

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

In the Matter of)	
)	Consolidated Case
S J)	OAH No. 16-0768-SAN
<hr/>)	Agency No.
In the Matter of)	
)	
B B)	OAH No. 16-0767-SAN
<hr/>)	Agency No.

DECISION

I. Introduction

This is a consolidated case involving appeals by S J and B B of substantiated findings of abuse and neglect entered against them by the Office of Children’s Services. Certain of the findings have been overturned by OCS, and others have been affirmed in a May 24, 2017 order granting OCS’s motion for summary adjudication, leaving Mr. J’s appeal of a single substantiated finding of physical abuse to be decided at a hearing. The hearing was held on July 26, 2017. Based on the testimony and other evidence presented at the hearing, the substantiated finding of physical abuse against Mr. J is affirmed.

II. Facts and Procedural Background

A. The substantiated findings encompassed by this case

Ms. B’s and Mr. J’s appeals concern events described in two protective services reports (PSRs) processed by OCS on July 8, 2015,¹ and February 1, 2016.² In the PSRs, it was alleged that they had each committed neglect of their children and exposed the children to domestic violence, and that Mr. J had committed an act of physical abuse of against Ms. B’s son Z L. Z was nine years old at the time of the second PSR and was living with Ms. B and Mr. J. Ms. B and Mr. J also have a daughter together, Y, who was an infant approximately one year old at the time of the second PSR.

OCS substantiated findings against Mr. J and Ms. B in connection with the July 8, 2015 PSR, for putting Y and Z at risk of mental injury by exposing them to domestic violence, as defined by AS 47.10.011(8). OCS substantiated similar findings against Mr. J and Ms. B arising from the

¹ The July 8, 2015 PSR is located at Administrative Record (AR) 0000023-24 and concerns an incident alleged to have taken place on July 7, 2015. It is noted that there are slight differences between the record citations in OCS’s filings and those listed in this Decision, probably due to the fact that OCS produced two separate records for Mr. J’s and Ms. Bs’ appeals. Unless otherwise indicated, this order cites to pages in Mr. J’s record.

² The Feb. 1, 2016 PSR is located at AR 0000007-8; it concerns an alleged incident on January 31, 2016.

February 1, 2016 PSR, under the same statutory authority, for putting Y at risk of suffering mental injury by exposing her to domestic violence. OCS substantiated one finding of physical abuse against Mr. J arising from that PSR, as defined by AS 47.10.011(6). It is that finding that is at issue here – it alleges that Mr. J physically abused Z by physically assaulting him. OCS also entered substantiating findings of neglect against Ms. B and Mr. J arising from the same PSR.

The neglect findings were overturned by OCS via letters sent to Ms. B and Mr. J in March 2016.³ Subsequently, prior to the scheduled hearing date of April 4, 2017, OCS filed a motion for summary adjudication. The motion was based on an order entered by Superior Court Judge Huguelet after a “contested adjudication trial” in a child in need of aid (CINA) proceeding against Ms. B and Mr. J.

With Ms. B’s and Mr. J’s consent, oral argument on the motion was held on April 4, 2017 in lieu of the hearing. On May 24, 2017, an order was issued partially granting OCS’s motion for summary adjudication, affirming one substantiated finding each against Ms. B and Mr. J for putting Y at risk of mental injury as alleged in the July 8, 2015 PSR.⁴ OCS subsequently overturned the remaining findings against both Ms. B and Mr. J, other than the physical abuse finding against Mr. J arising from the February 1, 2016 PSR, leaving that single issue to be decided after a hearing.⁵ The other findings, either overturned or affirmed via summary adjudication, are not further discussed in this Decision.

B. Facts

The only allegation remaining to be decided here, as described in the February 1, 2016 PSR, is that on or about January 31, 2016, Mr. J was accused of committing an act of maltreatment in the form of physical abuse of Z, as defined by AS 47.10.011(6). OCS opted to exclude this allegation from its motion for summary adjudication, and chose instead to have Mr. J’s appeal on the allegation be decided after an evidentiary hearing.⁶

The February 1, 2016 PSR states that a No Name Police Department officer reported to OCS that on January 31, 2016, after an argument and altercation between Mr. J and Ms. B, the following incident occurred:

³ See Exhibit A to OCS’s motion for summary adjudication.

⁴ The order on the motion for summary adjudication is attached and incorporated herein by reference.

⁵ See August 2, 2017 Notices of Filing OCS’ “Partial Overturn Letter” and attached July 25, 2017 OCS letters to Mr. J and Ms. B.

⁶ During status conferences early in this proceeding, Mr. J and Ms. B discussed and agreed to this manner of handling their appeals with OCS’s counsel and the administrative law judge.

Mr. J went into the living room to play a video game. The 9 year old, Z, comes into the living [room] and stands in front of [Mr. J] with his arms out obstructing the screen. He then unplugs the TV. [Mr. J] grabs him by the neck and slams him to the ground, takes off his belt, and hits him. This is all video recorded by [Ms. B]. [Mr. J] did not deny it and felt it was discipline. He did not see it as over the top.[⁷]

Judge Huguelet made findings in his CINA adjudication order concerning these factual allegations in the February 1, 2016 PSR. The order states that Mr. J perpetrated a physical assault against Z, that Ms. B took video of the assault, and the video was admitted into evidence at the CINA adjudication trial.⁸

A copy of Ms. B's video recording of the January 31, 2016 incident was submitted by OCS as part of the record in this matter, and the undersigned administrative law judge (ALJ) has viewed it several times.⁹ The video copy contains only about seven to eight seconds of actual footage. During the July 26, 2017 hearing, the ALJ watched the video during Mr. J's testimony about the incident, and it was extensively discussed. The video shows the interior of Ms. B and Mr. J's home; Z walks through a doorway and past Mr. J; Mr. J grabs him by the shirt in the area of his neck, yanks him off his feet and throws him to the floor. The edited video does not show the preceding portion of the incident, when Z apparently interfered with Mr. J's video game activity, nor does it show Mr. J taking off his belt or striking Z with it.

As a result of the January 31, 2016 incident, Mr. J was criminally charged with two counts of assault in the 4th degree; the first count was under AS 11.41.230(a)(1) ("recklessly causes physical injury to another person"), and the second count was under AS 11.41.230(a)(3) (" by words or other conduct ... recklessly places another person in fear of imminent physical injury").¹⁰ After a jury trial on or about June 00, 2016, Mr. J was acquitted of the first count but was convicted of the second count, under AS 11.41.230(a)(3), of recklessly placing Z in fear of imminent physical injury.¹¹

According to the police reports submitted by OCS, Mr. J apparently stated to investigating officers that he felt that his actions during the January 31, 2016 incident were within the bounds of acceptable parental discipline of Z. During the July 26, 2017 hearing, however, Mr. J testified that his act of grabbing Z and throwing him to the floor "really wasn't discipline," it was "more of a

⁷ AR 0000008. Police reports regarding the incident are in the record at AR 000205-000209.

⁸ CINA adjudication order, pp. 2-3.

⁹ The video submitted by OCS had apparently been edited, an issue that is further discussed below.

¹⁰ AR 000049-000050.

¹¹ AR 000053-000054.

rage.”¹² He admitted being angry during the incident and that his actions were in part a result of being angry.¹³

III. Discussion

A. The relevant statutes and regulations

The Alaska legislature has enacted several statutory schemes designed to protect children from abuse, maltreatment, and neglect.¹⁴ These laws give OCS a range of possible responses and remedies, depending on the level and immediacy of harm faced by the children. If the level of abuse, maltreatment, or neglect is cause for concern, but does not immediately threaten the health and safety of the child, OCS can investigate, make a finding that the report of abuse, maltreatment, or neglect has been substantiated,¹⁵ and place the child’s parent or caretaker on OCS’s “central registry,” which essentially amounts to a confidential “watch list.”¹⁶ Alternatively, if the level of abuse, maltreatment, or neglect is more serious, and the child is in need of immediate assistance, OCS can initiate CINA proceedings in Superior Court.¹⁷ OCS may also pursue each of these remedies simultaneously, as it did in the case of Ms. B and Mr. J.

OCS may issue a substantiated finding of abuse or neglect based upon probable cause.¹⁸ If a person appeals a substantiated finding, OCS has the burden of proving at an administrative hearing, by a preponderance of the evidence, that the alleged acts of abuse or neglect actually occurred.¹⁹

There are several statutes that are applicable to OCS’s substantiated findings in this case. They include AS 47.17.290(3), where “child abuse or neglect” is defined 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.”²⁰ The statutory definition of “maltreatment” guides us to Alaska’s CINA statutes: “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.”²¹ Within the CINA statutes, a “child in need of aid” under AS 47.10.011 means a child who has “suffered substantial physical harm, or there is a substantial risk that the child will

¹² J testimony.

¹³ *Id.*

¹⁴ See AS 47.10.005 - AS 47.10.990 (CINA statutes); AS 47.17.010 - AS 47.17.290 (child protection statutes).

¹⁵ This is typically referred to as a “substantiated finding of abuse or neglect.”

¹⁶ See AS 47.17.010 - AS 47.17.290; 7 AAC 54.010 - 7 AAC 54.900.

¹⁷ See AS 47.10.005 - AS 47.10.142.

¹⁸ *In re X.Y.*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011).

¹⁹ *In Re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health & Social Services, 2013).

²⁰ AS 47.17.290(2).

²¹ AS 47.17.290(9).

suffer substantial physical harm, as a result of conduct by ... the child's parent ... or custodian...
.”²² The CINA statutes then provide that “physical harm to a child or substantial risk of physical harm to a child” may be found if:

(1) the child was the victim of an act described in AS 11.41.100 - 11.41.250 ... and the physical harm occurred as a result of conduct by ... a parent ... or custodian; or (2) a negligent act ... by a parent ... or custodian creates a substantial risk of injury to the child.^[23]

Thus, the question to be decided here is whether OCS established that Mr. J committed physical abuse of Z as defined in the above-quoted statutes.

B. OCS met its burden of establishing that Mr. J engaged in physical abuse

Mr. J was found by a jury to have recklessly placed Z in fear of imminent physical injury and was convicted of assault in the 4th degree. The statute under which he was convicted, AS 11.41.230(a)(3), falls within the range of applicable criminal statutes in the definition of “physical harm” in AS 47.10.015, as set forth above. In addition, Judge Huguelet’s CINA adjudication order made factual findings to the effect that Mr. J’s actions on January 31, 2016 constituted an assault on Z.

Most importantly, the ALJ has been able to view the video recording of the incident, which speaks for itself. It clearly shows Mr. J committing a physical assault on Z, who was nine years old at the time of the incident. And Mr. J candidly admitted at the hearing that this wasn’t an attempt to impose parental discipline on Z, but really was “more of a rage.”²⁴

Based on OCS’s presentation of evidence establishing Mr. J’s conviction for Assault in the 4th degree, the related police reports, Judge Huguelet’s findings regarding the same incident, and above all the video of the incident, OCS met its burden of establishing that Mr. J committed physical abuse of Z during the January 31, 2016 incident.

C. Mr. J’s objections regarding the video of the assault

Throughout the numerous status conferences held in this proceeding, Mr. J repeatedly informed the ALJ that the video submitted for the record by OCS had been edited and that he would provide the full, unedited video for the hearing. Mr. J, however, never provided another version of

²² AS 47.10.011(6).

²³ AS 47.10.015.

²⁴ It seems likely that the only reason Mr. J was not convicted of the first count of assault in the 4th degree was that Z was not significantly injured by Mr. J in the incident; AS 11.41.230(a)(1) requires a showing that the defendant “recklessly cause[d] physical injury to another person.”

the video for the ALJ's review.²⁵ When questioned at the hearing as to how he believed the video had been edited, he stated that it had been shortened by deleting the portion preceding the assault, which would have showed Z allegedly antagonizing him by interfering in his video gaming and unplugging the TV. He also testified that the video submitted by OCS was more "zoomed in."

Neither of Mr. J's assertions regarding the video submitted by OCS carry any weight in this Decision. First, as to his argument that the preceding portion of the video had been omitted, Mr. J never was able to articulate how inclusion of that portion might have impacted the ALJ's understanding or interpretation of what is depicted on the video. He appeared to argue that if a reasonable person saw how he was allegedly provoked by Z's interruption of his video gaming, his action in assaulting the boy would be viewed as justified and thus not physical abuse. This argument, however, reflects a fundamental misunderstanding of what it means to commit maltreatment of a child. Regardless of how disrespectful or annoying Z's behavior may have been, Mr. J committed maltreatment in the form of physical abuse when he responded in a "rage," grabbed the boy near his neck, and threw him to the floor.²⁶

Second, whether or not the video provided by OCS was edited to make it more "zoomed in," there is nothing unclear or ambiguous about the events depicted in the video that a more "zoomed back" viewpoint might clarify. The video unequivocally shows a physical assault by a grown man on a nine-year-old boy, and that depiction would not be changed if the footage were more zoomed back and showed more of the physical setting where the incident took place.

In addition, at the conclusion of his testimony, in the final few minutes of the hearing, Mr. J objected that the video should not have been admitted as evidence in the first place, because the alleged alteration or editing by OCS made it misleading. The ALJ explained to him that the appropriate time to object to admission of a piece of evidence is before the evidence is admitted, viewed by the ALJ, and discussed and evaluated on the record. It was noted that the case had been pending for over a year, that he had been on notice from the beginning that OCS intended to seek admission of the video, and that Mr. J had ample opportunity to object to admission of the video prior to the hearing. In addition, Mr. J never was able to clarify how the alleged alteration of the

²⁵ It is noted that this case had been pending for well more than a year before the hearing was held on July 26, 2017, giving Mr. J ample time to obtain a copy of the unedited video from his attorney. Mr. J never gave a reasonable explanation for why he was unable to do this, other than that his attorney was too busy.

²⁶ Mr. J essentially waived his argument that this was a form of acceptable parental discipline; but even if he had not, his argument would have failed, and any reasonable viewer of the video would agree with the conclusion that this was an assault rather than parental discipline.

video somehow rendered it misleading or inaccurate. For all of these reasons, his objection was overruled.

Lastly, Mr. J argued that OCS's actions against both him and Ms. B have been motivated by racial animus against him, because he is African-American. Mr. J was unable to articulate how alleged racial prejudice played any role in OCS's substantiation of the finding of physical abuse against him, based on an incident that is clearly depicted in video footage. Mr. J's argument that his race played a role in the substantiation of the physical abuse finding is unsupported and without merit.

IV. Conclusion

OCS met its burden of establishing by a preponderance of the evidence that Mr. J committed a physical assault of Z on or about January 31, 2016, and therefore its substantiated finding of abuse against Mr. J is affirmed.

As discussed in the attached May 24, 2017 order partially granting and partially denying OCS's motion for summary adjudication, the substantiated findings against Ms. B and Mr. J for putting Y at risk of mental injury, as alleged in the July 8, 2015 PSR, are also affirmed. The remaining substantiated findings alleged in the July 8, 2015 and February 1, 2016 PSRs have been overturned by OCS.

Dated this 11th day of December, 2017.

Signed _____

Andrew M. Lebo

Administrative Law Judge

Adoption

The undersigned, 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 Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 24 day of January, 2018.

By: *Signed* _____

Name: Erin Shine

Title/Agency: Special Assistant, DHSS

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

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ORDER ON OCS MOTION FOR SUMMARY ADJUDICATION

I. Introduction

This is a consolidated case involving appeals by S J and B B of substantiated findings of abuse and neglect entered against them by the Office of Children’s Services. After being rescheduled numerous times, the hearing was scheduled for April 4, 2017. However, at the request of OCS, and with appellants’ consent, the hearing was vacated, and instead, oral argument on OCS’s motion for summary adjudication was held on that date.²⁷

OCS’s motion seeks a ruling that, as a matter of law, an adjudication order issued by a Superior Court judge in a related CINA proceeding disposes of appellants’ appeals in this matter.²⁸ The CINA adjudication order, however, only partially resolves the factual questions surrounding the substantiated findings at issue in this case. OCS’s motion, therefore, is granted in part and denied in part.

II. Facts and Procedural Background²⁹

Ms. B’s and Mr. J’s appeals concern two protective services reports (PSRs) received by OCS on July 8, 2015,³⁰ and February 1, 2016,³¹ in which it was alleged that they had exposed their children to domestic violence. Ms. B and Mr. J have a daughter together, Y J, who was an infant approximately five months old and one year old at the time of the two incidents in question. Ms. B

²⁷ Mr. J was incarcerated but was able to appear telephonically for the oral argument, which was held at 11:00 a.m. on April 4, 2017. Ms. B did not appear for the oral argument; later that day she called the Office of Administrative Hearings and explained that she had forgotten to put it on her calendar.

²⁸ The adjudication order is attached to OCS’s motion for summary adjudication as Exhibit C (referred to herein as “CINA adjudication order”).

²⁹ The factual findings in this decision are based upon the documents submitted by OCS as the agency record, and the attachments to OCS’s motion for summary adjudication.

³⁰ The July 8, 2015 PSR is no. 0000000, found at Administrative Record (AR) 23-24; it concerns an incident alleged to have taken place on July 7, 2015. It is noted that there are slight differences between the record citations in OCS’s Motion and those listed in this order, probably due to the fact that OCS produced two separate Administrative Records for Mr. J’s and Ms. Bs’ appeals. Unless otherwise indicated, this order cites to pages in Mr. J’s record.

³¹ The Feb. 1, 2016 PSR is no. 0000000, found at AR 7-8; it relates to an alleged incident on January 31, 2016.

also has a son, Z L, who at the time of the two incidents was eight years old and nine years old and was living with her and Mr. J.

OCS investigated both PSRs and eventually entered substantiated findings resulting from both incidents. For the July 8, 2015 PSR, OCS substantiated findings against Ms. B and Mr. J for maltreatment of Y and Z, by putting them at risk of mental injury through exposing them to domestic violence, as defined by AS 47.10.011(8). For the February 1, 2016 PSR, OCS again entered substantiated findings of maltreatment against Ms. B and Mr. J by putting Y at risk of suffering mental injury, as defined by AS 47.10.011(8), through exposing her to domestic violence.³² OCS also entered substantiating findings of neglect against Ms. B and Mr. J for the same incident,³³ OCS recently overturned the neglect findings, however, so they are no longer at issue in this case.³⁴

In May 2016, OCS filed an “emergency petition for adjudication of child in need of aid,” initiating a child in need of aid (CINA) proceeding against Ms. B and Mr. J.³⁵ The petition references OCS having received two PSRs, on July 8, 2015 and February 1, 2016, but does not reference the PSR numbers.³⁶ The petition goes on to discuss the factual allegations contained in the second of the two PSRs, making it clear that it is the same PSR as the February 1, 2016 PSR discussed above (number 0000000).³⁷ The petition, however, does not discuss the factual allegations in the July 8, 2015 PSR (number 0000000).

While the CINA case was pending, OCS substantiated the findings noted above. Both Ms. B and Mr. J appealed the findings in late June 2016, and their appeals were referred to the Office of Administrative Hearings (OAH). With the consent of all parties, the two cases were consolidated for a hearing and decision.

Subsequently, a “contested adjudication trial” was held in the CINA case before Superior Court Judge Huguelet in City A, Alaska, on September 00 and 00, and October 00, 2016. Both Ms.

³² OCS asserts in its motion for summary adjudication that it also substantiated findings for putting Z at risk of mental injury as a result of the February 1, 2016 PSR. The record, however, does not reflect any such findings. *See* AR 1-4 in Ms. Bs’ record (OCS closing letter to Ms. B dated 6/16/16), showing findings, as to Z, only for physical abuse by Mr. J and for neglect by Mr. J and Ms. B.

³³ Based on the February 1, 2016 PSR, OCS also substantiated an additional finding of maltreatment against Mr. J in the form of physical abuse of Z, as defined by AS 47.10.011(6) (OCS’s motion cites to AS 46.10.011(6), but this must be a typographical error, as AS 46.10.011(6) is not an existing statute). OCS’s motion, however, does not seek summary adjudication as to this physical abuse finding.

³⁴ *See* Exhibit A to OCS’s motion for summary adjudication.

³⁵ The petition is attached to OCS’s motion for summary adjudication as Exhibit B.

³⁶ Exhibit B to OCS’s motion for summary adjudication, p. 2.

³⁷ *See* Exhibit B to OCS’s motion for summary adjudication, pp. 2-3.

B and Mr. J appeared and were represented by counsel.³⁸ After the trial, Judge Huguelet issued the adjudication order relied on by OCS in its motion for summary adjudication in this matter.³⁹ The order finds, in pertinent part, that the children are children in need of aid, pursuant to AS 47.10.011(8)(B)(III), by evidence beyond a reasonable doubt.⁴⁰ It finds that Ms. B admitted to a history of domestic violence between her and Mr. J, some of which “occurred in front of one or more of her children,” and that she “acknowledged her pattern of reuniting with Mr. J following the various domestic violence incidents.”⁴¹

The CINA adjudication order makes findings concerning the factual allegations raised in the July 8, 2015 PSR. The order states that a City B Police Department officer testified that Ms. B told him that Mr. J assaulted her in the presence of their daughter Y.⁴² The order also finds that this allegation was corroborated by an OCS expert witness, who also noted that Ms. B bit Mr. J, and the two of them “wrestled on the bed” – the same bed where then five-month old Y was lying.⁴³

The CINA adjudication order also makes findings concerning the factual allegations raised in the February 1, 2016 PSR. It states that Mr. J perpetrated a physical assault against Z, that Ms. B took video of the assault, and the video was admitted into evidence.⁴⁴ The order, however, does not make any findings as to whether Y was present during the incident and thus was exposed to this act of domestic violence against Z.

OCS filed its motion for summary adjudication in this case on March 17, 2017. At that time, the hearing was scheduled for April 4, 2017. At status conferences on March 28, 2017, Ms. B and Mr. J agreed to OCS’s request to vacate the hearing date and instead hold oral argument on OCS’s motion on that date. At that time, it was noted that Ms. B’s and Mr. J’s responses to the motion were due on April 4, 2017; the parties agreed that Ms. B and Mr. J could present their responses on the record at oral argument in lieu of filing written responses, if they so desired.

III. Discussion

A. The relevant statutes and regulations

The Alaska legislature has enacted several statutory schemes designed to protect children

³⁸ CINA adjudication order, p. 1.

³⁹ None of the parties have given any indication that the CINA adjudication order has been appealed.

⁴⁰ CINA adjudication order, p. 2.

⁴¹ *Id.*

⁴² CINA adjudication order, p. 3.

⁴³ CINA adjudication order, p. 7.

⁴⁴ CINA adjudication order, pp. 2-3.

from abuse, maltreatment, and neglect.⁴⁵ These laws give OCS a range of possible responses and remedies, depending on the level and immediacy of harm faced by the children. If the level of abuse, maltreatment, or neglect is cause for concern, but does not immediately threaten the health and safety of the child, OCS can investigate, make a finding that the report of abuse, maltreatment, or neglect has been substantiated,⁴⁶ and place the child's parent or caretaker on OCS's "central registry," which essentially amounts to a "watch list."⁴⁷ Alternatively, if the level of abuse, maltreatment, or neglect is more serious, and the child is in need of immediate assistance, OCS can initiate CINA proceedings in Superior Court.⁴⁸ OCS may also pursue each of these remedies simultaneously, as it has done in the case of Ms. B and Mr. J.

OCS may issue a substantiated finding of abuse or neglect based upon probable cause.⁴⁹ If a person appeals a substantiated finding, OCS has the burden of proving at an administrative hearing, by a preponderance of the evidence, that the alleged acts of abuse or neglect actually occurred.⁵⁰

B. Summary adjudication motions in general

Motions for summary adjudication are authorized under the regulations governing hearings before the Office of Administrative Hearings.⁵¹ Summary adjudication motions in administrative proceedings are analyzed according to the same principles applied to motions for summary judgment in Alaska court proceedings. Summary adjudication will be granted if there are no material facts in dispute and one party is entitled to prevail as a matter of law.⁵²

Summary adjudication is "a means of resolving disputes without a hearing when the central underlying facts are not in contention If facts that are not disputed establish that one side or the other must prevail, then an evidentiary hearing is not necessary."⁵³ Therefore, if OCS can prove that Judge Huguelet's findings in the CINA adjudication order establish the facts underlying OCS's substantiated findings against Ms. B and Mr. J, then summary adjudication is appropriate, and a hearing will not be needed. If OCS cannot make that showing, then an evidentiary hearing will be required to resolve those findings.

⁴⁵ See AS 47.10.005 - AS 47.10.990 (Child in Need of Aid (CINA) statutes); AS 47.17.010 - AS 47.17.290 (child protection).

⁴⁶ This is typically referred to as a "substantiated finding of abuse or neglect."

⁴⁷ See AS 47.17.010 - AS 47.17.290; 7 AAC 54.010 - 7 AAC 54.900.

⁴⁸ See AS 47.10.005 - AS 47.10.142.

⁴⁹ *In re X.Y.*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011).

⁵⁰ *In Re K.C.G.*, OAH No. 13-1066-SAN (Commissioner of Health & Social Services, 2013).

⁵¹ 2 AAC 64.250.

⁵² See *Smith v. State of Alaska*, 790 P.2d 1352, 1353 (Alaska 1990); *Estate of Miner v. Commercial Fisheries Entry Commission*, 635 P.2d 827, 834 (Alaska 1981); 2 Davis & Pierce, *Administrative Law Treatise* § 9.5 at 54 (3d ed. 1994).

⁵³ *In Re K.S.*, OAH No. 07-0600-DHS (Commissioner of Health & Social Services, 2007).

C. OCS's summary adjudication motion

OCS's motion for summary adjudication asserts that there are no material facts in dispute and, therefore, that its substantiated findings against Ms. B and Mr. J should be upheld as a matter of law. OCS acknowledges that the issue in this appeal is whether OCS can prove, by a preponderance of the evidence, that Ms. B and Mr. J committed the acts of maltreatment alleged in the substantiated findings of causing risk of mental injury to Y and Z through exposure to domestic violence. OCS argues that the CINA adjudication order establishes as a matter of law that Ms. B and Mr. J committed these acts of maltreatment. Essentially, OCS is arguing in its motion that the doctrine of *collateral estoppel* should be applied here to give the CINA adjudication order binding effect in this proceeding.

In *State of Alaska v. United Cook Inlet Drift Association*, 895 P. 2d 947, 950-951 (Alaska 1995) the Alaska Supreme Court stated that there are three requirements for the application of collateral estoppel:

- (1) The plea of collateral estoppel must be asserted against a party or one in privity with a party to the first action;
- (2) The issue to be precluded from relitigation by operation of the doctrine must be identical to that decided in the first action;
- (3) The issue in the first action must have been resolved by a final judgment on the merits.

This doctrine binds the parties and their privies to factual findings, as well as legal conclusions, that have been the subject of prior litigation.⁵⁴ The doctrine “aim[s] to prevent parties from again and again attempting to reopen a matter that has been resolved.”⁵⁵ The principle of collateral estoppel applies in administrative proceedings as well as in court proceedings.⁵⁶

The Commissioner of Health and Social Services recently issued a decision applying the collateral estoppel doctrine to uphold substantiated findings of neglect, based on a CINA adjudication order, in a case with procedural similarities to this case – *In Re D.O. and T.X.*, OAH

⁵⁴ *Wilson v. Municipality of Anchorage*, 977 P.2d 713, 726 (Alaska 1999); *Smith v. CSK Auto, Inc.*, 132 P.3d 818, 820 (Alaska 2006); *Alaska Public Interest Research Group v. State of Alaska*, 167 P.3d 27, 44 (Alaska 2007).

⁵⁵ *Id.*; see also *State, Child Support Enforcement Div. v. Bromley*, 987 P.2d 183, 192 (Alaska 1999).

⁵⁶ See *United States v. Utah Construction and Mining Company*, 384 US 394, 422, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966); see also 2 *American Jurisprudence Second*, Administrative Law at Section 493; Davis, *Administrative Law*, Chapter 18 (Third Edition 1972); *Restatement (Second) Of Judgments* § 83(1) (1982) (“a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court”); Koch, 1 *Administrative Law and Practice* Section 6.63 (1985); *Sublett v. State of Alaska Commercial Fisheries Entry Commission*, 773 P.2d 952, 954 (Alaska 1989) (“principles of res judicata and collateral estoppel preclude collateral attack of a final agency decision made in an adjudicatory hearing”), citing *Jeffries v. Glacier State Telephone Company*, 604 P.2d 4, 8-9 (Alaska 1979); *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 44 (Alaska 2007), citing *Robertson v. Am. Mech., Inc.*, 54 P.3d 777, 779–80 (Alaska 2002) and *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989).

Nos. 15-1531-SAN, 15-1554-SAN (Commissioner of Health and Social Services, 2016).⁵⁷

The three criteria for application of the doctrine of collateral estoppel are satisfied for some of the substantiated findings at issue in this case. The first criterion is met, because OCS is asserting collateral estoppel against Ms. B and Mr. J, who are parties in the CINA case. The third criterion is also met; the CINA adjudication order is equivalent to a final judgment, as it is the final and dispositive document adjudicating that maltreatment was proven in the CINA case.

The second criterion, that the factual issues in this case must be identical to those addressed in the CINA case, requires closer scrutiny. Again, OCS has the burden of establishing facts, by a preponderance of the evidence, that demonstrate that Ms. B and Mr. J put Y and Z at risk of mental injury by exposing them to domestic violence. On this point, OCS asserts that summary adjudication is appropriate because “the facts in [Ms. B’s and Mr. J’s] appeals and the CINA matter are the same and stem from the same two Protective Services Reports.”⁵⁸ But that is as far as OCS’s motion goes - the motion fails to analyze the specific findings of fact in the CINA adjudication order to determine whether they are the same as the substantiated findings at issue in this case. The mere fact that the same two PSRs were cited in OCS’s petition that led to the CINA adjudication order, and that the adjudication order found the children to be children in need of aid, is not enough. To prevail on its summary adjudication motion, OCS must prove that the factual issues in the CINA case are “identical” to those underlying the substantiated findings against Ms. B and Mr. J.

Notwithstanding OCS’s imperfect argument, the findings in the CINA adjudication order do provide adequate support for summary adjudication regarding the substantiated findings arising out of the July 8, 2015 PSR, as to Y. As discussed above, the order makes factual findings to the effect that Mr. J assaulted Ms. B, that Ms. B bit Mr. J, and that the two of them wrestled on the bed where Y was lying. These findings are sufficient to support the substantiated findings of maltreatment of Y arising from the July 8, 2015 PSR. The CINA adjudication order makes no findings regarding whether Z was exposed to the July 2015 domestic violence, so collateral estoppel cannot be applied to establish the substantiated findings as to Z. This means that there are disputed issues of facts regarding those findings that must be resolved at an evidentiary hearing.

In addition, the CINA adjudication order lacks sufficient factual findings for collateral estoppel as to the substantiated findings of maltreatment arising from the February 1, 2016 PSR,

⁵⁷ Available online at:
<http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN151531%20&%20SAN151554.pdf>.

⁵⁸ OCS Motion for Summary Adjudication, p. 3.

which concern the incident when Mr. J is alleged to have directly assaulted Z. OCS entered substantiated findings arising from that PSR against Ms. B and Mr. J for putting Y at risk of suffering mental injury.⁵⁹ The key element missing from the CINA adjudication order is any sort of factual finding that **Y was present** during the assault incident. Therefore, collateral estoppel cannot be applied to support summary adjudication regarding the substantiated “risk of mental injury” findings arising from the February 1, 2016 PSR. The disputed issues of fact regarding those findings remain to be resolved at an evidentiary hearing.

Ms. B and Mr. J were given the opportunity to respond to OCS’s motion for summary adjudication and argue why the CINA adjudication order should not be relied upon in the manner urged by OCS. As noted above, Ms. B did not appear at the oral argument; in addition, she did not file a written response to OCS’s motion. Mr. J appeared telephonically for the oral argument, and he responded generally that, in his view, the testimony at the CINA adjudication trial did not support the judge’s findings regarding the July 7, 2015 incident. Mr. J asserted that the incident never took place and that it could not have taken place, because he wasn’t even at home on the day of the incident.⁶⁰ These assertions, however, ignore the fact that Mr. J was present during the CINA adjudication trial, that he was represented by counsel, that he had a full opportunity to litigate his version of the facts during that trial, and that the CINA adjudication order makes findings that directly support the substantiated “risk of mental injury” findings relating to the July 7, 2015 incident.⁶¹ It is in just these types of circumstances that collateral estoppel is applied to prevent litigating, “again and again,” factual issues that have already been conclusively resolved by a court or administrative tribunal.

IV. Conclusion

OCS’s motion for summary adjudication is granted as to the substantiated findings that Ms. B and Mr. J put Y at risk of mental injury by exposing her to domestic violence on July 7, 2015. Those findings, therefore, are upheld.

⁵⁹ As previously noted, the record indicates that OCS only substantiated findings of physical abuse and neglect as to Z in connection with the February 1, 2016 PSR.

⁶⁰ It is noted that these factual assertions by Mr. J regarding the July 7, 2015 incident are contradicted by contemporaneous statements he apparently made to the police, as reflected in documents in the record; a City B police officer reported that Mr. J stated that Ms. B had become upset with him, had pulled his hair and bit his forearm and his finger, and that he then “twisted” her breast to get her to stop biting him. AR 000217. At oral argument, Mr. J did not explain why he would have made these statements to the police at the time, if he had not even been home on the day of the incident.

⁶¹ Because OCS’s motion is denied as to the substantiated findings relating to the February 1, 2016 PSR, there is no need to address Mr. J’s comments at oral argument pertinent to those findings.

OCS's motion for summary adjudication is denied as to the substantiated findings that Ms. B and Mr. J put Y at risk of mental injury by exposing her to domestic violence on January 31, 2016; the motion is also denied as to the substantiated findings that Ms. B and Mr. J put Z at risk of mental injury by exposing him to domestic violence on July 7, 2015. A status conference will be scheduled to discuss the setting of a hearing date to resolve the appeals of those substantiated findings, as well as the substantiated finding against Mr. J of physical abuse of Z on January 31, 2016.

Dated this 24th day of May, 2017.

Signed

Andrew M. Lebo

Administrative Law Judge

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