available in Village A. OCS believes the family was insufficiently proactive in getting more propranolol and special formula expedited from Anchorage. It also believes the family missed or canceled an inordinate number of medical appointments for M.

To prove these allegations, the agency offered testimony of two OCS workers who had heard expressions of concern from others. The concerns came from medical providers in No Name Health Corporation. To document the concerns, OCS offered the No Name Health Corporation medical file, found at pages 102 to 149 of the agency record. The OCS witnesses were not familiar with the file, and it was not explained or presented in detail at the hearing. Regrettably, when the ALJ tried to examine the file in the level of detail needed to write a decision, he discovered that every other page was missing. The sequence of events in the child's care was impossible to follow. In particular, one cannot follow in any coherent way the history, if any, of missed appointments and reminders, nor the history of efforts to obtain prescribed medications or formula.

The standard for consideration of evidence in an administrative proceeding of this kind is that it be "evidence of the type on which a reasonable person might rely in the conduct of serious affairs."[24] While the No Name Health Corporation medical file was taken into evidence at the hearing as part of a bulk offer of the entire agency record, a medical file that is missing every other page is not the kind of evidence on which a reasonable person might rely in the conduct of serious affairs. Accordingly, this portion of the agency record will not be considered.

Without the No Name Health Corporation medical file, the record in support of this allegation is very thin. There are good records from No Name Medical Center from a course of treatment in late May of 2016, but these do not suggest any ongoing deficiencies in care at that time. Propranolol was apparently being given at the time, but was temporarily discontinued by

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22 *Id.*
23 C.R. 58.
24 2 AAC 64.290(a)(1).

the No Name Medical Center physicians.[25] No concerns were recorded about M receiving the wrong kind of nourishment or missing appointments.

There was credible testimony from the OCS workers that they had received expressions of concern from No Name Health Corporation that the parents had missed too many appointments and had not obtained timely refills of the fortified formula and propranolol. The specifics, however, were absent. Regarding the appointments, no particular appointments were identified, nor what they were for, nor whether they were rescheduled, nor whether circumstances such as bad flying weather may have contributed to difficulty reaching City B to keep them. Regarding the propranolol and formula, there are no specifics regarding how supplies are refilled, nor any information from the pharmacy about when the parents requested refills and when these orders were dispatched. Mr. Rogers testified that he had told Mr. T, in explaining his decision to substantiate, that he had "three doctors, professionals, that would testify in court" regarding M, but no such testimony was offered at the hearing.[26]

I am left with vague second- and third-hand reports that leave a troubling impression but that do not prove anything. A complete documentary record might be sufficient to prove a neglect allegation like this in some circumstances, but even that is absent in this case. The allegation of medical neglect of M is unproven.[27]

VI. Conclusion

OCS did not establish by a preponderance of the evidence that S K or T T committed child neglect with respect to any of their children in connection with the allegations arising from Protective Services Report 1. The findings to that effect entered on April 29, 2016, are overturned.

DATED: March 20, 2017.

By: *Signed*
Christopher Kennedy
Administrative Law Judge

[25] C.R. 56. It was discontinued permanently later in the summer. Ex. A; T testimony.

[26] Rogers testimony on cross-examination by Mr. T.

[27] Under no circumstances should the outcome regarding this allegation be read as a criticism of the Assistant Attorney General and OCS workers who participated in the hearing. The reasons for their inability to present a complete case are beyond the scope of this decision, but I am satisfied that any failure that occurred was institutional, not individual.

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 21st day of April, 2017.

By: *Signed*
Name: Douglas Jones
Title: Medicaid Program Integrity Manager

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