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

In the Matter of	)	
	)	
K Q	)	OAH No. 20-0012-SAN
	)	Agency No.

DECISION

I. Introduction

The Office of Children's Services (OCS) received a report that K Q was drinking to excess and driving under the influence with his minor children in the car, as well as exposing the children to domestic violence through his relationship with his girlfriend. After an investigation, OCS concluded that Mr. Q's conduct constituted neglect and had exposed the children to a substantial risk of physical harm.

When OCS notified Mr. Q of its findings, and that these would be entered in the "child protection registry" maintained by OCS, he requested an administrative hearing to contest the findings. After a hearing at which OCS bore the burden of proving the findings should be substantiated, this decision concludes that Mr. Q more likely than not maltreated his children both by drinking and driving with them in the car, and by exposing them to domestic violence. It is therefore appropriate that a substantiated finding be entered into the child protection registry. However, this decision rejects OCS's classification of the maltreatment as physical abuse. Accordingly, that finding is removed from the registry, but the neglect finding will remain.

II. Facts

A. Background

K Q and F P are the divorced parents of L and M, who were 14 and 12 years old, respectively, at the time of the events giving rise to this proceeding. At the time of these events, the parents shared custody of M and L.

Mr. Q is in a romantic relationship with T N. Their relationship is notable for a history of alcohol use and domestic violence, with Ms. N having been arrested in March 2018 for assaulting Mr. Q.[1] A protective services report (PSR) to OCS arising out of that incident was investigated but did not result in a substantiated finding of maltreatment.[2] OCS received two other PSRs about M and L in May 2018 – one concerning allegations of physical abuse of L, and

[1] Ex. 13.
[2] Ex. 2, p. 2.

the other concerning the children's exposure to alcohol abuse by Mr. Q and Ms. N.[3] Neither report resulted in substantiated findings of maltreatment.[4]

B. October 2019 report and investigation[5]

In October 2019 OCS received another PRS regarding concerns about M and L. While the identity of a reporter is typically confidential, multiple witnesses and documents in this case identified the reporter as L herself, who had approached her school counselor about problems at home.[6]

The report raised two concerns: (1) Mr. Q's alcohol use – including, specifically, an allegation that he had been drinking and driving with the children in the car, and (2) the volatile relationship between Q and Ms. N. As to the alcohol use, the report alleged that Mr. Q was drinking excessively, frequently buying 30-packs of beer, and that two days earlier he had driven the children after or possibly while drinking.[7]

When OCS receives a report of possible harm, a preliminary decision is made whether to "screen in" the report for investigation. The standard used in that decision is whether the allegations, if true, implicate a safety concern for the child or children. Here, OCS screened in the report as warranting investigation because of the risk to the children's safety if the allegations of excessive in-home drinking and of driving while intoxicated were accurate.[8] If a report is screened in, it is assigned to a protective services specialist to conduct an investigation and prepare an assessment. Here, OCS Protective Services Specialist Ezekiel Kaufman, a member of the investigations and assessments unit, was assigned to investigate the concerns in the report. During his investigation, Mr. Kaufman separately interviewed both children and both parents, as well as O R, a former OCS worker who had previously worked with the family.

1. <u>Interview with Ms. R</u>

As he began his investigation into the October 2019 report, Mr. Kaufman contacted Ms. R to get background information about the family dynamics and the family's prior interactions with OCS.[9] Ms. R described the children as having clear love and affection for both parents.

---

3 Ex. 2, p. 2.
4 Ex. 2, p. 2.; Kaufman testimony.
5 Except whether otherwise indicated, the description of Mr. Kaufman's investigation is based on his testimony and his contemporaneous investigative notes (as explained through his testimony, see below).
6 See Ex. F, p. 4.
7 Ex. 2, pp. 1-2
8 Ex. 2, p. 2.
9 Kaufman testimony.

She also noted that the children were both very much "aligned with" Mr. Q, and so had resisted sharing information about him and his substance abuse.

Ms. R told Mr. Kaufman that the main concern she dealt with regarding Mr. Q was his "excessive drinking – to intoxication on a regular basis for years." Additionally, she described his troubling relationship with Ms. N, indicating that Ms. N engaged in domestic violence towards Mr. Q, including berating him and breaking things in the house, and that he would minimize that behavior and align with Ms. N instead of with the children. As to both the drinking and the domestic violence, Ms. R observed that Mr. Q would minimize concerns – as to both the underlying problem and its effect on him and on the children – and would pivot discussions to other topics to avoid discussing these concerns.

As to Ms. P, Ms. R described her as having long ago resolved her own substance abuse issues, and being aligned with the children and protective of their safety.

2. Interviews with L and M

After obtaining background information from the OCS records and from the previous caseworker, Mr. Kaufman then began interviewing the family members. Mr. Kaufman interviewed both children on October 23, 2019 – M at school, and L at home.[10] Mr. Kaufman is trained in forensic interviewing of children, and testified credibly at the hearing about the techniques he employs to build rapport and introduce potentially uncomfortable topics without using leading questions. When interviewed by Mr. Kaufman, both children expressed love and affection for both of their parents. However, both children also disclosed concerning behaviors by Mr. Q, namely, excessive drinking that caused them stress, drinking while driving with them in the car, and engaging in domestic violence with Ms. N.

a. Disclosures of excessive drinking and driving under the influence

L described Mr. Q as drinking daily, and generally consuming thirty beers over the course of one to two days. M reported that his dad "drinks a lot" – specifically, beer and Fireball whiskey – describing that "his dad drinks daily and he is always drinking." Both children reported that it was difficult to distinguish when their father is sober versus not, due to the extent and frequency of his drinking.

[10] The descriptions in this section are based on Ex. 6, pp. 3-5 (L interview), Ex. 6, pp. 5-6 (M Interview), Ex. F, pp. 4-6 (rough transcript of Kaufman testimony at protective order hearing), and Mr. Kaufman's testimony.

Both children also described that Mr. Q's drinking causes them stress. M told Mr. Kaufman that his father's drinking makes him "feel scared and sad," and noted "that his dad yells more when he drinks." L, who has a history of anxiety and self-harm, told Mr. Kaufman that her father's drinking worried her both when she is with him and when she is not, including thinking about it regularly during the school day. His behavior – particularly the drinking while driving – scared her, she reported, because it makes her concerned for his safety.

L said she had tried to discuss his drinking with her father, but that he "dismisses it and minimizes … the extent of his drinking and the consequences of it or he will avoid the conversation." L told Mr. Kaufman she had disclosed concerns about her dad's drinking to her counselor "because the stress was too much for her," and that she worries about it "all the time."

Both children described Mr. Q routinely drinking while driving, and doing so while they were in the car. L reported that Mr. Q keeps beer in the backseat of the car and drinks while driving, including when she and M are in the car. M likewise told Mr. Kaufman that Mr. Q keeps Bud Light in the car. Mr. Kaufman's interview notes of M's disclosure provide this description:

> M said that his dad has a case of Bud [L]ight in the backseat and will drink the beers fast[.] M said his dad will drink one to three cans of beer[.] M said he does not like it because everybody can be injured[.] M said his dad will get offended when anybody brings this up.[11]

L described riding in the front seat so she could help him drive safely, such as turning down the radio, and reminding him to wear his seatbelt and to "focus on the road." She said that other adults had reassured her that she could refuse to get into a car if an adult was driving under the influence, but that she continued to go with him out of concern for his safety.

b. Disclosures of exposure to domestic violence

Both children also described an ongoing volatile relationship between Mr. Q and Ms. N. L told Mr. Kaufman that the two "physically fight every time" Ms. N is that the house, and that Ms. N had broken household items such as mugs and mirrors. L showed Mr. Kaufman a video she had recorded of Ms. N berating and swearing at Mr. Q. She also described another incident in which she, M, and Ms. N's children "had to break open the door" because they heard the adults arguing and heard Ms. N "gasping for air" as if being "choked." M likewise told Mr.

[11] Ex. 6, p. 6.

Kaufman that Mr. Q and Ms. N had engaged in physical violence, making similar disclosures to L's.

Both children described the relationship as negatively affecting them. L expressed that her father's volatile relationship with Ms. N "scared and worried" her. M told Mr. Kaufman that the relationship between his father and Ms. N "really scares him," that he worries whenever he sees Ms. N, and that the domestic violence in the relationship keeps him up and night.[12]

Finally, both children indicated that during their weeks with Mr. Q, he spent some nights at Ms. N's in City A, leaving them at his home. L indicated this happened "on a regular basis, a couple of times per week;" M described it as occurring two to three times per week.

3. Interview with Ms. P

Mr. Kaufman interviewed Ms. P twice – first, the day the case was assigned to him, and later, after interviewing the children. When they first spoke by phone on October 10, 2019, Ms. P expressed concerns about the children's safety at Mr. Q's house. She reported that the children had disclosed to her that Mr. Q drinks and drives with them in the car. She also reported that they had disclosed being left home alone about once per week in the past few months, and that she would come get them when this occurred.[13]

Mr. Kaufman then met with Ms. P in person on October 24, 2019.[14] Ms. P reported that the children told her that Mr. Q drinks and drives with them in the car, and that L reported having to stay in the front seat "in order to protect M" Ms. P also reported that the children described being left home alone. This issue came to a head the week before the PRS, when the children were left home alone overnight, and L called 911 because she was concerned someone was breaking into the house. Ms. P also told Mr. Kaufman that both she and Mr. Q had histories of drug use, that she had been clean for the past eight years, and that she didn't know whether or not Mr. Q still used drugs.[15]

When interviewing parents, Mr. Kaufman considers their relationship dynamic as a contextual factor in considFg what parents say about one another. In the case of Ms. P, he found her interview more reliable because she highlighted both positives and negatives about Mr. Q. He also noted that the information she gave was consistent with the reports by the children, while

[12] Ex. F, p. 5.
[13] Ex. 6, p. 1.
[14] Ex. 6, p. 8.
[15] Ex. 6, p. 8.

not containing identical language or phrasing that would be suggestive of a parent coaching a child to give a false report. Because Ms. P provided consistent information without suggestions of coaching, Mr. Kaufman found that her interview provided triangulated support of the report and the children's disclosures.[16]

In his discussions with Ms. P, Mr. Kaufman both interviewed her about the allegations, and engaged in safety planning – that is, OCS's process for ensuring that a child involved in an investigation can be kept safe despite concerning allegations. The safety planning discussion involved the children temporarily relocating to Ms. P's – which had occurred by agreement of the parents after the 911 call incident – and her seeking a protective order against Mr. Q's dangerous behaviors. Ms. P had previously attempted to obtain protective orders against Mr. Q, but had not been successful in doing so. As is discussed further below, Ms. P filed for and obtained a temporary protective order on October 29, 2019, and a longer-term order in mid-November 2019.

4. Interviews with Mr. Q

As with Ms. P, Mr. Kaufman met twice with Mr. Q – the first time on October 23, 2019, and a second time on November 8, 2019. Mr. Kaufman characterized his interactions with Mr. Q as "very challenging," with Mr. Q insisting that the children were lying, and ending both meetings abruptly.

Mr. Kaufman initially spoke with Mr. Q in his home on October 23, 2019.[17] He informed Mr. Q of the allegations and described OCS's investigative process, including the need to engage in safety planning to address any safety concerns. In response, Mr. Q denied all of the allegations in the protective services report. He told Mr. Kaufman that his drinking was limited to a couple of beers a few times per week, and only getting "drunk" about five times per year. He assured Mr. Kaufman that the allegations were false, that the report was motivated by Ms. P wanting to avoid an increase in child support, and that Ms. P must have "manipulated" the children into making their disclosures.[18]

When pressed by Mr. Kaufman about multiple reporters having a version of events so different from his own, Mr. Q "pivoted to other conversations," told Mr. Kaufman the concerns

---

16 Kaufman testimony.
17 Ex. 6, pp. 1-2.
18 Ex. 6, p. 2.

raised were unimportant, and repeated that Ms. P was manipulating the children to get out of paying child support. The meeting ended with Mr. Q asking Mr. Kaufman to leave.

They later met again, on November 8, 2019, at Mr. Kaufman's office. As with the first meeting, Mr. Q minimized his drinking, interrupted Mr. Kaufman frequently, and refused to meaningfully engage in a discussion of the allegations in the report. When asked about his alcohol use, Mr. Q again "pivoted" the conversation to other topics. When confronted with his children's reports about excessive alcohol use, domestic violence, and driving under the influence, Mr. Q responded to Mr. Kaufman that "kids say the darnedest things," and insisted the children were making up stories.[19] Mr. Q accused Mr. Kaufman of bias in favor of Ms. P, and of wanting to help her "take the kids away." Like the first meeting, this meeting, too, was ended abruptly by Mr. Q.

C. Superior Court protective order proceeding

As Mr. Kaufman's investigation was progressing, a parallel proceeding was unfolding in Superior Court. In his discussion with Ms. P, Mr. Kaufman had discussed safety planning and OCS's need for some assurance that the children were safe and protected.[20]

One of the ways that a parent can demonstrate protective capacity when dealing with an unsafe co-parent is by pursuing a protective order against the unsafe co-parent's dangerous behaviors. Both Ms. R and Ms. P told Mr. Kaufman that Ms. P had previously applied for protective orders against Mr. Q, but that those applications had been denied.[21] Mr. Kaufman noted that Ms. P's prior petitions had been largely focused on the conduct of Mr. Q's girlfriend, and suggested that she might have greater success if she instead focused on Mr. Q's own behavior.[22]

On October 29, 2019, Ms. P filed a request for a protective order.[23] That proceeding is procedurally and legally unrelated to this one, and is factually related only inasmuch as the existence of a protective order informed OCS's decision to close this matter without further involvement, as opposed to deciding to pursue a Child in Need of Aid (CINA) case. Specifically, because Ms. P's successful pursuit of a protective order reflected her willingness

19 Kaufman testimony; Ex. 6, pp. 11-12.
20 Kaufman testimony; Ex. 6, p. 8.
21 Ex. 6, pp. 12-13.
22 Kaufman testimony.
23 Ex. 8.

and ability to protect the children from harm, OCS was able to conclude that the children were not unsafe.[24]

Ms. P's petition for protective order described – under penalty of perjury –concerns about Mr. Q exposing the children to multiple dangerous situations, including:

- Leaving them alone without a phone overnight several times a week during his two weeks to stay with Mr. N;
- Drinking excessively around the children with Ms. N present;
- Drinking and driving with the children in the car "on a constant basis;" and
- DV episodes with Ms. N, including her breaking his ribs and attempting to stab him with scissors and a broken coffee pot.

Ms. P also noted that Mr. Q's behavior had led to multiple complaints to OCS over the prior 4.5 years by school officials, other children's parents, police, and, recently, the children themselves.

The court issued a 20-day ex parte order on October 29, 2019.[25] A hearing was later held on the request for a long-term protective order. Mr. Kaufman attended the November 18, 2019 hearing and testified about the children's disclosures after being ordered by the court to do so.[26] The court granted Ms. P's request and entered a one-year protective order.

D. OCS substantiation and notification of findings

At the close of a child protection investigation, the agency answers two questions: (1) is there evidence of maltreatment, and (2) if so, what else (if anything) needs to be done? Mr. Kaufman's investigation led him and his supervisor to conclude that maltreatment had occurred. As to the second question – whether any further action would be required – Mr. Kaufman and his supervisor determined that sufficient safety protections had been put in place by Ms. P to obviate the need for further OCS involvement. Accordingly, despite substantiating the allegations that maltreatment had occurred, the case was otherwise closed without further intervention.

On November 23, 2019, OCS sent Mr. Q a notice regarding its findings in this matter. The notice stated:

- OCS had received a report on October 8, 2019;
- The report had identified M and L as victims of alleged child maltreatment;

---

[24] Kaufman testimony.

[25] Ex. 6, p. 9.

[26] Ex. 6, pp. 9-11. Mr. Kaufman had informed the Superior Court judge that, absent a court order, he was unable to disclose the nature or content of OCS's involvement with the family.

- Mr. Q had been "identified as the alleged perpetrator" of neglect and physical abuse of M and L;
- OCS had substantiated the allegations in the report;
- Both findings were related to Mr. Q's "habitual use of an intoxicant;"
- If not appealed, the substantiated findings would be placed on the child protection registry.

The notice, as is standard for notices OCS issues in child protection investigation matters, did not reveal any information about the underlying factual basis for the findings or the nature of the investigation conducted.[27]

E. Procedural History

OCS sent Mr. Q notice of its substantiated findings on November 23, 2019. Mr. Q completed the attached form allowing a respondent to request a hearing to challenge substantiated findings. The matter was then referred to the Office of Administrative Hearings (OAH).

The day of the scheduled case planning conference, Mr. Q informed OAH that he had retained counsel to assist him in this matter. A brief planning conference was held including Mr. Q's counsel, but, because of the late notice to OCS, OCS's counsel was unable to participate. The conference was therefore rescheduled. Several planning conferences were then held in February and March 2020.

The hearing was scheduled for April 23, 2020, and deadlines were set for the filing of witness lists, exhibit lists and exhibits, and prehearing briefs. Prior to the start of the hearing Mr. Q did not file a witness list, an exhibit list, any exhibits, or a prehearing brief.

The hearing was initially scheduled to be held in person but was converted to a teleconferenced hearing because of the courtroom closures necessitated by the COVID-19 pandemic. The parties were offered but did not choose the opportunity to replace the in person hearing with a video-conferenced hearing. Neither party having requested to convene via video conferencing, the hearing was held telephonically.

Although the parties had indicated they anticipated a half-day hearing, various delays during the hearing led to the need to schedule a second hearing session, which was held on April

[27] A recent decision in an unrelated SAN case invalidated OCS's notice due to these flaws, but found that the flaws were not fatal because, like here, the parent had ample actual notice of the allegations well in advance of the hearing. See *In re N C*, OAH No. 19-0979-SAN (Commissioner of Health and Social Services, 2020) (available at https://aws.state.ak.us/OAH/Decision/Display?rec=6562).

29, 2020. On April 27, Mr. Q's counsel filed an untimely nine-item exhibit list, with eight previously undisclosed exhibits and no motion requesting leave to file these late materials. OCS objected to the exhibits when Mr. Q sought to introduce them at the April 29 hearing; those objections are discussed below.

At the hearing, testimony was taken from Mr. Kaufman and from Mr. Q. Mr. Kaufman testified about his investigation, consistent with the descriptions above and with his case notes.

Mr. Q testified that his drinking was "not even close to how [he was] being represented," and that he neither drank excessively around his children nor drank while driving with them. His description of his drinking, however, was shifting and inconsistent. He described telling Mr. Kaufman that he drank one to three beers, four times per week, but admitted that this was inaccurately low. When asked to clarify the actual amounts, he first responded that it was irrelevant. He later testified, variously, (1) that he drank no more than eight beers per night, but less when the kids are there, when he would have at most six beers in a night, (2) that the most he would drink in a week would be a 12-pack, (3) that it took him between a week and a month to finish a 30-pack of beer, and (4) that he doesn't recall how often or how much he would drink when he had the kids.

Mr. Q unequivocally denied driving with the children while drinking. While both children told Mr. Kaufman that they had confronted him about his drinking, Mr. Q said he "[does] not recall those conversations." (He concedes he may have had a conversation with L). He also denied ever leaving the children home without a phone, explaining that his home has a landline.

Much of Mr. Q's testimony – and his counsel's questioning of Mr. Kaufman – centered around the protective order proceedings. He testified to his belief that Ms. P made false allegations against him in the protective order proceeding, and that Mr. Kaufman "orchestrated" Ms. P's restraining order against him. He further testified to his belief that OCS "used the findings of the [protective order] hearing they orchestrated to come up with [the substantiated findings of] abuse and neglect."

Following the hearing, OCS filed a motion to admit an affidavit to correct an inaccuracy in Mr. Kaufman's testimony about where his interview with L had taken place. Mr. Q did not

file an opposition to the motion, and it was granted when it became ripe on May 26, 2020.[28] The record then closed.

III. Discussion

A. Legal Framework

1. Alaska's Child Protection Statute

Alaska's Child Protection statute, AS 47.17, defines "child abuse or neglect" to mean "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[.]"[29] The statute then defines one of these terms – "maltreatment" – to mean "an act or omission that results in circumstances under which there is reasonable cause to suspect that a child may be a child in need of aid," as defined under the separate Child in Need of Aid (CINA) statute, AS 47.10.011.[30]

Of the various situations that can support a Child in Need of Aid finding under the CINA statute, OCS relies on two here. First, under AS 47.10.011(6), a child can be found to be "in need of aid" under the CINA statute if "the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately."[31] Secondly, under AS 47.10.011(10), a child is "in need of aid" if their parent's "ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child."[32]

When a parent challenges a substantiated finding of abuse or neglect under the Child Protection statute, OCS has the burden of proving that the substantiation should be upheld. This burden has both a factual and a legal component. That is, OCS must prove as a matter of fact that certain conduct occurred, and as a matter of law that the conduct warrants a substantiated finding.[33]

2. Evidentiary issues

---

28 2 AAC 64.270(a).
29 AS 47.17.290(3).
30 AS 47.17.290(9).
31 AS 47.10.011(6).
32 AS 47.10.011(10).
33 *Matter of E.O.*, OAH No. 16-1407-SAN (Commissioner of Health & Soc. Svcs 2017).

In an administrative hearing before OAH, the rules of evidence do not apply "except as a guide."[34] Critically, the statement of exception is not superfluous; it has meaning. And if any aspect of the rules must guide us, it is their central concern for the trustworthiness of proffered evidence.

> [E]vidence must bear some minimum mark of trustworthiness to have any value to the trier of fact. For example, many of the Federal Rules of Evidence-such as the rules regarding hearsay, expert testimony, authentication of documentary evidence, and the oath requirement-are geared toward ensuring a degree of reliability. Thus, to have evidentiary value, the submitted material, be it testimony or documents, must tend to prove or disprove the existence of a material fact and, more importantly for our purposes, must include, or be accompanied by, some indicia of reliability.[35]

Thus, with the rules of evidence as a backdrop, the administrative law judge "may admit evidence of the type on which a reasonable person might rely in the conduct of serious affairs."[36] Additionally, the administrative law judge also may exclude evidence that was not timely disclosed.[37]

a. Mr. Q's objections to OCS's evidence

OCS relied on, and Mr. Q objected to, Ms. Kaufman's testimony about his interviews with L and M, and his notes documenting those interviews. The evidentiary concerns about the interviews and the notes are addressed separately.

Mr. Kaufman's testimony about the interviews is, of course, hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted in the statement. A witness's description of what he was told during an interview is therefore hearsay. However, and as was discussed throughout the hearing, hearsay is not prohibited in these administrative proceedings. Rather, the question for the administrative law judge is whether the challenged evidence is of the type upon which reasonable people would rely in the conduct of serious affairs.

As to the interviews, these are reliable and admissible evidence. Structured interviews by trained social workers are the type of evidence upon which reasonable people would rely in conducting serious affairs. Mr. Kaufman is a trained forensic interviewer who testified credibly about the interviews and his technique in conducting them. He independently recalled the children's statements and affect. He also noted the consistencies in the information provided by

---

34 2 AAC 64.290(b).
35 *United States v. Trainor*, 376 F.3d 1325, 1331 (11th Cir. 2004).
36 2 AAC 64.290(a)(1).
37 2 AAC 64.290(a)(3).

each child, while at the same time observing a lack of any apparent "coaching" or types of behavior that typically give rise to such concerns.

Mr. Kaufman's testimony about the interviews likewise informs the reliability of the written interview notes. Without corroborating and explanatory testimony, Mr. Kaufman's interview notes would likely not have been admissible in this proceeding. This is because they are so riddled with typographical errors as to be virtually undecipherable on their own. Mr. Kaufman's testimony, however, filled in the gaps to explain the source of those errors – namely, his use of transcription software that filled the notes with sound-alike words. He was readily and credibly able to interpret the erroneous entries and decipher the notes. Within that context, the notes (as corrected/interpreted) corroborate the other evidence about what the parties said during their interviews. While they would not be reliable on their own, they are admissible here in the context of the other supporting evidence.

b. OCS's objections to Mr. Q's exhibits

Mr. Q submitted an exhibit list of previously undisclosed exhibits on April 27, 2020. These were submitted after the first day of hearing testimony – nearly two weeks after the exhibit disclosure deadline – and with no excuse offered for the delay. Ex. A is the October 29, 2019 short term protective order, which is already in the record as OCS's Exhibit 7 (and in the agency record at R. 28-34). The rest are not part of the agency record and were not previously disclosed.

Exhibits B, C, H, and I appear to be emails from Mr. Q to his attorney, apparently drafted after the first day of hearing. In Exhibit B, Mr. Q queries his counsel about whether certain documents should be submitted as evidence, and then repeats what he alleges to be a statement from L about wanting to be able to live with him again. This document is problematic on multiple levels, including that communication between counsel and client is privileged, and that, to the extent the privilege is being waived, a client's strategy proposal to his attorney is not relevant to any factual issue in the case. Further, and to the extent it is being offered because of the statements attributed to L, the document lacks sufficient indicia of authenticity and reliability to be admissible. Although the document is proffered as an email, it does not look like an email – there is no email header, no "@" addresses, and none of the other distinctive characteristics of an email.[38] In the complete absence of any standard features of an email, the document is not

[38] *See generally*, *United States v. Safavian*, 435 F. Supp. 2d 36, 40 (D.D.C. 2006) ("One method of authentication identified under Rule 901 is to examine the evidence's 'distinctive characteristics and the like,'

self-authenticating. Then, within the already questionable document, the statements attributed to L are simply described in the text, with the author indicating "L told me that…" (as opposed, to, say, the author embedding a copy of the alleged text or email within the document so that the reader can see the original message as it was transmitted).

Thus, on top of an insurmountable authentication problem, the layers of hearsay here include: (1) the allegation that L is supposedly making (that her "words were changed" or that "OCS tried to manipulate the situation"), (2) the allegation that L actually made this statement, and (3) the allegation that Mr. Q repeated these two layers of hearsay in another email (although not one that resembles an email). There is no corroboration that L sent a message or otherwise used these words.

Moreover, the text attributed to L does not actually inform the analysis in this case. The exhibit purports to quote L expressing unhappiness about the protective order, expressing a desire to live with both parents, and opining – based on what she apparently "heard" about what was said at a court hearing she did not attend – "that OCS tried to manipulate the situation." Nothing in these attenuated statements makes it more likely true or not true that the original reports – about drinking, drinking and driving, and domestic violence – were accurate. And no explanation or context is provided to explain what was supposedly manipulated, how, or why. For all of these reasons, and because it was not timely submitted, Exhibit B is not admitted.

Exhibit C is a February 2019 email exchange between Ms. R and Mr. Q about the role of parent coordinators in custody disputes, forwarded to Ms. Q's current counsel with a note that the email from Ms. R to Mr. Q "somewhat shows the pattern of [Ms. P's] behavior regarding the child support issue." It is described, boldly and inaccurately, in Mr. Q's Witness List as "Letter from F threatening M." But the forwarded email is from Ms. R, not Ms. P; has no content related to Ms. P; and simply provides factual information about what parent coordinators do as well as contact information for four such coordinators in the City A area. Nothing in this email is relevant to the allegations at issue in this case, and it is not admitted.

Exhibit D appears to be a pair of emails from Mr. Q to Ms. R about classes and/or therapists recommended by Ms. R. In the middle of the exchange is a statement by Mr. Q that Ms. P "is threatening me to Sign Child Support paperwork and if I don't she is going to file for

---

including '[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken in conjunction with circumstances.'" (quoting Fed.R.Evid. 901(b)(4)).

full custody[.]"[39] Presumably, then, this email is offered to support Mr. Q's theory that the report and investigation in dispute here were orchestrated by Ms. P to avoid paying child support. But the only support for that proposition is self-serving double hearsay (Mr. Q's claims about alleged statements by Ms. P) in the email. While the email does not suffer from the authentication/reliability problems of some of Mr. Q's other exhibits, and is therefore admitted, it is of minimal if any evidentiary value.

Exhibit E is an undated handwritten letter, purportedly from M, and addressed to "Dear whomever this is going to." (The witness list describes it as "Letter from son, M to K Q"). The letter is problematic, from an evidentiary standpoint, on multiple levels. First, it cannot be authenticated either in terms of its authorship or in terms of the circumstances under which it was created. On this basis alone, the letter does not rise to the level of the type of evidence upon which reasonable people would rely in the conduct of serious affairs. Moreover, even if the letter really is authentic, it does not establish or purport to establish that M was untruthful in his statements to OCS. Rather, the letter says that the author "felt that when I was talking to OCS I was not told the truth about what was going to happen and that I and my family was manipulated by OCS."[40] But the statement that the author did not know what would happen as a result of the OCS interview is not a repudiation of that interview. Thus, in addition to its authentication problems, Exhibit E does not tend to make any fact at issue in this case more or less likely. It is irrelevant and therefore not admitted.

Mr. Q also submitted as Exhibit F an unverified transcript of the Superior Court's long-term domestic violence protective order hearing. Mr. Q has various grievances about how the protective order hearing went and whether he had an opportunity to be heard. This tribunal has no jurisdiction to hear those complaints, however, and will not address them. As noted elsewhere in this decision and in the hearing, the protective order was relevant to the child protection matter only inasmuch as it informed Mr. Kaufman's decision not to also open a CINA case because he concluded that the children were being adequately protected by their mother. Of greater concern, the transcript submitted by Mr. Q has numerous typographical errors and appears to be incomplete, as well as containing no indication of who prepared it or certification

[39] Ex. D.

[40] The rest of the letter is spent expressing that M and his father no longer spend as much time together, lamenting that things are different than before, and expressing sadness about having to wait until November (presumably when the protective order expires) to spend unsupervised time together.

as to its accuracy.[41] At the same time, the (rough) transcript of Mr. Kaufman's testimony is useful in providing a contemporaneous telling of the OCS investigation – including detailed descriptions of the children's disclosures to Mr. Kaufman. Because of the value of this information the transcript will be admitted, but the typographical errors and lack of certification go to its weight.

Lastly, Exhibits G, H, and I all purport to be emails drafted by Mr. Q, although, like Exhibit B, they suffer from basic authentication issues. But these are the least of the evidentiary problems with these three exhibits. Exhibit G purports to be an email to the undersigned administrative law judge about Mr. Q's meetings with Mr. Kaufman. There is no mechanism for a party to introduce evidence in this format. The mechanism for Mr. Q to introduce into evidence whatever he wants to share about his meetings with Mr. Kaufman is for him to testify, which he did. Exhibit G has no separate evidentiary value.

Similarly, Exhibits H and I purport to be emails from Mr. Q to Mr. Ross. Exhibit H shares Mr. Q's feelings about Mr. Kaufman, and Exhibit I addresses the allegation about the children being left home without a phone. Like Exhibit G, these are not admissible. As emails from a client to his attorney describing the client's version of events, they have no evidentiary value. The evidentiary mechanism for introducing Mr. Q's version of events is through his own sworn testimony, which was presented. He cannot either bolster or replace his testimony with emails he wrote for the apparent purpose of responding to the hearing testimony. Exhibits G, H, and I are not admitted.

B. Did OCS meet its burden of showing that the maltreatment allegations should be substantiated?

Turning finally to the merits of OCS's substantiated findings in this case, OCS contends that Mr. Q's conduct – in drinking to excess, drinking and driving, exposing the children to domestic violence, and leaving the children alone overnight without means of contacting anyone – justifies substantiated findings of neglect and physical abuse.

1. What facts are established by a preponderance of the evidence?

As a factual matter, the evidence does not support a finding that the children were left overnight without access to a phone. Mr. Q testified credibly that his home has a land line, and

[41] *See, e.g.*, Ex. F, p. 7, in which the (unidentified) Judge is quoted as follows: "So Let me ask you this Mr. Paquette are you cooperate with OCS? Because at the time of the short term order it says that you had agreed not to do pending further OCS action, - is there a child avita case?" (All errors in original exhibits). The subsequent response to that question is likewise riddled with typographical errors.

OCS did not attempt to dispute this evidence. However, the evidence *does* support that Mr. Q more likely than not exposed the children to domestic violence with Ms. N, and that he more likely than not drove with them while intoxicated. Both children raised these concerns in their interviews, and Mr. Q's denials were not credible or convincing.

As noted in Mr. Kaufman's testimony, the children's disclosures were consistent with one another, but did not have indicia of having been coached or influenced. Mr. Kaufman credibly described his application of standard and accepted interviewing techniques, and the absence of input suggestive of coaching (such as interview responses or event descriptions that exactly overlap, and/or the use of identical words or phrasing by a child and parent). The children's disclosures were consistent but not so identical as to be suspicious. And their disclosures triangulated with other evidence, such as the past observations of Ms. R, and information obtained shared by Ms. P.

The only contrary evidence is Mr. Q's denials, which were not particularly convincing on their face, and are even less so when weighed against the significant consistent evidence that the conduct occurred. To credit Mr. Q's version of events over the information provided by both children, their mother, and the prior OCS worker requires acceptance of Mr. Q's theory that Ms. P orchestrated the report and the children's statements to force a change in custody and therefore relieve her of an obligation to pay child support. The evidence does not support such a finding, and the far likelier explanation for the complaint and the children's statements is that the children accurately described the situation in which they found themselves.

2. Does the evidence support a neglect finding?

Neglect is defined in the Child Protection statute (AS 47.17) 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."[42] But the Child Protection also defines "child abuse or neglect" to mean "maltreatment" of a child under circumstances that harm or threaten the child's health or welfare, with "maltreatment" then defined as an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011. That statute, in turn, provides that a variety of circumstances that could lead to a superior court finding that a child is in need of aid.

[42] AS 47.19.290(11).

The definition relied on by OCS for its neglect finding in this case is AS 47.10.011(10), which allows a CINA finding where the parent's "ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child."[43]

Factually, OCS contends that Mr. Q neglected the children by:

- Routinely drinking to excess while responsible for their care;
- Driving with them while intoxicated;
- Exposing them to domestic violence in his relationship with Ms. N; and
- Leaving them unattended while he spent nights at Ms. N's.

As noted above, this decision finds insufficient evidence to support a finding that the children were left unattended without means to contact someone. Leaving teenaged children home alone overnight is not a per se neglectful choice, and OCS did not submit evidence to suggest it was neglectful here. Thus, this decision will not uphold a maltreatment finding based on the children being home alone.

As to the remaining allegations, however, this decision concludes that Mr. Q more likely than not did (1) drink to excess frequently in their presence and while acting as their caretaker, (2) drive with the children while drinking, and (3) expose the children to domestic violence through his relationship with Ms. N. The evidence further supports that these situations were harmful to the children's mental welfare, and that Mr. Q failed to recognize those harms. Both children expressed worry and stress about the drinking, the drinking while driving, and the domestic violence. Both children also described raising their concerns with their father, and Mr. Q engaging in the same deflection described by Ms. R and Mr. Kaufman rather than taking their concerns seriously. Taken as a whole, the conduct described by the children supports a finding that Mr. Q's parenting was substantially impaired by the habitual use of alcohol, and that this in turn resulted in substantial risk of harm to the children.

---

[43] AS 47.10.011(10). Although it labeled this finding as "neglect," OCS did not substantiate under either the child protection statute's neglect definition (AS 47.10.014 (defining neglect as "fail[ure] to provide the child with adequate food, clothing, shelter, education, medical attention, or other care and control necessary for the child's physical and mental health and development")) or the CINA neglect standard (AS 47.10.011(9) (providing that a child is in need of aid if "conduct by or conditions created by the parent, guardian, or custodian have subjected the child or another child in the same household to neglect," with neglect meaning a parent's failure to provide adequate care and control necessary for a child's physical and mental health and development)).

This decision should not be read to suggest that a parent commits neglect by drinking alcohol while supervising or caring for teenage children. In considering the harmful effects of Mr. Q's drinking on his children's well-being, the evidence is sufficient to conclude that Mr. Q's substance abuse – his "habitual use of an intoxicant" – while serving as the children's caretaker led him to engage in conduct that created a substantial risk of harm to the children. This included both a substantial risk of physical harm due to driving while intoxicated with the children present, and a substantial risk of mental injury, due to both children reporting the negative effects of the drinking and domestic violence on their well-being. The evidence is sufficient to justify a finding of child maltreatment under AS 47.17, based on conduct described in AS 47.10.011(10), and the neglect findings on this basis are therefore upheld.

3. Does the evidence support a separate "physical abuse" finding?

OCS also substantiated allegations of physical abuse against Mr. Q. Although physical abuse is separately identified as a violation of the Child Protection statute itself,[44] OCS instead relies on the maltreatment definition to allow it to make findings by reference to the CINA statute. OCS's notice characterizes the physical abuse finding as a type of maltreatment – an act or omission that results in circumstances in which there is reasonable cause to suspect that a child may be a child in need of aid, as described in AS 47.10.011." OCS then cited AS 47.10.011(6) and (10) as justifying a finding of "physical abuse." Subsection 6 allows for a CINA finding where there is a substantial risk of substantial physical harm. Subsection 10 – the very same definition OCS uses to justify the neglect finding in this case – allows a CINA finding where the parent's "ability to parent has been substantially impaired by the addictive or habitual use of an intoxicant, and the addictive or habitual use of the intoxicant has resulted in a substantial risk of harm to the child."

In this case and in others OCS has concluded that "physical abuse" under the maltreatment definition encompasses not only non-accidental physically injurious acts, but also behavior that created a risk of physical harm. While OCS is correct that such conduct can justify a maltreatment finding, it is error to label it "physical abuse." In the specific context of this case, while OCS is correct that Mr. Q's conduct gave rise to a substantial risk of physical harm, it is incorrect to label this type of maltreatment as "physical abuse."

[44] See AS 47.10.015.

While this decision agrees that Mr. Q's conduct subjected the children to a risk of physical harm, it cannot substantiate a finding of physical abuse based on neglectful or reckless (as opposed to non-accidental) conduct that did not result in actual physical injury. Rather, the conduct at issue and the harm at issue are the very same as formed the basis for the neglect finding discussed above. That is, Mr. Q placed the children at risk of physical harm by driving with them while intoxicated. This was neglectful. He did not however cause them physical harm, or engage in any overt non-intentional act of physical force against them. Indeed, OCS relies on the same conduct and the same authority to justify its neglect finding. A finding of "physical abuse" is not warranted under these circumstances.

Concerns about OCS's broad-brush use of the "maltreatment" standard – and its bypassing of the definitions of abuse and neglect offered in the Child Protection statute itself – have previously been addressed in other substantiation appeal decisions.[45] In *Matter of K.L.*, the Commissioner held that OCS should use the Child Protection statute's definition of "child abuse or neglect" as a starting point for analyzing the allegations in PSRs.[46] While that decision focused on the CINA statute's broad definition of neglect being, at times, over inclusive of neglect in the child protection context, the same concerns are present applicable here. In *K.L.*, OCS substantiated a parent for neglect of one child based on the parent having neglected a different child; the Commissioner's decision concluded that a neglect-through-maltreatment substantiation could not stand unless the child at issue was actually the subject of neglect.[47]

Likewise, in *Matter of E.O.*, the Commissioner rejected the use of "maltreatment by risk of sexual abuse" as a basis for a substantiated finding of sexual abuse:

> While a child may be found to be "in need of aid" because the child is at heightened risk of future sexual abuse, it defies common sense to say that an allegation against a parent has been "substantiated" for "sexual abuse" where the allegation does not involve the parent (or, here, anyone) actually having committed an act of sexual abuse against the child.[48]

---

45 *See, e.g., Matter of K.L.*, OAH No. 16-1145-SAN (Commissioner of Health & Soc. Svcs. 2017).

46 *Id*., at 7.

47 Id., at p. 8 ("In the context of a CINA proceeding, this definition is perfectly sensible. That is, a child indeed may be "in need of aid" because he or she is at heightened risk of future harm, as evidenced by the parents' past conduct with other children. In such a case, OCS is appropriately involved on a proactive basis to protect the child. However, in the context of a substantiation case under AS 47.17, it is not possible to substantiate that the parent has, in fact, neglected Child A, based only on the risk of future harm to that child, or based only on the fact that the parent actually neglected a different child, Child B. Instead, the correct substantiation under AS 47.17, using the definitions provided in that chapter, would be to substantiate neglect of Child B.").

48 *Matter of E.O.,* OAH No. 16-1407-SAN, at 13 (Commissioner of Health & Social Svcs. 2017).

The same overarching concerns about OCS's approach to the "maltreatment" definition are present here as were identified in both *K.L.* and *E.O.*

Here, the children were not physically injured by Mr. Q's conduct. However, the evidence supports the conclusion that – in driving while intoxicated with the children in the car – Mr. Q created a substantial risk that the children would suffer substantial physical harm. Drinking and driving with one's children in the car is careless, dangerous behavior. It is maltreatment, and has been substantiated as such above. It is not, however, "physical abuse," and a physical abuse finding is inappropriate here. To accept OCS's definition of physical abuse would be to allow an interpretation that swallows neglect whole. The conduct was neglectful because it placed the children at a substantial risk of harm. That cannot be the sole basis by which it is also (and therefore) "physical abuse."

OCS's prehearing brief also suggests that the physical abuse maltreatment finding is supported by Mr. Q exposing the children to domestic violence. In its prehearing brief, OCS described the justification for the physical abuse substantiation as follows:

> OCS substantiated the claim of maltreatment due to physical harm to [L] and [M] caused by Mr. Q based on disclosures from both children that described in detail the volatile relationship between Mr. Q and his significant other as well as the dangerous environment caused by Mr. Q's out of control drinking and how scared and worried the children were as a result.[49]

As an evidentiary matter, there is no evidence to suggest the children were at risk of physical harm based on the conflicts between Ms. N and Mr. Q. Moreover, OCS's proffered justification is not consistent with any accepted definition of physical abuse. While exposure to their domestic violence may well have caused the children mental injury (another category under which OCS makes substantiated findings), OCS did not seek to substantiate on that basis. Being scared and worried is not physical abuse. Rather, like the other ways in which alcohol abuse has impaired Mr. Q's ability to parent, exposing the children to the conflicts with Ms. N is encompassed by the neglect substantiations.

In short, while the Child Protection statutory scheme allows OCS to make a maltreatment finding based on conduct that would give rise to a CINA finding, it would be inconsistent with the statutory scheme to allow a "physical abuse" finding in situations where no physical injury

[49] OCS Prehearing Brief, p. 4.

occurs, and where the conduct at issue is more fairly characterized as another form of maltreatment.

Mr. Q's conduct should result in a substantiated finding of maltreatment, and has, but does not justify a "physical abuse" finding.

IV. Conclusion

OCS met its burden of proving that Mr. Q engaged in maltreatment that led to a lack of adequate care and a substantial risk of physical harm. The neglect findings are therefore upheld. Because the conduct here did not meet the definition of physical abuse, those findings are reversed.

Dated: July 23, 2020

Signed
Cheryl Mandala
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 8th day of September, 2020.

By: *Signed*
Name: Jillian Gellings
Title: Project Analyst
Agency: Office of the Commissioner, DHSS

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