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

In the Matter of	)	
	)	
N V. C	)	OAH No. 19-0979-SAN
	)	Agency No.

FINAL DECISION

I. Introduction

N V. C contests a substantiated finding of child maltreatment entered against him by the Office of Children's Services (OCS) on December 18, 2018, following an investigation of a report of harm received October 9, 2018.[1] OCS substantiated the finding of maltreatment based on its conclusion Mr. C repeatedly required his grandchildren to drink alcoholic beverages "until they got sick or passed out."

Because OCS has not shown it is more likely than not that Mr. C did so, the substantiation finding is Reversed.

II. Facts and Proceedings

The proposed decision in this matter was issued on April 27, 2020. Both OCS and Mr. C filed Proposals for Action (PFA). This final decision has been modified and reflects the decision of the commissioner's delegate pursuant to AS 44.64.060(e)(3).

J and T C were married following a brief courtship that began while T was visiting family and friends in Alaska. Following the wedding, T moved from her home on the East Coast to the C family property several miles from City A, Alaska. The C property is significant in size. Multiple members of the extended family live on or nearby the family home property. Many, including J, have also worked in the family construction business. The property and construction business appear to be primarily owned by N C, J's father, who is the subject of this proceeding.[2]

In 2018 J and T had three children: M.B., ten-years-old; G.B. nine-years-old; and J.B., four-years-old.[3] All three children are boys. The oldest boys attended public school until spring 2018 when the family decided to home school them.[4]

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1 The delay between the finding and the administrative hearing on appeal is explained by Mr. C's decision to stay the administrative proceeding while related civil cases were resolved in state superior court.

2 Testimony of I. C and M. C.

3 Agency Record (AR) 000006.

4 AR 00015-16; Testimony of P. V.

On or about October 8, 2018, T reported that J had assaulted her to the police. She moved from the C home to a shelter in City A. On October 19, 2018, OCS received a report of harm regarding M.B., G.B, and J.B. related to the incident of domestic violence between J and T.[5]

An OCS worker, Q V, met with T and the boys to investigate the report of harm. The OCS investigation at that time was primarily concerned with whether the boys were Children in Need of Aid (CINA) due to conduct by J. However, during their interview with Ms. V, the older boys also told her that their grandfather, N, had given them alcohol on repeated occasions.[6]

M.B. told Ms. V that his grandfather, N, forced him to drink alcohol. He reported that one time he was forced to drink so much alcohol that he vomited.[7] He did not provide any details as to when or where this occurred other than it happened before he started home schooling in the spring of 2018.[8]

G.B., interviewed separately, told Ms. V that his grandfather had given him wine, moonshine, and vodka. He described moonshine and vodka as tasting the same. He stated it made him "dizzy."[9]

The children did not provide any specific detail regarding their age when this occurred, the location, or who was present when they were given alcohol. OCS did not ask and no information was ever presented regarding whether the children received or needed medical care due to alcohol consumption.

J and N were interviewed by OCS on October 25 and 26, 2018.[10] Again, much of those interviews pertained to the allegations T made against J which are irrelevant to the issue presented here. Regarding whether the children had ever been given alcohol, J and N told OCS that the children had been given a Russian folk-remedy of herbs soaked in vodka on occasion, and were permitted to taste wine and other spirits when the adults were drinking, if the children asked. They said that children were not given alcohol to drink, nor were they forced to drink alcohol to appease N C.[11]

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5 AR 000002.
6 Testimony of P. V.
7 AR. 000015-16; Testimony of P. V.
8 *Id.*
9 *Id.*
10 AR 000012-13.
11 *Id*.

The Cs suggested that because M.B. was given the herbal remedy when sick, he mistakenly attributed his vomiting to alcohol rather than his underlying illness. J specifically denied ever having seen his father give alcohol—other than the remedy and the tastes—to his children. N C denied ever forcing or coercing M.B. or G.B. to consume alcohol.[12]

OCS counseled T regarding the risk of harm presented to M.B., G.B, and J.B. by their father. T filed divorce and custody proceedings against J on December 20, 2018.[13] She also filed requests for domestic violence restraining orders for herself and children against J and N.[14] Because OCS concluded T was taking adequate action to protect the children, OCS did not file a CINA case against her or J C.[15]

J responded to the divorce action, and requested custody and visitation of the children. He filed a counter request for a domestic violence restraining order against T.[16] N C with his wife, P, also filed a domestic violence restraining order request against T.[17]

A hearing on the consolidated restraining orders took place on October 26, 2018. The parties entered a stipulation resolving the issues before a ruling from the court, however. At the restraining order hearing prior to entry of the stipulation, the court took testimony regarding the extended C family relationships from several witnesses. Two witnesses, Z D, J's sister, and L D, her husband, provided testimony regarding whether N C furnished alcohol to his grandchildren.[18]

Z D initially testified that she lived on C family property until 2016. She said she saw her father give alcohol to her own children and her nephews on a regular basis. According to her, he gave them wine, beer, vodka, and moonshine, forcing them to drink it. She also said their grandmother, P, gave the children alcohol.[19] She was not asked to, nor did she describe any specific occasion on which the furnishing of alcohol occurred, the general time frame or location,

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12 Testimony of I. and M. C.

13 *T C v. J C*, No. 3XX-18-00000-CI (Superior Court). See, https://records.courts.alaska.gov/eaccess/home.page.2. (Hereinafter "CourtView"). None of the filings or rulings in that case were submitted to OAH.

14 *See T C v. J C*, No. 4XX-18-00000-CI. (District Court). Available on CourtView. The underlying filings were not submitted to OAH, but presentation for the hearing included information indicating the divorce proceeding was particularly acrimonious.

15 AR 000009.

16 *See, J C v. T C,* No. 4XX-18-00000-CI. (District Court). Available on CourtView.

17 Testimony of M. C. *See also, P. C v. T C,* No. 4XX-18-00000-CI. (District Court). Available on CourtView.

18 Ex. 3.

19 The boys did not report this to OCS.

or any detail regarding who was present, where it occurred, or what happened. She did say the children were "little," indicating they were not close to their current age, and estimated their ages as six and two when Mr. C gave them alcohol. She saw them "act goofy" after alcohol was given to them.[20]

On cross-examination, Ms. D admitted, that despite her initial testimony, she had only been at the C family residence on a handful of occasions since 2012, primarily to deliver potatoes. She did not go in the residence at those times. She also acknowledged that she was angry with her father because he had assaulted her; made a false assault accusation against her husband; and was demanding repayment of a $100,000 loan that she and her husband apparently considered a gift. As cross-examination continued, she became increasingly hostile and antagonistic toward counsel. Her answers became less responsive. Ultimately, she made several self-bolstering claims and proclamations regarding her good character that came across as exaggerated and insincere vouching, further undermining her credibility.[21]

Her husband, L, also testified that he saw N "push" alcohol on L's children and his nephews. He testified this occurred before 2014. He believed M.B. was around six years old and G.B. was around two years old when he saw N give alcohol to them. He recalled that N frequently gave the children "two shots" of beer in the presence of T and J. He was not asked to, nor did he describe any specific occasion on which the furnishing of alcohol occurred, the general time frame or location, or any detail regarding who was present, where it occurred, or what happened. He acknowledged his relationship with N was unpleasant. Disputes between them had repeatedly involved police response and family intervention. He had not returned to the C family residence nor seen N since he threatened to kill N in 2010 or 2012.[22]

The administrative hearing took place on March 27, 2020.

The OCS adverse action notice informed Mr. C that it substantiated the claim against him because the children "committed an illegal act as a result of pressure, guidance, or approval from" him as prohibited in AS 47.10.011. The "illegal act" M.B. and G.B. would have committed was underage drinking in violation of AS 04.16.050. Although it is improbable children as young as M.B. and G.B. would be pursued for this illegal act, the technical reading

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20 *Id.*
21 *Id.*
22 *Id.*

by OCS that an illegal act could have occurred is correct, and that framework shaped this case. Prior to the hearing, N C filed a Motion for Summary Disposition supplemented by an oral request to void the substantiation finding 1) due to vagueness in the notice against him and 2) because any provision of alcohol to M.B. or G.B. by him would have been lawful under AS 04.16.051(b) so the children did not commit an illegal act as alleged in the notice.

As discussed more fully herein, the argument regarding deficiency of the original notice is well-taken, but because Mr. C received actual notice prior to the time his motion was made and was given more than adequate time to prepare, his requested remedy was denied. The issue of whether the children consumed alcohol or committed an illegal act at Mr. C' s encouragement was reserved for hearing.

Exhibits from both parties were admitted as was the written administrative record. Assistant Attorney General Brian Starr appeared on behalf of the agency. He called two live witnesses: R E and Q V. Ms. E testified regarding OCS procedures, her supervision of the case, and how it was assigned to Ms. V. Ms. V testified regarding her interviews regarding the boys and the statements they made to her as outlined above.

Both OCS workers submitted their conclusion that M.B. and G.B. committed an illegal act due to Mr. C' s coercion of them to consume alcohol and, thus, his conduct constituted maltreatment under the Child Protection statutes.[23] In addition, Ms. V's testified to her opinion Mr. C's conduct constituted neglect because there was "a reasonable potential that Mr. C' s actions would have impacted their health and development."[24]

Jason Wiener, Esq., appeared on behalf of Mr. C. Mr. C appeared at the hearing and testified on his own behalf as outlined above. He denied ever providing his grandsons alcohol other than the homeopathic remedy and sips to taste a beverage he was drinking. His son, J, the children's father, testified the children were given the vodka/herbal remedy and allowed to taste alcohol on occasion. However, he said he never saw N encourage or force them to drink alcohol or give them their own shot or glass. He did say that had his father wanted to let the children drink more, he would have given permission for that to occur.[25]

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[23] Ex. 3.

[24] Testimony of H. E and P. V. However, OCS did not include this theory in the notice sent to Mr. C in December 2018, nor amend the notice, so this theory was not considered by the Administrative Law Judge.

[25] Testimony of I. C.

III. Discussion

A. Adequacy of Notice Contained in the OCS Adverse Action Form Letter

1. Introduction

Substantiated abuse, maltreatment, or 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).[26] The registry is not available directly to the public, but it is used by governmental agencies with child and adult protective functions, inside and outside the Alaska, relating to investigations or judicial proceedings involving abuse, neglect, or custody.[27] Presence on the list can impact an individual's eligibility for certain occupational licenses.[28] Placement on the list is based on an individual's prior conduct rather than an assessment of the individual's current dangerousness. There is no mechanism for removal from the registry based on a showing of rehabilitation. The only basis for placement on this registry is a prior finding by a court or other adjudicatory body that Mr. C committed abuse or neglect.[29]

This case involves whether Mr. C can properly be named on that list. According to Mr. C, in addition to the stigma associated with the abuse finding, his presence on the list impacts his ability to pursue employment opportunities. He states he has been unable to work since the OCS determination because the registry is available to social work and health care employers and placement on the list constitutes a barrier to licensing and employment. Although little detail was provided for this assertion, it was not challenged by the agency, and Mr. C's assertion of impediment is accepted.[30]

Prior to the hearing Mr. C made challenges to the adequacy of the notice provided to him by OCS. The Administrative Law Judge (ALJ) made an oral ruling with written decision to follow, that the OCS notice was inadequate. However, Mr. C's requested remedy was denied.

This portion of the decision explains the reasoning for the conclusions that OCS's notice was legally insufficient to inform N C of the allegations against him, but under the existing

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[26] AS 47.17.040.
[27] *Id.*
[28] AS 47.17.040(b).
[29] *In re B.B.*, OAH 12-0206-DHS (Commissioner or Health and Social Servs. 2013). Available on line at https://aws.state.ak.us/OAH/Decision/Display?rec=5942 as are the other OAH cases cited herein.
[30] Mr. C only made a procedural due process argument: i.e., the notice was inadequate. He did not file a substantive due process challenge to the central registry.

circumstances he was not prejudiced thereby. There are no factual issues to be resolved regarding the OCS notice: the notice speak for itself. Accordingly, adequacy of the OCS notice can be resolved as a purely legal matter based on the applicable regulations and precedent.

OCS provides the suspected abuser with a form notice called an Adverse Action Letter when it substantiates a finding as notice for its action. The Adverse Action Letter form tells the person the day the report of suspected harm was received. It then provides a grid listing the victim, the suspect, and the statute violated. It does not provide the date the suspected misconduct occurred nor identify what acts were taken or omitted. Mr. C received the Adverse Action Letter in this format.[31]

2. The Governing Standards

The due process clause of the Alaska Const. provides: "No person shall be deprived or life, liberty, or property without due process of law."[32] This clause requires that adequate and fair procedures be employed when state action threatens protected life, liberty, or property interests.[33] Property and liberty rights cannot be taken or infringed upon by government action unless there is notice of the action proposed to be taken and an opportunity to be heard.[34] Due process typically requires a state agency provide timely and adequate notice detailing the reasons for a proposed action and effective opportunity to defend before taking action to afford individuals protection from agency error and arbitrariness.[35]

In determining whether notice of proposed agency action is adequate, the balancing test articulated by the U.S. Supreme Court in *Mathews v. Eldridge*[36] is applied. The amount of information required in a notice depends partly on the importance of the individual interest at stake. Mr. C's interest is substantial as a matter of law.[37]

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31 AR 000001-4.

32 Alaska Const. art. I, sec. 7.

33 *E.g. Doe v. State, Dept. of Public Safety*, 444 P.3d 116, 124 (Alaska 2019).

34 *Campbell v City of Homer*, 719 P.2d 683 (Alaska 1986).

35 *Baker v. State, Dep't of Health and Soc. Serv*, 191 P.3d 1005, 1009 (Alaska 2008) (discussing public benefits).

36 424 U.S. 319 (1976).

37 The Alaska Supreme Court has previously held that Alaskans have a right of personal autonomy that includes a right to shield personal information from public disclosure.[37] *E.g., Alaska Wildlife All. v. Rue*, 948 P.2d 976, 980 (Alaska 1997). Presence on a state registry maintained to list offenders who harmed children or the vulnerable can lead to serious negative consequences that the Alaska right to privacy is meant to protect against. *Doe v. State*, 189 P.3d 999 (Alaska 2008) (discussing the more widely available Sex Offender Registry).

The regulatory and constitutional sufficiency of Alaska state agency notices is governed by *Allen v. State, Dep't Soc. Serv., Dep't of Public Assistance*, 203 P.3d 1155 (Alaska 2005). That case addressed Division of Public Assistance (DPA) authority to recoup excess food stamp benefits and concluded the notice used was substantively inadequate because it did not contain information on the reasons underlying the agency determination in sufficient detail to permit informed review or preparation of a defense. Due process requires notice and an explanation of the *specific* reasons for agency action. The agency must "show how and why it determined that [action] was in order."[38]

3. The Notice is Insufficient

Applying the governing standards here, the current OCS Adverse Action letter did comply with the regulatory requirement Mr. C be advised of the right to appeal its substantiation finding.[39] It did properly provide him with notice of the statutory provision underlying its decision.[40] The Adverse Action letter did not, however, notify him regarding the date the alleged abuse occurred nor identify what action he took in violation of the governing statutes. In addition, although the notice informed Mr. C that he would be placed on the child-protection registry because of the substantiation finding, it did not inform him of the consequences attaching to that action or identify the applicable statute which would permit him to independently investigate the consequences.[41] Those failures are material under both the *Mathews v. Eldridge* and *Allen* standards. The notice is constitutionally insufficient.[42]

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38 *Allen*, 203 P.3d at 1166-67.

39 7 AAC 49.070.

40 AR 000001-4.

41 AR 000003. Prior to 2018, OCS kept two registries, the "*central registry"* established in AS 47.17.040 and a "*centralized registry"* established in 7 AAC 10.955. The registries had different purposes and differing degrees of public access. Substantiation findings by OCS were appealed to OAH pursuant to 7 AAC 54.215. That regulation was repealed when the centralized registry was abolished. Hence, substantiation findings now only implicate the central registry and are appealed pursuant to AS 47.17.040(c). The referral is now submitted via AS 44.64.060(b).

42 Per *Allen, supra,* defective notice cannot be cured by simply having a claimant go through the hearing process and thereby obtain the information that the initial notice should have contained. *Id.* at 1167. Nor is the appellant automatically entitled to a ruling in his favor as requested by Mr. C. Instead, OCS is permitted to correct its defective notice by completely reissuing it. *Id*. at 1169. That is the approach previously taken following defective notice determinations by OAH in other contexts. *E.g., In the Matter of J.Q,* OAH 19-0435-GRE (Commissioner of Health and Social Servs. 2019). Decision at 11; *In the Matter of J. Doe,* Case No.11-FH-129 (DHSS Ofc. Hrgs. & Appeals 2011). But, in this case, Mr. C participated in the administrative process for months before raising the notice issue. By then, he had received the complete agency record, heard and cross-examined the OCS workers, and had access to all the tools of civil discovery in the related civil proceeding. This process gave Mr. C more than adequate notice of the allegations against him. Due process does not require the remedy he proposed, and because the issuance of a new notice would have served no purpose but delay, under the circumstances presented here, it was unnecessary. *See, e.g., Skvorc v. State, Personnel Bd.*,996 P.2d 1192, (Alaska 2000) (post-filing amendments and information sufficient to provide preparation of defense in administrative proceeding).

The Department of Health and Social Services is committed to procedural fairness as well as the protection of children. In its PFA, OCS acknowledges the current notice form is deficient, and indicates it intends to amend the Adverse Action letter now that the issue has been squarely addressed. Such efforts should be promptly executed as the original ruling from the Administrative Law Judge occurred in February 2020 and this issue has been informally brought to OCS attention in the past.

It is expected that future notices will contain a brief written summary of the essential facts constituting the abuse, maltreatment, or neglect, including the general date and location, the victim by initial, and the statute violated. Along with notice of the right to request a hearing, the notices should also identify the Child Protection Registry by statute and include at least some description of the consequences of appearing on it

B. The Merits of the Substantiation Findings

1. The Relevant Statutes and Regulations

The Alaska legislature has enacted a comprehensive statutory scheme designed to protect children from mistreatment and neglect. The Child in Need of Aid (CINA) statutes and Child Protection statutes are included in this scheme. These laws give OCS a range of possible responses and remedies, depending on the type and immediacy of harm faced by the children. OCS may pursue each of these remedies simultaneously; however only OCS's conclusions under the Child Protection statute are at issue in the administrative hearing.

a. The Child in Need of Aid (CINA) statute (AS 47.10)

One portion of the statutory scheme is designed to "promote the child's welfare and the parent's participation in the upbringing of the child to the fullest extent consistent with the child's best interests."[43] Thus, OCS is authorized to protect a child whenever a parent's conduct triggers a finding that the child is a Child in Need of Aid (CINA) as defined in AS 47.10.005 - AS 47.10.990. The CINA statutes list twelve discreet circumstances that trigger OCS action.[44]

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[43] AS 47.10.005(1); *See also* AS 47.05.060 providing: The purpose of this title as it relates to children is to secure for each child the care and guidance, preferably in the child's own home that will serve, the moral, emotional, mental, and physical welfare of the child and the best interests of the community; to preserve and strengthen the child's family ties unless efforts to preserve and strength the ties are likely to result in physical or emotional damage to the child, removing the child from the custody of the parents only as a last resort when the child's welfare or the safety or the protections of the public cannot be adequately safeguarded without removal; and when the child is removed from the family, to secure for the child adequate custody and care and adequate planning for permanent placement of the child.

[44] AS 47.10.011.

CINA proceedings take place in superior court and are designed to facilitate family reunification through the provision of state services addressing the causes underlying parental failure.[45] The CINA statutes specifically provide for protective action based on the likelihood of future harm as well as completed acts of harm.[46] OCS may take emergency or non-emergency action depending on the immediacy of harm.[47] The touchstone of CINA proceedings is the "best interest of the child."[48] OCS is authorized to seek permanent removal of the child from the home only as a "last resort."[49] CINA proceedings are "not concerned with imposing either criminal penalties or civil liability on the abuser," but rather with determining "whether the child's well-being is imperiled."[50]

b. The Child Protection Statute (AS 47.17)

In contrast, the Child Protection (CP) statutes, AS 47.17.010 - AS 47.17.290, look more narrowly at whether a particular event occurred, and, if so, whether it constitutes child maltreatment under the law. The Child Protection statutes require OCS to investigate reports of suspected harm to children and determine whether conduct by the suspect is "substantiated."[51] To enter a "substantiated" finding, OCS must determine, more likely than not, that the adult in question has abused or neglected a specific child. Those terms are defined as follows for purposes of the Child Protection statute:

- Abuse or neglect is defined in AS 47.17.290(3) 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."
- Maltreatment is defined in AS 47.17.290(9) and permits OCS to substantiate a report of harm under any circumstances which would trigger a CINA finding under AS 47.10.011.
- Neglect is defined in AS 47.17.290(11) as "the failure by a person responsible for the child's welfare to provide necessary food, care, clothing, shelter, or medical attention for a child."[52]

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45 *A.A. v. State, Dep't of Family and Youth Servs.*, 982 P2d 256, 259-60 (Alaska 1999).

46 *Theresa L., supra; See also, In re K.L.,* OAH 16-1145-SAN (Commissioner of Dep.t of Health and Soc. Servs. 2016). Decision at 8.

47 AS 47.10.142.

48 *Id.*

49 AS 47.05.060.

50 AS 47.17.010.

51 AS 47.17.025; AS 47.17.030.

52 Note that this statutory definition is narrower in scope than the CINA definition. *Compare*, AS 47.10.014.

Substantiated abuse, maltreatment, or neglect is reported on a list, established by AS 47.17.040, known as the "central registry" The central registry contains all investigative reports filed by the DHSS as outlined above.[53] As previously discussed, the internal registry is not available to the general public, but is used by governmental agencies with child and adult protective functions as well as occupational licensing and enforcement.[54] Placement on the central registry can have meaningful implications on one's life and livelihood.[55] Thus, unlike CINA statutes, the Child Protection statutes result in some civil sanction on the abuser even if such sanction is not a primary purpose of the central registry.

c. The substantiation appeal framework

Proceedings regarding the propriety of an OCS substantiation finding are handled through the Office of Administrative Hearings (OAH).[56] The administrative proceeding does not focus on the best interest of the child or a possibility of future harm, but only whether a discreet act violative of the statutes occurred.[57] Thus, a substantiated finding by OCS will be affirmed following an administrative hearing/appeal only if OCS proves, by a preponderance of the evidence, that the alleged misconduct occurred and that the child was harmed thereby.[58]

The formal rules of evidence do not apply in these proceedings "except as a guide."[59] The standard for admissibility is whether the evidence presented is the kind of evidence on which reasonable people might rely on in the conduct of serious affairs.[60] This is a lower standard than applied at OAH hearings conducted under the Administrative Procedure Act (APA), AS 44.62.330-660. In those cases, hearsay continues to be generally admitted, and may be used to supplement or explain direct evidence, but "is not sufficient by itself to support a finding unless it would be admissible over objection in a civil action."[61] For purposes of deciding whether reasonable people would find the type of evidence submitted in this case persuasive and reliable, it is necessary to keep this distinction in mind.

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53 AS 47.17.040.
54 *Id.*
55 AS 47.17.040(b).
56 AS 47.17.040(c).
57 *In re K.L., supra*, at 8.
58 *Id.*
59 2 AAC 64.290(b).
60 2 AAC 64.290(a)(1).
61 AS 44.62.460.

OCS originally substantiated the report of harm against Mr. C based on its conclusion he violated AS 47.10.011(6)(substantial physical injury) and AS 47.10.011(12)(child pressured to commit an illegal act).[62] These are the statutes for which it provided notice in the Adverse Action letter dated December 11, 2018.[63] For whatever reason, OCS did not choose to pursue substantiation under AS 47.17.290(3) the general prohibition against abuse or neglect contained in the Child Protection statutes.[64] At the hearing, OCS is bound by the elements of the statutes for which it gave notice. The theories under which OCS chose to proceed against Mr. C presented it with certain difficulties at the hearing.

d. OCS Did Not Prove a Violation of AS 47.10.011(6).

A violation of AS 47.10.011(6) requires proof by a preponderance of the evidence that the "child has suffered substantial physical harm, or there is a risk that the child will suffer substantial physical harm as a result of conduct by or conditions created by the" alleged abuser. Pursuant to AS 47.10.015 physical harm[65] and risk of physical harm occurs to a child if:

> (1) the child was the victim of an act described in AS 11.41.100- 11.41.250,[66] 11.41.300[67], 11.41.410 - 11.41.455[68], or AS 11.51.100[69] and the physical harm[70] occurred as a result of conduct by or conditions created by a parent, guardian, or custodian; or
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> (2) a negligent act or omission by a parent, guardian, or custodian creates a substantial risk of injury to the child.[71]

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62 AR 00001-04.

63 *Id.*

64 That statue provides: "child abuse or neglect" means 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 that the child's health or welfare is harmed or threatened thereby; in this paragraph, "mental injury" means an injury to the emotional well-being, or intellectual or psychological capacity of a child, as evidenced by an observable and substantial impairment in the child's ability to function;

65 Defined in AS 47.10.990(28).

66 Forms of homicide and assault.

67 Kidnapping.

68 Sexual Assault and Sexual Abuse of Minors.

69 Endangering the Welfare of a Child in the First Degree.

70 For purposes of these statutes serious physical injury to a child under 12 years of age like M.B. and G.B. means: (1) physical injury caused by an act performed under circumstances that create a substantial risk of death; or (2) physical injury that terminates a pregnancy or causes (A) serious disfigurement; (B) serious impairment of health by extensive bruising or other injury that would cause a reasonable person to seek medical attention for the child from a health care professional in the form of diagnosis or treatment; (C) serious impediment of blood circulation or breathing; or (D) protracted loss or impairment of the function of a body member or organ. AS 47.10.015.

71 AS 47.10.015.

Applying this framework to the evidence presented at the hearing results in the conclusion the OCS substantiation finding based on AS 47.10.011(6) must be reversed. OCS presented no evidence that M.B. or G.B were injured in the manner required by AS 47.10.015(1). They were not killed, assaulted, sexually abused, kidnapped, or endangered as defined by the governing statutes. Nor did OCS establish or argue that a negligent act or omission by N C created a substantial risk of physical injury to his grandsons as required in AS 47.10.015(2). To the contrary, OCS solely argued that Mr. C engaged in purposeful acts directed toward them.

e. OCS Did Not Prove a Violation of AS 47.011(12)

A violation of AS 47.10.011(12) requires proof that "the child has committed an illegal act as a result of pressure, guidance, or approval from the child's parent, guardian, or custodian." In this case, OCS alleged that M.B. and G.B. violated AS 04.16.050, underage consumption of alcohol, because of pressure from their grandfather. That statute reads:

> a) A person under 21 years of age may not knowingly consume, possess, or control alcoholic beverages except those furnished to persons under AS 04.16.051(b).

AS 04.16.051 prohibits furnishing or delivering of alcoholic beverages to persons under the age of 21. The exception set out in AS 04.16.051(b) allows furnishing or delivering "by a parent to the parent's child, by a guardian to the guardian's ward, or by a person to the legal spouse of that person if the furnishing or delivery occurs off licensed premises. This is an affirmative defense.[72] It does not shield the minor or the adult from prosecution, it only permits the jury to enter a finding of not guilty after it hears evidence of consumption and concludes that the alcohol was provided by a parent to the parent's child.

Mr. C relies on the provisions of AS 04.16.051(b) to argue that while he did not provide his grandsons with alcohol other than the medicinal remedy, had he done so the consumption by the children would not have been illegal because this statute gives him legal authority to do so. In effect, he argues that even assuming the accusation against him is true, OCS is not entitled to substantiate a finding against him as a matter of law. This argument is not persuasive.

First, prior to the hearing, Mr. C strenuously argued that OCS had no authority to place him on the registry because he was *not* a parent or guardian and OCS authority was limited to taking action solely against individuals in those positions. Mr. C cannot claim the protection

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[72] *Trout v. State*, 866 P.2d 1323 (Alaska App. 1994).

granted to the status of parent or guardian under criminal law while also denying he holds the same status for child protection purposes.

Second, Mr. C is not a parent or guardian. He relies on a hypothetical transfer of authority from his son, the children's parent, as the basis for his claim of legal privilege. However, Mr. C provided no authority for the proposition that a parent can delegate the statutory power to provide alcohol to their child to a third-person no matter how close the relationship. Nor could the ALJ find authority for the proposition the parent could expand the specific legislative scope of AS 04.16.051(b). Had the legislature intended to include grandparents or other delegees in the protections of AS 04.16.051(b), it could have easily done so. It did not. The statute will be enforced as written.

Third, the circumstances presented here would not provide a compelling argument for Mr. C' s justification in any event. J C, testified he never saw his father provide his sons with alcohol. He did testify that he would have permitted his children to drink alcohol with their grandfather had he been present and the request made to him. However, a post-event statement that consent would have been provided is not the equivalent of the specific, contemporaneous act of consent established in AS 04.16.051(b), especially when N C denies the conduct ever occurred.

Therefore, Mr. C' s argument is rejected. If N C provided alcohol to his grandsons, their consumption would have been an illegal act as defined in AS 04.16.050 and the OCS substantiation finding is correct.

The question then becomes one of whether OCS established by a preponderance of the evidence that N C provided alcohol to his grandsons. Neither M.B. nor G.B. testified at the hearing. To meet its burden of proof, OCS relied solely on their hearsay statements as relayed by Ms. V, the contents of the agency file, and prior recorded testimony from the domestic violence restraining order (DVRO) hearing.

Ms. V provided pure hearsay testimony: the statements by M.B. and G.B were offered to prove the truth of their contents and no exception for the admission exists under the rules of evidence.[73] Although hearsay, such statements are always admissible in an OAH substantiation hearing, and are often extremely credible. They can form the basis of an OAH decision standing alone.

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[73] Alaska Rule of Evidence (A.R.E). 801.

In this case, though, the age of the children and lack of concrete grounding as to when and where the events took place diminished the reliability of the evidence. Based on when the children were in public school, the events could have taken six months to four years before the report. Reasonable people would not rely solely on the vague second-hand reports of young children to conduct their serious affairs.

OCS argued the children's statements as relayed by the caseworker were sufficiently reliable, especially when supported by testimony from their aunt and uncle to meet its burden. OCS presented the former testimony[74] of Z and L D, to provide sufficient corroboration of the children's statements and establish their reliability.[75] Testimony from the Ds was originally offered in the DVRO hearing between T C on behalf of her children against J, their father, and N, their grandfather.[76]

Having heard the testimony by Z D, however, this decision concludes she was not sufficiently believable to justify reliance on her former testimony. Ms. D was evasive, hostile, and partisan. Her theatrical invocations of good character and purity of heart are viewed with skepticism and make the rest of her testimony appear more dubious. Her testimony included numerous false suggestions, such as when she claimed to live at N C's home and "always" be there, but she had, in fact, departed in 2012, six years before her testimony. There were other inconsistencies in her account which rendered her not credible. Notably, she testified she saw Mr. C provide alcohol to M.B. starting when M.B. was six years-old, however, M.B. was only four years old when Ms. D departed the household.

L D testified he had not seen N C since he threatened to kill N in 2010 or 2012. Logically, then, he could not have seen N C give alcohol to M.B. or G.B. after that time. He,

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74 Under A.R.E. 804(b)(1) "former testimony" is an admissible exception to the evidence rules. Former testimony is that of unavailable witness previously given "at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

75 OCS originally submitted a large portion of the DVRO hearing. However, most of that information was irrelevant and pertained only to actions by J. A specific exhibit, Ex. 3, containing only this evidence from the proceedings, was created and admitted. The remaining portions of the DVRO hearing were not.

76 A restraining order against N C would have been legally authorized only if he committed a crime involving domestic violence against them. AS 18.66.100. This is sufficient to establish a similar if not identical motive for cross-examination at the DVRO hearing. The former testimony by the Ds was admissible under the relaxed OAH standards and would be admissible over objection in a civil action pursuant to A.R.E. 804(b)(1). *Sanders v. State*, 364 P.3d 412 (Alaska App. 2015). It could be used to corroborate the hearsay statements from M.B. and G.B. even under the more stringent APA hearing standards.

too, testified the boys were "somewhere" around two and five or two and six when Mr. C gave them alcohol. This is impossible given the boys' dates of birth: they were born only 14 months apart.[77] At no time would three to four years have separated their age. If Mr. D were attempting to convey that Mr. C began giving alcohol to M.B. when he was five or six, but started at a younger age with G.B., his word choice was unusual.[78] On balance, given Mr. D's obvious bias and the vagueness of his testimony, this decision concludes his testimony was not sufficiently reliable that reasonable people would rely on it to conduct their important business.

OCS's concern for M.B. and G.B.'s best interest is more than understandable given their statements to the caseworkers, T's troubling descriptions of her relationship with their father and grandfather in the agency record, and the dysfunctional description of the extended C household presented at the restraining order hearing. Under the CINA standards for intervention to insure the children were not in need of aid, OCS's actions were reasonable. Regardless of the propriety of a CINA response to address that risk, however, the focus in this proceeding requires OCS separately establish that its decision to place Mr. C on the central registry was correct.

It did not do so.

IV. Conclusion

OCS chose to proceed against Mr. C relying on very specific allegations. OCS was hindered by the unavailability of live witnesses at the hearing. OCS did not establish that is more likely than not that Mr. C committed a violation of AS 47.10.011(6) as defined by law. Nor did OCS prove by a preponderance of the evidence that he committed a violation of AS 47.10.011(12) because it lacked sufficient reliable evidence to do so. Accordingly, both substantiation findings are reversed.

Dated: June 11, 2020

Signed
Jillian Gellings
Commissioner Delegate

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]

[77] M.B. was born 00/00/2008 and G.B. on 00/00/2009.

[78] This is improbable as well. If Mr. D last saw Mr. C in 2010, M.B. would only have been two years old. If Mr. D last saw Mr. C in 2012, M.B. would have been four years old.