

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

In the Matter of)	
)	
M U)	OAH No. 18-0022-SAN
_____)	Agency No.

DECISION

I. Introduction

The Office of Children’s Services (OCS) received a report that M U had sexually abused his minor stepdaughter. OCS investigated and substantiated the allegations. It notified Mr. U that his name would be placed on the Child Protection Registry. Mr. U requested a hearing to challenge OCS’s substantiated finding.

OCS had the burden of proof in this case. It did not meet that burden. As a result, the substantiated finding and Mr. U’s subsequent placement on the Child Protection Registry is REVERSED.

II. Procedural History

OCS notified Mr. U that he was placed on the Child Protection Registry on October 25, 2017. Mr. U requested a hearing to challenge that placement on November 24, 2017. The case proceeded to a telephonic evidentiary hearing on June 29, 2018. OCS was represented by Assistant Attorney General Aaron Jabaay. Mr. U was represented by Jason Weiner, Esq. OCS did not present any witnesses. It relied upon the administrative record, which included the video of the forensic interviews of Mr. U’s two stepchildren. Mr. U testified on his own behalf. All exhibits were admitted.

III. Facts

Mr. U was married to E M in 2017. Mr. U, Ms. M, and Ms. M’s two children from a prior relationship, B and C, were residing together in City A at all relevant times. B was then 11 years old and C was then 9 years old.

In the summer of 2017, B and C had extended visitation out-of-state with their biological father for approximately six weeks. They returned to Mr. U’s and Ms. M’s home for a short period of time, and then Mr. U, Ms. M, and the two children left to visit out-of-state grandparents. They returned to their home on or about August 9, 2017.

On August 10, 2017, Ms. M came to her local police station with the two children. She reported that her children had just told her that Mr. U had touched B inappropriately. B told the

police officer that Mr. U had asked her if she wanted to take a bath with him, that he asked her if she wanted to wear a bikini, that she did not want to wear the bikini, and that they took a bath together, both of them wearing bathing suits, and that she wore her own bathing suit, and that this occurred sometime between March and June of 2017. B told the officer that Mr. U had touched her “in bad places” while in the bathtub. The police arranged for a forensic interview to be conducted.¹ The police reports indicate that the police’s preliminary interview of B, prior to the forensic interview, was recorded on body cam.² That interview is not contained in the record.

Both of the children were interviewed on August 10, 2017.³

A. B’s Interview

In B’s interview, she appeared a bit shy and reluctant to talk. In the interview, she stated the following:

- Sometime between April and June of 2017, Mr. U asked B if she would take a bath with him. B could not recall the exact date, only that the snow was melting. Her mother was working, and her brother was in bed.
- Mr. U was wearing shorts and asked B to put on a white bikini with red hearts that he took from a storage tub. She thought the bikini was “inappropriate” and wore her own one-piece swimsuit. Mr. U told her that he was trying to make their relationship stronger.
- While in the bathtub, Mr. U touched her inappropriately. B would not state where he touched her, nor would she circle the touched body part(s) on an anatomy drawing. Instead, she pointed to the breast area and the pubic area. Mr. U touched her under her clothing, and only touched the outside of her body.
- Mr. U told her to keep it a secret from her mother.
- B told her brother about the touching about two weeks before the interview.

B. C’s Interview

C was very matter-of-fact during his interview. In it, he stated the following:

- His sister told him about Mr. U touching her about three weeks before the interview. She told him twice “because that’s only how many times it happened.”⁴
- He and his sister had spent about six weeks that summer with their biological father. Afterwards, they visited their grandparents. The day after they got back from their

¹ Administrative Record (AR) 36.

² AR 39.

³ Both of the children’s forensic video interviews are contained in the administrative record.

⁴ See Interview at 6:55 – 7:10.

grandparents' is when he told Ms. M about Mr. U touching his sister. He and his sister waited to tell Ms. M until Mr. U had left for work because Mr. U gets "really mad."

- He did not see the incident.

C. Ms. M's Statements

Ms. M did not testify, and the record does not contain a recorded interview with her. She told the police that Mr. U had sexual fantasies involving micro-bikinis, that she had a white bikini with red hearts, and that her children should not have known about the bikini.⁵ Ms. M says that she thinks the incident would have occurred around May 24, 2017.⁶ On August 10, 2017, Ms. M told the police that she and Mr. U and she had an argument regarding a laptop computer and his infidelity the night before.⁷

D. Search Warrants

The police department requested and obtained a search warrant to search the U's home and also obtained a search warrant to record Mr. U's phone conversations and electronic communications with Ms. M.⁸

The police department did find and seize the white bikini with red hearts.⁹ Ms. M had several recorded conversations with Mr. U. During those conversations, he did not admit to improperly touching B. His tone in those conversations was angry but did not appear defensive. Ms. M and Mr. U discussed his prior infidelity in those conversations.¹⁰

E. Mr. U's testimony.

Mr. U testified as follows:

- He and B did not take a bath together, he did not ask her to wear a bikini, and he did not behave inappropriately with her.
- He had a good relationship with both children, although he had a better relationship with C than with B. He noticed some standoffishness when they came back from visiting their father.
- At the end of May or the beginning of June 2017, which was right before the children left to visit their father, the family took a fishing trip to City B. Mr. U provided pictures of

⁵ AR 70, 79.

⁶ AR 48, 53.

⁷ AR 47.

⁸ AR 66 – 79.

⁹ AR 63.

¹⁰ The record contains recordings of phone conversations between Mr. U and Ms. M on August 11, 2017 and August 15, 2017. The police records contain a summary of the August 11, 2017 recording. AR 48 – 52.

the fishing trip. In those pictures, both children were sitting on his lap while he was driving the boat, and both children and Ms. M appeared happy.¹¹

- Ms. M was not neat and would leave personal items that the children should not see in the open in their bedroom where the children could see them.
- He and Ms. M had a big fight immediately after they got home from the visit with her grandparents.

IV. Discussion

A. The Relevant Statutes and Regulations

The Alaska legislature has enacted several statutory schemes designed to protect children from abuse, maltreatment, and neglect.¹² 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 and make a finding that the report of abuse, maltreatment, or neglect has been substantiated.¹³

Substantiated abuse, maltreatment, and neglect is reported on a list, established by AS 47.17.040, known as the “central registry.” The central registry contains all investigative reports (but not reports of harm) filed by the Department of Health and Social Services (DHSS).¹⁴ These reports are confidential, but can be used by governmental agencies with child-protection functions, inside and outside the state, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody.¹⁵ Cases involving the central registry established by AS 47.17.040 are not subject to the Administrative Procedure Act (AS 44.62.330 - AS 44.62.630).¹⁶ The central registry is the only registry involved in this case.¹⁷ Child abuse, maltreatment, and neglect, as defined by statute, specifically include sexual abuse as it is defined in the criminal statutes.¹⁸

¹¹ Ex. A.

¹² 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).

¹³ This is typically referred to as a “substantiated finding of abuse or neglect.”

¹⁴ AS 47.17.040(a).

¹⁵ AS 47.17.040(b).

¹⁶ 7 AAC 54.255.

¹⁷ There is also a “centralized” registry, which is used for licensing background checks. See AS 47.05.330. This case does not involve placement on that registry.

¹⁸ AS 47.17.290(9); AS 47.10.011(7); AS 47.10.990(31).

OCS may issue a substantiated finding of abuse, maltreatment, or neglect based upon probable cause.¹⁹ For sexual abuse cases, a substantiated finding by OCS will be affirmed following an administrative hearing if OCS proves, by a preponderance of the evidence, that the sexual abuse occurred.²⁰

B. Did Mr. U sexually abuse his stepdaughter?

OCS's case consisted solely of the administrative record. While it included the forensic interviews with the two children, and recordings of conversations between Ms. M and Mr. U, there were no witnesses and it was not possible to ask the children, the interviewers, or Ms. M questions.

Mr. U testified. His testimony was not evasive. He appeared aggrieved, but not defensive. His recorded conversations with Ms. M were similarly aggrieved, but not defensive. Nothing in his statements can be construed as an admission. While this hearing was telephonic and it was not possible to physically observe him, nothing in the manner of his testimony suggests that he was not credible. OCS has not otherwise shown that he should be disbelieved. Accordingly, his testimony is accepted as credible.

In contrast, it is hard to assess either B's or C's credibility. Their demeanors during the forensic interviews did not lend to a finding one way or another, and OCS did not present any witnesses who might have assisted in making a credibility finding.

Mr. U's credible testimony was that the alleged incident with B did not occur. This was consistent with his recorded conversations with Ms. M. His testimony that the children could see personal items lying around his and Ms. M's bedroom accounted for B knowing about the bikini.

OCS's evidence also contains some major inconsistencies. B said the incident occurred when the snow was melting. However, Ms. M believes it had to have happened on May 24, 2017. The snow would have been completely gone in City A by May 24, 2017. In addition, Mr. U introduced photographs taken on a fishing trip at the end of May or beginning of June 2017. Those photographs show smiling children and both children sitting on his lap while driving the boat. It appears that both children were at ease with Mr. U. If B had recently been touched inappropriately by Ms. U, it is unlikely that she would have been so comfortable with sitting on

¹⁹ *In re X.Y.*, OAH No. 10-0312-DHS (Commissioner of Health and Social Services, 2011) (available online at http://aws.state.ak.us/officeofadminhearings/Documents/SAN/DHS100312.pdf?_ga=2.136013938.2105652554.1497906011-931794347.1416513843).

²⁰ *See generally, In re T.M.*, OAH No. 13-1200-SAN (July 7, 2014) (available online at http://aws.state.ak.us/officeofadminhearings/Documents/SAN/SAN131200.pdf?_ga=2.258099657.2105652554.1497906011-931794347.1416513843).

his lap. Finally, in C's forensic interview, he said "it" happened twice. It is unclear from the context whether he was talking about how many times his sister told him about the event, or whether he was saying that his sister told him that Mr. U had touched her on two separate occasions. In contrast, B only reported one incident.

OCS has the burden of proof by a preponderance of the evidence. Given the fact that Mr. U was credible and the inconsistencies in the evidence, it has not met its burden.

V. Conclusion

OCS's substantiated finding that Mr. U sexually abused B and the subsequent placement of Mr. U on the Child Protection Registry is REVERSED.

DATED: July 30, 2018.

By: Signed
Lawrence A. Pederson
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 24th day of August, 2018.

By: Signed
Deborah Erickson, MBA
Project Coordinator
Office of the Commissioner
Department of Health and Social Services

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