

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

In the Matter of)	
)	
K B)	OAH No. 17-0094-SAN
_____)	Agency No.

DECISION

I. Introduction

The Office of Children’s Services (OCS) received a report of harm on July 27, 2016, alleging that K B beat F B in front of the couple’s children. OCS investigated. OCS substantiated the allegation of abuse or neglect in the form of maltreatment against Mr. B, for placing his children Z and L at a substantial risk of mental injury by exposing them to an incident of domestic violence. OCS then placed Mr. B’s name on the central registry of substantiated investigation reports of child abuse or neglect maintained under AS 47.17.040, also known as the child protection registry. Mr. B appealed.

Because OCS has not shown that it is more likely than not true that Mr. B put Z and L at substantial risk of mental injury, the substantiations are overturned.

II. Facts

On July 27, 2016, two different people contacted OCS expressing concern for the children of F and K B. The first caller told OCS that Mr. B had grabbed Ms. B by the throat “and was crushing it,” that he was throwing her around, and that he injured her, all in front of the children. The caller said the children were talking about what happened between their parents. The caller said Mr. B was using meth, heroin, alcohol, and marijuana. The second caller provided the same information, and added that the violence between the couple was severe and had been going on for years, and that the police department had responded to the incident.¹ OCS had not received any prior reports about the family.²

The July 27, 2016 incident was also reported to the police. VPSO C C called the police department dispatcher to report that Ms. B told him that Mr. B had beaten her up, thrown her against the wall, and “choked her out.”³ VPSO C also reported the incident to Chief T of the Police Department.⁴

¹ Record at 9.
² Record at 11.
³ Record at 19 (Police Department Calls for Service Detail Page).
⁴ Record at 16, 19.

OCS Protective Services Specialist B H began to investigate the case by calling Chief T. Chief T told her that Ms. B refused to make a report or meet with him.⁵ He also told Ms. H that there was “not a lot of criminal history that the Police Department have been involved in,” and that he “did not have any knowledge of their using or drinking to excess.”⁶

Ms. H phoned C C. Mr. C is not only the Village Public Safety Officer for No Name Area, but also the husband of Ms. B’s sister D. Mr. C told Ms. H that the Bs’ children come over to the Cs’ house to play. He said “that [the] kids reported that mom and dad were fighting and daddy beat mommy up right in front of him.”⁷ Mr. C also told Ms. H that he thought Mr. B was using, and that “F and K are not welcome in his home anymore because of the way that K behaves.”⁸ At the hearing, Ms. H described the relationship between the Bs and the Cs as “somewhat estranged.”⁹

Ms. H then traveled to No Name Area and visited the B home. First, Ms. H interviewed Ms. B. According to Ms. H, Ms. B “did agree that he had slapped her and pushed her.” Ms. B did not report having been injured, or placed in fear.¹⁰ Next Ms. H interviewed Z, age eight, in a separate room.¹¹ Ms. H noted that Z “knows that her dad hurts her mom” because she hears them yelling through the wall. Z reported that her dad “broke a phone and grabbed her mom by the arm and threw her on the couch.”¹² Z did not say when that happened.¹³ Meanwhile, Mr. B dropped L off at the house, and then left. Ms. H did not speak with Mr. B.¹⁴ Finally, Ms. H interviewed L, age five, who reported that his dad sometimes slaps his mom in the face.¹⁵

Ms. H attempted to contact Ms. B’s sisters, D C, Z U, and L R.¹⁶ All three also live in No Name Area, about seven miles from the Bs.¹⁷ Ms. C told Ms. H that Ms. B had cut off contact with her. The other two sisters did not respond to Ms. H’s attempt to contact them.¹⁸

⁵ Record at 16.

⁶ Record at 16.

⁷ Record at 16.

⁸ Record at 16.

⁹ Testimony of H.

¹⁰ Record at 16; Testimony of H.

¹¹ Testimony of H.

¹² Record at 17.

¹³ Testimony of H.

¹⁴ Testimony of H. Ms. H did not speak with Mr. B during her visit to the home or at any point during the investigation. Ms. H testified that she tried to call Mr. B; Mr. B testified that he had not missed any phone calls from Ms. H.

¹⁵ Record at 17.

¹⁶ Record at 10.

¹⁷ Testimony of E. B.

¹⁸ Testimony of H.

Ms. H then completed her initial assessment of the case.¹⁹ She found that “collaterals and law enforcement confirm history of DV” and “their DV is well known amongst extended family.”²⁰ An assistant attorney general was consulted about the case. The assistant attorney general advised OCS that OCS did not have grounds to intervene “based upon one reported incident, no specific documented historical pattern, lack of a series of incidents close in time to this one and not clearly identifiable substantial impairment in child(ren)’s ability to function.”²¹ Ms. H substantiated the report for substantial risk of mental injury due to repeated exposure to domestic violence by one household member against another, notified Mr. B, and closed the case.²² Mr. B appealed.²³

A telephonic hearing in this matter was held on March 29, 2017. Ms. B presented Mr. B’s case, with testimony from Mr. B. Assistant Attorney General Laura Bowen represented the Office of Children’s Services (OCS). OCS Protective Services Specialists B H and L D testified.

III. Discussion

OCS maintains a central registry of reports on child abuse and neglect investigations.²⁴ These reports are confidential, but may be disclosed to other governmental agencies in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.²⁵ At the conclusion of an investigation, OCS may find that an allegation has been substantiated. When a substantiated finding is appealed, OCS has the burden of proving by a preponderance of the evidence that the finding should be upheld.²⁶

OCS argues that the report should be substantiated against Mr. B under AS 47.10.011(8)(B)(iii) for repeatedly exposing Z and L to domestic violence. At the hearing, OCS alleged that Z and L were repeatedly exposed to assault in the fourth degree, reckless endangerment, or both. In its post-hearing brief, OCS narrowed its focus, arguing that Z and L had been exposed to two incidents of assault in the fourth degree.²⁷

There are three different types of conduct that constitute assault in the fourth degree. A person commits the crime of assault in the fourth degree if

- (1) that person recklessly causes physical injury to another person;

¹⁹ Testimony of H.

²⁰ Record at 11.

²¹ Record at 11 – 12.

²² Record at 1 – 5, 12, 14.

²³ Record at 18.

²⁴ AS 47.17.040.

²⁵ AS 47.17.040(b).

²⁶ *In re KC. G.*, OAH No. 13-1066-SAN at 2 (Commissioner of Health and Social Services 2013).

²⁷ Argument at hearing; Post-Hearing Brief at 2, 4.

- (2) with criminal negligence that person causes physical injury to another person by means of a dangerous instrument; or
- (3) by words or other conduct that person recklessly places another person in fear of imminent physical injury.²⁸

OCS has not alleged that Mr. B physically injured Ms. B. This rules out using paragraphs (1) or (2) as a theory for establishing assault. That leaves OCS arguing that by words or conduct, Mr. B recklessly placed Ms. B in fear of imminent physical injury on two or more occasions.

OCS, in its post-hearing brief, argued that “Mr. B’s beating and choking of Mrs. B, as well as the phone breaking incident described above by Z, would have put Mrs. B in fear of imminent physical injury.”²⁹ In other words, OCS first accepts that the conduct alleged in the reports occurred, and then speculates that this conduct would have put Ms. B in fear of imminent physical injury. However, OCS did not prove by a preponderance of the evidence that Mr. B beat or choked Ms. B on July 26, 2016.

At the hearing, Mr. B objected to the two reports to OCS discussed in the protective services report, because the reports are hearsay.³⁰ The rules of evidence, including the hearsay rules, do not apply to this proceeding except as a guide.³¹ The protective services report is relevant and admissible. However, the fact that an item contains hearsay and the lack of an opportunity to cross-examine the declarant may be considered in determining what weight to give to that evidence.³² In this case, the allegations in the protective services report are considered. However, as explained below, the substantiation of those allegations is overturned because OCS did not present sufficient evidence to support them.

OCS substantiated the protective services report based on a history of domestic violence between the Bs that it described as “well known amongst extended family” and confirmed by “collaterals and law enforcement.” OCS concluded that the Bs’ children were “obviously aware and have been exposed.”³³

However, the agency record and the testimony at the hearing do not support these conclusions. OCS did not call any witnesses with first-hand knowledge. Its witnesses were the protective services specialist who investigated the report, and the investigator’s supervisor. In particular, OCS did not call C C, the law enforcement officer who reported the incident and brother-

²⁸ AS 11.41.230.

²⁹ Post-Hearing Brief at 4.

³⁰ See Record at 9.

³¹ 2 AAC 64.290(b).

³² *In re L.H. and LA. H*, OAH Nos. 14-0725-CHC and 14-0658-SAN at 4 (Commissioner of Health and Social Services 2015).

³³ Record at 11.

in-law of Ms. B, or any other member of the extended family. It did not call Chief T of the police department.

The notes of Ms. H's conversation with Chief T do not support OCS's conclusion that there was a confirmed history of domestic violence in the B family. Rather, they say there was a report of the incident, that there was not a lot of criminal history, and that Chief T was not aware of drug use or excessive drinking in the household.³⁴ Ms. B declined to meet with Chief T or make a report of the incident.³⁵ As shown elsewhere in the record, the report to the police department came from VPSO C, Ms. B's brother-in-law.³⁶ The only law enforcement "confirmation" that the incident occurred came from a law enforcement officer who is also an extended family member.

There is reason to question this report because VPSO C is also a relative, and there was evidence that the Bs and the Cs were not getting along. Ms. B testified that her sisters, including D C, did not like Mr. B. Ms. H reported VPSO C's comment to her that Mr. and Ms. B were no longer welcome at the C home because of Mr. B's behavior.

This would not necessarily be fatal to OCS's case, except that there is no other confirmation of the incident reported to OCS besides VPSO C's report. Ms. H interviewed Z and L, but their statements to her did not confirm the events described in the report to OCS made on July 27, 2016. Ms. B not only declined to make a report to Chief T, at the hearing she denied that she had reported the incident described to VPSO C, and denied that anything had occurred between her and Mr. B on the night of July 26, 2016. The OCS investigation did not include interviews with any other family members.

The allegations in the protective services report were not supported by testimony at the hearing, or evidence in the agency record. OCS did not demonstrate that it is more likely than not that the incident alleged in the report made to OCS on July 27, 2016 occurred. Based on the agency record and the evidence presented, this report should not be substantiated.

IV. Conclusion

The December 29, 2016 notice of substantiation of the report of maltreatment in the form of mental injury of Z and L by K B, made on July 27, 2016, is overturned.

DATED: July 5, 2017.

Signed

Kathryn L. Kurtz
Administrative Law Judge

³⁴ Record at 16.

³⁵ Record at 16.

³⁶ Record at 19.

Adoption

The undersigned, by delegation from of 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 14th day of August, 2017.

By: Signed _____
Name: Erin E. Shine
Title: Special Assistant to the Commissioner
Agency: Office of the Commissioner, DHSS

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