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

In the Matter of	)	
	)	OAH Nos. 16-1186 & 1187-SAN
D & E M	)	Consolidated
	)	Agency No.

DECISION

I. Introduction

D M was convicted of assault in March 2016. The victim of the assault was his wife, E. Their five-month-old daughter was present during the assault. D was later accused of another assault in July, and also accused of having committed domestic violence on several occasions. No reliable evidence in this record, however, shows that he committed these other incidents of domestic violence or that the child was present when the alleged conduct occurred.

The Office of Children's Services substantiated two counts of child abuse or neglect by D and one count by E. D and E appealed, and a hearing was held. Early in the hearing, OCS agreed to overturn the substantiation against E and one of the substantiations against D. OCS clarified that the basis of its remaining charge was that D allegedly exposed the child to repeated acts of domestic violence, each of which met the elements of a crime of assault in the fourth degree under AS 11.41.230(a)(3).

Nothing in OCS's charging documents or the process, however, gave D notice of what he allegedly had done to give rise to the charge of child abuse or neglect. Nothing in the charging document gave D notice of OCS's theory of liability. Without notice of the charge against him, D could not prepare a defense. Because the deficient notice falls below the standards of due process of law, this case is dismissed and the substantiation of child abuse or neglect overturned.

II. Facts

D and E M live in No Name, Alaska, with their infant daughter, T. T was born in October 2015. On March 19, 2016, when T was five months old, D and E engaged in a tussle over who would hold T. The tussle became serious and physical, and resulted in D hitting, choking, and smothering E. When family members arrived, D grabbed T and would not relinquish her. After the situation finally calmed down, T was not hurt and it does not appear from the record that E was seriously injured. D was arrested. He was convicted of assault.[1]

[1] Admin. Rec. at 57-66.

Four months later, during the weekend of July 16-17, a second incident of domestic violence may have occurred in the M home. The only evidence of the incident, however, is a report made by E's mother, S C, to OCS. Ms. C did not testify in this proceeding. No written or oral recording of her report is in the record. Bruce Hall, a Protective Services Specialist with OCS, talked to Ms. C. He took notes and testified about what she told him. Even this hearsay evidence provided by Mr. Hall was limited. Ms. C did not claim to have witnessed an assault or threats by D on the weekend of July 16-17. She reported that she was aware of domestic violence, having arrived at the home after it occurred.[2] She also reported her concerns that domestic violence occurred frequently in the home.[3]

When Mr. Hall was in No Name to investigate the July incident of domestic violence, neither E nor D would discuss or acknowledge the alleged July incident. No person who had first-hand knowledge of the alleged July incident has made a statement acknowledging that domestic violence occurred in the presence of T in July. No person to whom Mr. Hall spoke verified that E was in fear of imminent physical injury during any incident other than the March incident.

On August 29, 2016, D and E were each sent a document entitled "Notice of Alleged Maltreatment Decision and Case Status and Placement on the Child Protection Registry."[4] The notice to D informed him that OCS had placed him on the child protection registry and that OCS substantiated two counts of maltreatment against D as follows:

- D had violated AS 47.10.011(9) by neglecting T;
- D had violated AS 47.10.011(9) by causing mental injury to T.[5]

The notice to E informed her that OCS had substantiated one count of child abuse or neglect against E as follows

- E had violated AS 47.10.011(8) by causing mental injury to T.[6]

The notice sent to D had no additional information other than that the substantiation was based on a March 22, 2016, report.[7] The notice to E contained additional information about the charges

---

2 Hall testimony; Admin. Rec. at 30.
3 *Id.*
4 Admin. Rec. at 1, 5.
5 Admin. Rec. at 1. The statutory reference box in the notice to D was not completed.
6 Admin. Rec. at 5-7. The reference to AS 47.10.011(9) for the allegation of mental injury by D was corrected to AS 47.10.011(8) by the notice to E, which OCS's counsel explained at a prehearing conference was understood to cover D also.
7 Admin. Rec. at 1.

against both D and E. Because the cases were later consolidated, this decision will treat the notice to E as if it was a notice to D also.

The notice to E advised that the case status was: "no further intervention."[8] As with the notice to D, the notice referenced a report received on March 22, 2016. This reference appeared to signal that the maltreatment being charged related to the March 19th incident. The notice did not reference anything regarding a July incident. It described the harmful effect that exposure to domestic violence could have on T, but did not mention or describe any conduct committed by D or E that constituted abuse or neglect.[9] It recommended that D and E seek counseling.[10] It commended D for being a good father who enjoys caring for T. It commended E for reporting "this incident of domestic violence."[11]

With regard to the neglect charge against D, the notice to E cited to and quoted AS 47.10.011(9) as follows: "conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect."[12]

With regard to the two "mental injury" charges, the notice told D and E that they were being charged with causing mental injury to T. The notice cited paragraph (8) of AS 47.10.011. One subparagraph of paragraph (8) deals with mental injury. The second subparagraph, which has three different sub-parts, deals with the circumstances under which exposing a child to domestic violence is considered child abuse because of the substantial risk of mental injury to a child.[13] The notice quoted all of paragraph (8). The notice did not describe which theory of liability under paragraph (8) was being alleged or explain that some of the quoted material was not relevant to the charges against the Ms.

Both D and E appealed the substantiations. Their cases were consolidated. In October, before a hearing was held, D was arrested again and convicted for another incident of domestic

8 Admin. Rec. at 7.
9 *Id.*
10 *Id.*
11 *Id.*
12 Admin. Rec. at 5.
13 The statute that defines child abuse or neglect for purposes of this case is AS 47.17.290(2). The pathway from AS 47.17.290(2) to AS 47.10.011 (which is actually the statute on determining when a child is a child in need of aid) can be found in the definition of "maltreatment," AS 47.17.290(8). Because maltreatment is a bad act included in the definition of abuse or neglect, and because the definition of maltreatment cross-references AS 47.10.011, the bad acts listed in AS 47.10.011 can be a route to a substantiation of child abuse or neglect under AS 47.17.290(2).

violence against E.[14] This incident did not occur in T's presence, so OCS did not further investigate it as an incident of child abuse or neglect.[15]

A hearing was held on January 5, 2017. D was in jail at the time, but was allowed to participate by telephone from the jail.

At the outset of the hearing, I stated that I understood the charge of mental injury against D to actually be a charge of having created a substantial risk of mental injury by exposing T to an act of domestic violence against E on March 19, 2016, which was an assault in the fourth degree under AS 11.41.230(a)(2). This theory of neglect would be based on a violation of AS 47.10.011(8)(B)(ii). I explained, however, that my review of the file did not reveal any explanation for the substantiated charges of mental injury against E or neglect against D. I asked that OCS state on the record precisely what conduct E and D had committed that led to all three substantiations.

Both OCS's counsel, and its representative, Mr. Hall, seemed to initially confirm that my understanding of the mental injury charge against D was correct—that it was a charge of substantial risk of mental injury, based on a single incident of domestic violence in T's presence. Neither, however, was able to offer any explanation or description of conduct regarding the mental injury count against E or the neglect count against D. After a short recess, OCS dismissed these two counts, leaving only the charge of substantial risk of mental injury against D under AS 47.10.011(8)(B)(ii) for hearing. Later in the hearing, OCS clarified that I was in error when I characterized its theory as charging a violation of AS 47.10.011(8)(B)(ii). It said that its actual theory was a violation of AS 47.10.011(8)(B)(iii).

Changing from sub-sub-paragraph (8)(B)(ii) to sub-sub-paragraph (8)(B)(iii) is a significant change of approach. Under sub-sub-paragraph (8)(B)(iii), OCS was alleging that D had exposed T to repeated instances of domestic violence against E. Any form of domestic violence would be counted against D under this theory as long as it amounted to at least an assault in the fourth degree under AS 11.41.230(a)(3). The elements of this crime would be met when words or conduct put a person in fear of imminent physical injury.[16] With that understanding, the hearing went forward.

---

[14] Admin. Rec. at 67-71.

[15] Hall testimony. An additional incident of domestic violence resulting in a conviction occurred before T was born. Admin. Rec. at 41.

[16] AS 11.41.230(a)(3).

At the end of the hearing, the record was left open for OCS to supplement the record with any documents from D's criminal file that would be relevant to the charge of repeatedly exposing T to domestic violence. OCS filed a supplement to the record on January 19, 2017.

III. Discussion

A. This case must be dismissed because OCS has not given D notice of the charges against him.

An administrative action that could significantly infringe upon a person's property or liberty interests must provide procedures that give the person an opportunity to defend the person's interests.[17] The more important the interest, and the greater the potential infringement, the more process must be provided in an adjudication over contested material issues.[18] Thus, in order to evaluate how robust the process provided to D must be, I must first address how significantly this case could affect D's liberty or property interests.

This case involves a substantiation of child abuse or neglect. A substantiation that is not overturned goes on a person's permanent record.[19] Although the permanent record is confidential, and nothing happens directly as a consequence of a substantiation (no sanction is imposed and no child custody decisions are made during the substantiation process itself), having the substantiation on one's permanent record can lead to adverse consequences in future matters. For example, the substantiation could be used against a parent in a future custody proceeding. It could affect an application for a license involving child welfare, such as a foster-care license. It could affect any matter related to child protective services. Because these are important interests, a substantiation of child abuse or neglect is an important matter.[20] Therefore, an adjudication regarding a substantiation of abuse or neglect must provide sufficient process to ensure that a respondent has a fair opportunity to present his or her case before a neutral decisionmaker.

Courts have long recognized that before the government can take action against a person's liberty or property interests, the government must give notice of the charges against the person.[21]

---

[17] *See, e.g., Laidlaw Transit, Inc. v. Anchorage Sch. Dist.,* 118 P.3d 1018, 1026-27 (Alaska 2005).

[18] *See, e.g., Heitz v. State, Dep't of Health and Soc. Servs.,* 215 P.3d 302, 305 (Alaska 2009) ("The amount of information required in a notice depends partly on the importance of the individual interest at stake").

[19] AS 47.17.040 (requiring the department to maintain a central registry of investigation reports).

[20] *Cf., e.g., D.M. v. State, Div. of Family & Youth Servs.,* 995 P.2d 205, 213 (Alaska 2000) (recognizing that a process that can affect future proceedings is an important matter entitled to due process).

[21] *See, e.g., Matanuska Maid, Inc. v. State,* 620 P.2d 182, 192 (Alaska 1980) ("The crux of due process is opportunity to be heard and the right to adequately represent one's interests"); *Heitz v. State, Dep't of Health and Soc. Servs.,* 215 P.3d 302, 305 (Alaska 2009) (explaining that due process requires "notice and an opportunity to be heard" before a valuable property right can be taken or infringed).

An accused person must know what the charges are in order to defend against the charges. "Adequate notice is the common vehicle by which these rights are guaranteed."[22]

In general, an administrative proceeding that comports with due process is initiated by a charging document.[23] The charging document must describe the conduct that allegedly fell below the standards required by law. It must be reasonably clear from the document what those standards of conduct are.[24]

This does not imply that the requirement of due process puts the agency in a straitjacket. In most administrative proceedings where the notice does not have to conform to the specific detail required under the Administrative Procedure Act, a charging document will comport with due process if it provides reasonable notice, and the most important criterion will be whether the respondent understands the charges.[25] Moreover, as the case develops, the charges can evolve, and the charging document can be amended to conform to the evidence. The safeguard for a fair process is to ensure that the respondent understands the charges, and has the opportunity to prepare a defense.

Except for public benefits cases, a problem with the notice will not automatically lead to dismissal. Dismissing an enforcement action such as this one requires more than a theoretical problem with the notice.[26] In order to have an enforcement action dismissed for inadequate notice, D must show evidence that he suffered actual prejudice, not just theoretical prejudice, from the deficient notice.[27]

With regard to the theoretical question of whether the notice provided to D was reasonable notice of the conduct and charge alleged, the charging document—the August 29 letter to E—did not identify any instance of conduct by D as the basis for the allegation. The only allegation that might have given notice of specific conduct was a reference in the letter to a report that OCS received on March 22, 2016.[28] No reference was made in the August 29 letter to the July

---

22 *Matanuska Maid*, 620 P.2d at 193.

23 *See, e.g., Laidlaw,* 118 P.3d at 1023.

24 *See, e.g., Heitz,* 215 P.3d at 307 (holding that due process requires explanation of specific reasons for government action that infringes property interest).

25 *See, e.g., In re C.S.,* OAH No. 15-1227-SAN at 10-11 (Dep't Health and Soc. Servs. 2016).

26 *D.M.*, 995 P.2d at 212 ("Thus, a court must consider the likelihood that proper notice might alter the outcome. In answering that question, we must assess the ways which D.M. here claims she might have been prejudiced."); *Matanuska Maid*, 620 P.2d at 193 ("Where notice is inadequate the opportunity to be heard can still be preserved and protected if a contestant actually appears and presents his claim"); *In re C.S.,* OAH No. 15-1227-SAN at 10-11 (Dep't Health and Soc. Servs. 2016) (finding substantial due process problems in notice but not dismissing on that grounds because respondent had opportunity to prepare defense).

27 *D.M.*, 995 P.2d at 212.

28 Admin. Rec. at 5.

incident. From the reference to the March report, I assumed that the conduct being alleged was the documented act of domestic violence that occurred on March 19, 2016. At the outset of the hearing, when I explained to D that the March 19 incident was the basis for the charge, I asked D if he understood the allegation, and he responded that he did. Thus, although the notice of this conduct was vague, and should have been more specific, if the March 19 incident was the conduct that formed the basis for the charge, it likely comported with minimal due process requirements for giving notice of the conduct that allegedly fell below the standard.

When OCS clarified its approach to allege repeated exposure to domestic violence, however, I asked D if he understood that the basis of the charge was both the March incident and the July incident. He responded, "what July incident?" He did not understand that the charge related to an alleged July incident, and had prepared no testimony or evidence relating to July because neither he nor E knew what was being alleged. Thus, he was prejudiced by the deficient notice.

Later, Mr. Hall implied that the actual basis for the charge against D was the generalized allegation that D and E had frequently engaged in domestic violence over the term of their marriage. This allegation, however, was never clear. It had no specifics and no particulars, and was not an understandable allegation of child abuse or neglect. D would have no way of knowing what this allegation related to, and thus have no way to put on evidence in his defense.

With regard to whether the charging document communicated to the respondents what standard they allegedly failed to meet, OCS specifically identified its charge as "mental injury." D and E both clearly understood that they were being charged with having caused mental injury to T. The only evidence they put on in D's defense was testimony by E that T did not suffer any mental injury. In E's view, T is healthy and happy, and is thriving. D and E clearly believed that this evidence is relevant to a charge of having caused mental injury. They were not prepared to defend against a charge of having created a substantial risk of mental injury, which is a different approach to liability. Thus, they suffered additional actual prejudice from the inadequate notice of the charge.

Moreover, no reasonable person could glean from the charging document or the record as a whole that D was being charged under AS 47.10.011(8)(B)(iii). OCS's charging document cites all of paragraph (8) of AS 47.10.011 as the basis for its substantiation of mental injury. Paragraph (8), however, contains four different approaches to a charge of child abuse or neglect. Each is a different theory of liability and requires different evidence to prove or rebut the charge. Given

that the charge was called "mental injury," a reasonable person would have been justified in understanding that OCS was charging D with a violation of AS 47.10.011(8)(A) because only subparagraph (8)(A) addresses actual mental injury.[29] The three sub-sub-paragraphs of subparagraph (8)(B) all address a substantial risk of mental injury—a different theory. Although I would have given OCS some leeway to clarify the charge if anything in the charging document could reasonably be construed as charging D under AS 47.10.011(8)(b)(iii), nothing indicated that was OCS's approach. Thus, here, not only did D himself have no actual understanding of the charge, no reasonable person could have understood the nature of the charge from the charging document, the prehearing proceedings, or the outset of the hearing itself.

In some cases of inadequate notice (although not in public benefit cases), the agency can cure the deficient notice with further process even if the respondent was initially prejudiced to some degree by the inadequate notice. Here, in OCS's view, the record that was sent to D and E on November 8, 2016, cured any defect in the notice. This record included a one-page snapshot of a screen from a database called "ORCA."[30] This screen snapshot had several boxes that were beside text. Two boxes were checked: first, the box next to "Repeated exposure to conduct by a household member against another household member that is a crime or has elements similar to a crime"; and second, the box next to "Substantial risk of mental injury."

This screen shot did not cure the defect. First, this page was not sent in a letter or with an explanation that the page was amending or clarifying the charge. It was merely a page in the record, along with many other pages that could have been (but were not) amendments to the charge.[31] Second, it did not give an explanation of the conduct that gave rise to the charge. Third, it did not cite the sub-sub paragraph that described the applicable theory of liability. Without explanation, this screen shot is obtuse and unhelpful. Clearly, the evidence here shows that D did not understand that he was being charged with creating a substantial risk of mental injury to T by exposing her to repeated incidents of domestic violence.

Finally, the proceedings in this case did not cure the defect. Here, at the time of the case planning conference on October 25, 2016, OCS's counsel had not seen the record and did not

---

[29] Subparagraph (8)(A) is implicated when "conduct or conditions created by the parent, guardian, or custodian have (A) resulted in mental injury to the child." AS 47.10.011(8)(A).

[30] Admin. Rec. at 26.

[31] For example, the record also includes two Initial Assessment Summaries, both of which list substantiations of child abuse or neglect, based on different incidents. Admin. Rec. at 20, 23. Either of these pages could have been amendments to the charging document, but apparently neither were. If OCS considers the "ORCA" page an amendment to its charge, it needs to provide notice to this effect.

know the facts or the theory of liability.[32] Unfortunately, the Ms did not attend the prehearing conference that occurred one week before the hearing, which would have been an opportunity for clarification. Nevertheless, OCS did attend, and could have clarified the charge on the record (which would have cured the deficiency because the Ms had the opportunity to attend the conference), but did not do so.[33] Although OCS did eventually clarify its theory of liability at the hearing, the factual basis for the charge was never clear. Moreover, the notice of the charge was so deficient that curing the inadequacy by identifying the charge or requesting more process on the day of the hearing would not be possible. Because this proceeding falls below the standard required for due process of law, it is dismissed. The substantiation of child abuse or neglect by D based on the two protective service reports in this record is overturned.

B. In the alternative, OCS's failure to prove its case also requires dismissal.

In the alternative, the same result would be reached by examining the merits of the evidence. If OCS's theory of the case is that the July incident and the March incident together constitute repeated exposure to conduct or words by D that recklessly placed E in fear of imminent physical injury, that theory fails. Although OCS has proved that the March incident exposed T to conduct by D that placed E in fear of imminent physical injury, it has no proof that the July incident even occurred, much less put E in fear of imminent physical injury. It has no proof that T was exposed to the alleged July incident. It has no proof that T was placed at a substantial risk of mental injury as a result of her exposure to the March incident and alleged exposure to the July incident.[34] If OCS's theory of the case is that T was exposed to frequent incidents of domestic violence, it has no proof that any incident other than the March incident even occurred, much less that the incidents meet the elements of AS 47.10.011(8)(B)(iii). Thus, OCS's failure to prove the elements of the charge against D would be a second reason to overturn the substantiation. The lingering uncertainty with regard to the basis for OCS's substantiation,

---

[32] Nothing in this decision should be interpreted to imply that OCS's counsel was in any way obstructionist. Indeed, the opposite is true—OCS's counsel was cooperative and helpful. She provided contact information to the Ms and was willing to work with them. OCS's counsel appeared to be struggling with the notice and the theory of liability, as were the Ms and the ALJ.

[33] In response to a question from me about the charge at the prehearing conference, OCS did cite to page 26 of the record (the "ORCA" screenshot), although it did not clarify the charge. At the prehearing conference, OCS was advised that the ALJ was uncertain as to the charge, and that it needed to clarify the charge for the Ms.

[34] With regard to the March incident—which clearly involved exposing T to a traumatic incident of domestic violence—OCS has not proved or argued that exposing a five-month-old child to one incident of domestic violence causes a substantial risk of mental injury. OCS did place in the record an interesting article, which does suggest that repeated exposure to domestic violence could place an infant at risk of mental injury. Admin. Rec. at 72-76 (Lynn Hecht Schafran, *Domestic Violence, Developing Brains, and the Lifespan New Knowledge from Neuroscience,* The Judges' Journal, Volume 53, No. 3, Summer 2014). Merely placing an article in the record, however, does not constitute proof of an essential element of the charge.

however, makes clear that OCS's failure to identify the conduct or law at issue is the primary reason for overturning OCS's findings.

IV. Conclusion

Many aspects of this record are disturbing. Although D is a loving parent, he clearly has significant issues of anger and violence. His conduct in the March and October incidents raises uncertainty regarding T's emotional wellbeing. OCS should be concerned about this household.

Concern, however, is not a substitute for adequate notice. Supposition is not a substitute for proof. Because OCS did not provide sufficient notice to D to allow him to prepare a defense, this case is dismissed and OCS's substantiations against D and E M contained in Case ID 000000 are overturned.

DATED this 26th of January, 2017.

By: *Signed*
Stephen C. Slotnick
Administrative Law Judge

Adoption

Under a delegation from the Commissioner of Health and Social Services and under the authority of AS 44.64.060(e)(1), I adopt this decision 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 7th day of March, 2017.

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

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