

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

In the Matter of:)	
)	
K D)	OAH No. 16-0753-SAN
_____)	Agency No.

DECISION

I. Introduction

The Office of Children’s Services (OCS) placed K D on the Child Protection Registry based on substantiated findings that Mr. D had committed acts of abuse against his stepson in April 2016. Mr. D requested a hearing to challenge those findings and his placement on the Child Protection Registry. The hearing was held at the Office of Administrative Hearings (OAH) on December 6, 2016.

OCS’s substantiations consisted of the following two findings:

- one finding of maltreatment in the form of physical abuse of his stepson O;
- one finding of maltreatment in the form of causing “substantial risk of mental injury” to O, based on Mr. D having engaged in domestic violence against his wife in the presence of the child O.¹

OCS did not meet its burden of establishing, by a preponderance of the evidence, that Mr. D committed the acts on which the substantiated findings of maltreatment were based. Therefore, Mr. D’s placement on the Child Protection Registry is reversed.

II. Facts

Mr. D represented himself and testified on his own behalf at the hearing. OCS was represented by Assistant Attorney General Laura Bowen, and presented testimony from OCS Protective Services Specialist II (“PSSII”) B H. No other witnesses testified at the hearing.

Mr. D is an active duty soldier in the U.S. Army, and during the time of the incident at issue here, he, his then-12-year old stepson O, and Ms. D resided on Base X.² On April 4, 2016 OCS received a report alleging that Mr. D had physically abused O and had put him at risk of mental injury by exposing him to domestic violence he perpetrated against Ms. D.

¹ Mr. D and his wife T D divorced while this case was pending; to avoid confusion, she is referred to as Ms. D in this decision.

² AR 16.

A. OCS's Evidence

PSSII H investigated the report for OCS. According to an OCS Protective Services Report, the anonymous reporter stated that Mr. D was wrestling with O and started pulling on his hair and would not let go, even after O protested; that Mr. D did not release O's hair until Ms. D threatened to call the police; and that some of O's hair came out when Mr. D let go of him.³ The incident apparently had taken place a day or two before the report to OCS.⁴ The reporter also alleged that Mr. D had engaged in domestic violence against Ms. D, stating in the allegation that he "has taken [Ms. D] down to the floor with his hands around her neck."⁵

On April 6, 2016, Ms. H first spoke with Base X investigator K C, who had already interviewed O and Ms. D. Mr. C told her that he and O spoke about the hair-pulling incident, and that O was shy and "closed down."⁶ When OCS's counsel asked Ms. H to describe the details Mr. C provided to her about the incident, she replied "that's a question for C." Mr. C, however, did not testify at the hearing. When pressed, Ms. H said that Mr. C "was vague" about whether O had provided detailed confirmation of the hair-pulling incident.⁷ Ms. H's written record regarding the conversation with Mr. C indicates that he said that "O corresponded with what the mother disclosed," and that O "did not make any other disclosures regarding DV or anything else in the house."⁸ Mr. C said that he had examined O and that "no injuries, bruises or missing hair were observed."⁹ Ms. H's written record also indicates that Mr. C said Ms. D "fully disclosed" the domestic violence that had occurred between her and Mr. D.¹⁰ Ms. H testified, however, that Mr. C did not provide any specifics regarding any such incidents.¹¹

On April 11, 2016 Ms. H interviewed O. He told her that although Mr. D is sometimes nice, he can be mean and aggressive towards O's mother; Ms. H testified that at this point O got emotional and told Ms. H that "I wish I could protect my mom from him."¹² O said he had witnessed Mr. and Ms. D yelling and swearing at each other and Mr. D pushing his mom.¹³ He said

³ Administrative Record ("AR") 5, 7.

⁴ H testimony.

⁵ AR 5.

⁶ AR 12.

⁷ H testimony.

⁸ AR 12.

⁹ AR 12; H testimony.

¹⁰ AR 12.

¹¹ H testimony.

¹² AR 12; H testimony.

¹³ *Id.*

that he and Mr. D often wrestled and rough-housed, and when they engaged in such activities either of them could “tap out” when they’d had enough. O told Ms. H, however, that on the night of the hair-pulling incident, they were wrestling when Mr. D started pulling his hair and wouldn’t let go, despite O’s attempts to “tap out.” According to O, Mr. D finally let go when Ms. D yelled at him and “finally she called the police.”¹⁴ When Ms. H met with O, she did not see any evidence of injuries to O or hair loss.¹⁵ Ms. H testified that she believed that Ms. D called the Anchorage Police Department (“APD”) that day, but on review of the file she was unable to find any record to support that recollection.¹⁶

Ms. H interviewed Ms. D at her residence on April 11, 2016. Ms. D described the hair-pulling incident similarly to O’s description, except that she said that afterward, she got on a bicycle and rode around Base X crying; she asked someone for help but didn’t want to reveal her identity because that would get Mr. D in trouble; eventually she identified herself when the Family Advocacy Program became involved.¹⁷ Regarding domestic violence in general, Ms. D told Ms. H that there was a history of physical violence between her and Mr. D and that she felt threatened by him and afraid of him. Ms. H did not recall Ms. D providing any specifics regarding prior incidents of domestic violence, and she testified that because Ms. D was very emotional, she did not press her for details. Ms. H did recall, however, that Ms. D commented regarding “verbal and emotional abuse” and “pushing” incidents between her and Mr. D, and she also told Ms. H that she and O would hide in her room because she was afraid of Mr. D.¹⁸ Ms. D also told Ms. H about her history of being a domestic violence victim in prior abusive relationships.¹⁹

Ms. D had previously been interviewed by Mr. C and a Family Advocacy Program case manager, A N. At some point in April, Ms. H spoke with Ms. N about the Ds’ situation. Ms. N described Ms. D as a domestic violence victim. Ms. N also related what Ms. D had told her in describing the hair-pulling incident with O, and acts of domestic violence perpetrated by Mr. D against Ms. D.²⁰ Ms. H, however, did not testify as to any specific information that may have been provided by Ms. N regarding acts of domestic violence against Ms. D.

¹⁴ H testimony; AR 8.

¹⁵ H testimony.

¹⁶ *Id.*

¹⁷ H testimony.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Ms. H testified that she substantiated the two findings at issue in this hearing based upon all of the interviews she conducted. In response to questions regarding how she evaluates the credibility of persons that she interviews, she stated that “we consider anyone involved in the case ... to be credible witnesses.”²¹ On further inquiry, she said that she found Ms. D to be credible based in part on the emotions she displayed while discussing her relationship with Mr. D, as well as on Ms. D’s personal history of being a domestic violence victim: “The fact that she’d been in prior abusive relationships bolstered the credibility of her story of being victimized in this relationship.”²² Ms. H later clarified this comment by testifying that she wasn’t holding Ms. D’s prior domestic violence experiences against Mr. D, and that she only meant that domestic violence victims tend to become involved in abusive relationships “over and over.”²³

B. Mr. D’s Evidence

Mr. D’s testimony on his own behalf contrasted markedly with Ms. H’s testimony. Mr. D noted that he only recently turned 21 years of age and that he is closer in age to O than to Ms. D, who is about 10 years older than Mr. D. He testified that in March 2016, while he was away at training in Louisiana, he came to the realization that he and Ms. D should get divorced.²⁴ Upon his return from training during the last week of March, he informed Ms. D of that, and started moving his belongings out of the house. Shortly thereafter, on the day in question, April 4, 2016, he learned that Ms. D had withdrawn \$15,000 from his bank account; he called her and told her he planned to file papers with the court “to get my money back.”²⁵ Before he could do that, however, Ms. D filed what Mr. D characterized as “these false accusations” against him with the Family Advocacy Program at Base X. Mr. D testified that he believed that Ms. D took the steps of making up the story, and coaching O about it, in order to obtain an advantage in the impending divorce.²⁶ Mr. D also testified regarding Ms. D’s own personal history of violence, stating that she had been jailed for assault in the lower-48 during her previous marriage, a fact that Ms. D apparently did not disclose to Ms. H or the Base X Family Advocate Program staff.²⁷

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ K D testimony.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See AR 22 (OCS form indicating that Ms. D answered “no” to the inquiry whether she had been “arrested as a juvenile or adult”).

Mr. D testified that he never pulled O’s hair while wrestling or at any other time. He stated emphatically that the hair-pulling incident simply “never happened.”²⁸ He also testified that although he and Ms. D at times yelled or swore at each other, and they may have engaged in some mutual pushing and shoving, he never hit her or committed other violent acts against her. Mr. D noted that the police were never called at the time of the alleged hair-pulling incident, or at any other time during their marriage. (He acknowledged that there was one exception to this later, when Ms. D had a protective order against him and he went to the home to try to retrieve some of his belongings with another soldier as an escort; Ms. D called APD to have him removed from the home.)²⁹

Mr. D concluded his testimony by pointing out that the Base X investigation of Ms. D’s allegations against him was concluded favorably to him; no negative findings were entered against him by Base X authorities.³⁰

III. Discussion

OCS maintains a central registry of all investigation reports.³¹ 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.³² At the conclusion of an investigation, OCS may find that an allegation of abuse or neglect has been substantiated.

Alaska Statute 47.17.290(3) defines “child abuse or neglect” as “the physical injury or neglect, mental injury, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person under circumstances that indicate the child’s health or welfare is harmed or threatened thereby.”³³ The statutory definition of “maltreatment” guides us to Alaska’s “child in need of aid” provisions: “Maltreatment means an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011.”³⁴ A “child in need of aid,” under AS 47.10.011, means a child who has been “subjected to ... conduct by or conditions created by the parent [that] have (A) resulted in mental injury to the child; or (B) placed the child at substantial risk of mental injury as a result of ... (ii)

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ AS 47.17.040.

³² AS 47.17.040(b).

³³ AS 47.17.290(2).

³⁴ AS 47.17.290(9).

exposure to conduct by a household member [that constitutes certain enumerated criminal offenses].”³⁵ The enumerated offenses include acts of domestic violence.

OCS’s burden in this case is to prove, by a preponderance of the evidence, that Mr. D committed the acts of abuse involving his stepson that are the basis for OCS’s two substantiated findings. To prove a given fact by a “preponderance of the evidence,” OCS “must show that the fact *more likely than not* is true.”³⁶

A. Substantiated Finding for Physical Abuse

OCS made a substantiated finding of physical abuse based on the hair-pulling incident that was alleged to have taken place between Mr. D and O in early April 2016.

The evidence presented by OCS in support of this substantiated finding primarily consisted of Ms. H’s testimony relating what she was told by O and Ms. D about the incident. OCS also relies to some extent on the initial report and Mr. C’s statements. All of this evidence is hearsay evidence, which is admissible in this proceeding,³⁷ as long as it is “evidence of the type on which a reasonable person might rely in the conduct of serious affairs.”³⁸ Although admissible, however, hearsay evidence is accorded less weight than sworn testimony that has been subject to cross-examination. The initial report and Mr. C’s comments relating what he was told by O and Ms. D are hearsay-within-hearsay, and are accorded very little weight.

In this case, there are inconsistencies in OCS’s hearsay evidence regarding the hair-pulling incident allegation that are problematic. Although the initial reporter informed OCS that Mr. D had pulled out some of O’s hair, both Ms. H and investigator C observed that O displayed no sign of injuries or loss of hair.³⁹ In addition, according to Ms. H, O told her that it was when his mother called the police that Mr. D finally let go of his hair. Yet there is no evidence in the record that the police were ever actually called; and Ms. D told Ms. H that after the incident she rode around on a bicycle, crying, and was unwilling to disclose her identity to a person trying to help her for fear of getting Mr. D in trouble.⁴⁰ Ms. D’s description of the aftermath of the incident cannot be squared with O’s statement that she called the police.

³⁵ AS 47.10.011(8)(A), (B)(ii).

³⁶ 2 AAC 64.290(e) (emphasis added).

³⁷ 2 AAC 64.290(b).

³⁸ 2 AAC 64.290(a)(1).

³⁹ H testimony; AR 12.

⁴⁰ H testimony.

Because O and Ms. D did not appear to testify, Mr. D was unable to cross-examine them about these inconsistencies.⁴¹ As a general matter, this sort of problem is a primary reason why hearsay evidence is often given less weight than sworn testimony. In this case, the hearsay statements are accorded less weight because their inconsistencies could not be explored, and because neither the administrative law judge nor Mr. D were able to observe O or Ms. D's demeanor while making their statements.

Balanced against OCS's hearsay evidence was Mr. D's own testimony regarding the hair-pulling allegation. As a general matter, Mr. D testified calmly and rationally, and his testimony was not glib or overly verbose. Regarding the specific incident, his testimony was concise – the incident simply never happened. And his testimony was coherent and consistent, to the effect that Ms. D made up the story, and coached O about it, to obtain an advantage in her pending divorce.

Most importantly, OCS did not come forward with any evidence to show that Mr. D was not a credible witness. I find that Mr. D testified credibly in denying that the hair-pulling incident took place. Here, with no first-hand evidence that his version of events was untrue, with clear indications that at least some of OCS's version of the facts was inaccurate, and weighing the hearsay descriptions by O and Ms. D against Mr. D's credible testimony that the hair pulling simply never happened, I find that OCS did not meet its burden of proving by a preponderance of the evidence that Mr. D engaged in physical abuse of O.

B. Substantiated Finding for Risk of Mental Injury

OCS also made a substantiated finding that Mr. D caused “substantial risk of mental injury” to O, as a result of having exposed O to domestic violence with Ms. D.⁴² OCS's “closing letter” to Mr. D cited AS 47.10.011(8), which describes “substantial risk of mental injury” as “exposure to conduct by a household member ... against another household member that is a crime under AS 11.41.100-11.41.220, 11.41.230(a)(1) or (2), or 11.41.410-11.41.432”⁴³ The enumerated crimes in AS 11.41 are all crimes of violence ranging from murder and manslaughter to assault. Thus, to uphold this substantiated finding, OCS must prove that Mr. D caused O to experience

⁴¹ In addition, Mr. D was unable to cross-examine Ms. D about any of the other details of the hair-pulling allegation, such as whether she informed OCS that some of O's hair was pulled out, or whether she concocted the story in order to gain an advantage in the divorce.

⁴² AR 1.

⁴³ AS 47.10.011(8)(B)(ii).

“exposure to conduct by a household member ... against another household member” that constituted domestic violence.⁴⁴

The evidence presented by OCS in support of this substantiated finding again consisted only of Ms. H’s testimony, in which she related what she was told by O, Ms. D, and Ms. N. But Ms. H testified that O only told her about incidents of yelling and swearing, and Mr. D pushing Ms. D.⁴⁵ Ms. H testified that Ms. D told her generally of there being a history of physical violence between her and Mr. D, and that she was afraid of Mr. D, but she did not provide details to Ms. H, particularly regarding incidents that Mr. D perpetrated *in the presence of O*. And Ms. N’s comments to Ms. H, relating what she had been told by Ms. D, constitute *double hearsay* that carry almost no weight in this proceeding.⁴⁶

Balanced against this unspecific, hearsay evidence is Mr. D’s credible testimony that he never struck Ms. D and that at worst, there was mutual pushing and shoving between them. Mr. D also testified about Ms. D’s arrest for assault in the lower-48, a fact that she apparently did not disclose when she sought help from the Base X Family Advocate Program. The fact that OCS’s evidence was comprised only of hearsay means that Mr. D was unable to cross-examine Ms. D about her domestic violence allegations against him, about her own apparent history of violence, or, most importantly, about incidents that she may have alleged had taken place in the presence of O.

There is a dearth of credible, reliable evidence from OCS regarding incidents where Mr. D may have caused O to be exposed to acts of domestic violence. Weighing the facts of this case, I find that OCS did not meet its burden of proving by a preponderance of the evidence that Mr. D caused risk of mental injury to O.

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⁴⁴ *Id.*

⁴⁵ H testimony.

⁴⁶ The first level of hearsay is Ms. D’s out-of-court statement to Ms. N, and the second level is Ms. N’s out-of-court statement to Ms. H. Also carrying very little weight are Ms. D’s hearsay statements about her own history of being a victim of domestic violence; while such statements might be useful to corroborate testimony based on personal knowledge regarding specific incidents of violence, they have little probative value in the context of the overly general hearsay evidence presented in this case.

IV. Conclusion

OCS’s substantiated findings that Mr. D committed abuse of O and caused substantial risk of mental injury to O are reversed.

DATED this 11th day of January, 2017.

Signed _____
Andrew M. Lebo
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 17th day of February, 2017.

By: *Signed* _____
Douglas Jones, Manager
DHSS Medicaid Program Integrity

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