

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF FAMILY AND COMMUNITY SERVICES**

In the Matter of	)	
	)	
K. S.	)	OAH No. 20-0796-SAN
_____	)	

DECISION

I. Introduction

The Office of Children's Services (OCS) received a report alleging that K. S. had sexually abused a minor niece. After an investigation, OCS concluded that the allegations were accurate, and notified Mr. S. that its findings would be placed on the state Child Protection Registry. Mr. S. requested a hearing to contest OCS's findings.

Following a hearing, this decision concludes that OCS did not establish that it is more likely true than not true that Mr. S. engaged in conduct that would support a finding of maltreatment based on sexual abuse. Consequently, the substantiated finding is reversed.

II. Facts¹

A. Background

K. S. is a widower. His wife, L., committed suicide in February 2019. He and L. were the parents of two minor children.

L.'s biological family consisted of her parents, M. and C. M., and several sisters. The allegations giving rise to this case concern B., who is the daughter of L.'s sister D.. B., who was 12 at the time of the alleged incident. She was 14 when the allegations were made.

B. Initial conflict over custody

Following L.'s death, Mr. S. was living in City A with his children, but was unemployed. He was able to obtain a seasonal construction job in Anchorage. While he was working in Anchorage, his three children lived in City B with the Ms (their maternal grandparents) in City B, and Mr. S. would drive down from Anchorage to spend the weekends with them.² However,

¹ Unless otherwise stated, the facts are found by a preponderance of the evidence, based upon Mr. S.'s credible testimony.

² Additionally, during this time, Mr. S. had a brief (six-month) consensual relationship with his former sister-in-law, E.. Mr. S. testified credibly that he chose to end the relationship after about six months.

the relationship between Mr. S. and his in-laws had been strained since his wife's death, if not before, and that relationship continued to sour after the children moved to City B.

By March 2020 Mr. S.'s seasonal construction job had ended, and he was living in City B with the Ms and his children. However, the relationship between the Ms and Mr. S. was conflict-laden, with the Ms making it clear that they blamed Mr. S. for their daughter's death. Indeed, Mr. M., immediately after L.'s death, accused Mr. S. of having killed her.

It was in the context of this conflict that Mr. S. applied for and obtained a new job in City A. He told the Ms that he would be moving back to City A and taking the children with him. This announcement significantly exacerbated the existing conflict between him and the Ms. Mr. S. temporarily moved out of the M. home and into a motel, leaving his children with the Ms.

M. M. visited Mr. S. at the motel on March 3, 2020. Mr. M. told Mr. S. that he needed to sign over custody of the children to the Ms, and threatened him if he did not, telling him that he (Mr. M.) was going to take Mr. S. on a ride from which he would not return.

The confrontation at the motel ended with Mr. S. telling Mr. M. that he would follow him to the M. home. He instead drove to the Alaska State Troopers station where he made a report that Mr. M. had threatened him.

Mr. M. and E., another of L.'s sisters, followed Mr. S. into the Troopers' station and apparently also attempted to make some sort of report. After the Troopers placed Mr. S. and the Ms in separate rooms, he overheard E. alleging that he had raped her when she was a minor. E. had stayed with L. and Mr. S. intermittently when she was younger due to issues with her parents. When E. was 18 or 19, Mr. S. had a consensual sexual encounter with her, which he described as a mistake, a couple of months before L.'s death. After L.'s death, Mr. S. had an approximately six-month long relationship with E., which he ended.³ Mr. S. also overheard them accusing him of murder and that he should sign over custody of the children.

Mr. S. testified that the State Trooper he spoke to suggested that he sign custody of his children over to the Ms. He did not follow that advice.⁴

C. Superior Court Proceedings

The following day, after speaking to his own family members, Mr. S. filed a domestic violence petition against Mr. M.. The petition asked for a restraining order against Mr. M., and

³ Mr. S. credibly denies that he had any sexual contact with E. when she was a minor, or any nonconsensual contact with her at any time.

⁴ Mr. S.'s testimony.

that he be allowed to take custody of the children, who were currently in the Ms' care.⁵ His petition, heard on an *ex parte* basis, was granted and he was granted a writ of assistance to retrieve his children from the M. household.⁶ When Mr. S. went to the Ms' home along with the Troopers to pick up the children, his mother-in-law C. M. told him that he would "regret this." At the same time, E. came out of the house, accusing him of raping her, ruining her life, and how he would regret it.

On March 12, 2020, the Ms filed an action in City B Superior Court seeking visitation with the S. children. That complaint did not allege that Mr. S. was an unfit parent, nor did it accuse him of abuse. That action was later dismissed for a failure to serve Mr. S..⁷

A long-term hearing on Mr. S.'s domestic violence restraining order against Mr. M. was held on March 20, 2020. Mr. M. did not attend the hearing, and the court granted Mr. S. a long-term restraining order.⁸

Mr. M. subsequently filed a request to dissolve the restraining order. Both Mr. S. and Mr. M. attended an December 9, 2020 hearing on the request. Mr. M. testified that he was trying to obtain visitation, and that Mr. S. had driven his wife, Mr. M.'s daughter, to suicide. He did not, however, allege any sexual assault or parental unfitness on Mr. S.'s part. The hearing judge kept the long-term restraining order in effect, denying Mr. M.'s motion to dissolve Mr. S.'s restraining order.⁹

D. M. Reports to OCS

1. March 6, 2020

On March 6, 2020, only days following the March 3, 2020 incident and the March 4, 2020 restraining order, Mr. M.¹⁰ made a report to OCS regarding Mr. S.. In that report, Mr. M. alleged that Mr. S. had raped Mr. M.'s now-adult daughter E.¹¹ when she was a minor. Mr. M. also alleged that Mr. S. was using drugs, had physically abused his children, and that were reasons for concern that Mr. S. might be sexually abusing his children. The report also

⁵ Ex. K.

⁶ Exs. A, I, and L.

⁷ Exs. D and F.

⁸ Exs.B, H, and M.

⁹ Ex. C, E, and N.

¹⁰ Although the applicable page in the record (AR 57) is redacted, both the context of the evidence and the information provided at hearing made it clear that Mr. M. was the complainant.

¹¹ Again, the information in the record (AR 57) is redacted, but the context is clear that Mr. M. identified E. as the alleged victim.

mentioned Mr. S. having gotten a protective order against Mr. M., and having the children removed from the M. home.¹²

Mr. S.'s children "were seen at the Child Advocacy program on 3/6/20, and no disclosures were made, and there were no marks on the children."¹³ OCS had Mr. S. tested for drugs on March 9, 2020. He passed the drug test.¹⁴ Following its investigation, OCS did not substantiate the allegations made against Mr. S..¹⁵

2. July 16, 2020

Mr. M. made a second report to OCS on July 16, 2020.¹⁶ This report, ostensibly based on information from his daughters (D. and E.), alleged that Mr. S. had improperly touched D.'s daughter, B., two years earlier, which would have been when she was 12 years old. Reportedly, B. had relayed these events to her aunt, E., who then relayed them to B.'s mother, D..¹⁷

i. B. Interview

As a result of the report, 14-year-old B. was forensically interviewed at Children's Hospital A on August 3, 2020. When asked at the outset if she knew why she was there, B. stated that it was probably due to her grandfather (M. M.).

During her interview, B. described that, several years earlier, Mr. S., while tickling her, had laid on top of her with his legs inside of hers, and had touched the insides of her thighs and the side of her breast. She stated that everyone was fully clothed and that there was no direct touching of the skin. She did not indicate that the touch went up to her pubic area but described feeling "frozen" when Mr. S. touched her side.

B. did not disclose any other incidents of improper touching or any other improper conduct by Mr. S..

B. was notably emotional throughout the interview, even in response to innocuous questions.¹⁸

ii. D. Interview

When interviewed by the Children's Hospital A team and OCS immediately prior to B.'s forensic interview, D. (B.'s mother) described the discovery of the incident as follows: "B. told

¹² AR 57.

¹³ AR 59.

¹⁴ AR 59.

¹⁵ AR 58, 70 – 71; Ex. G.

¹⁶ AR 61 – 62.

¹⁷ AR 55 – Video Interview; Ex. 8 (OCS notes of forensic interview, unredacted AR pp. 7, 19 – 22).

¹⁸ AR 55 – Video Interview; Ex. 8 (OCS notes of forensic interview, unredacted AR pp. 7, 19 – 22).

her aunt, E., about it, and then E. told her parents/maternal grandparents about it, and they talked to B..”

D. also noted that B. had always been a very emotional child and predicted she would cry during the interview.¹⁹

In another interview later that day, D. opined that her father (Mr. M.) had “made the report because he is out to get” Mr. S..²⁰

iii. E. Interview

OCS interviewed E. on August 4, 2020. According to the OCS worker’s contemporaneous notes, E. made the following statements:

- Mr. S. had sexually assaulted her (E.) repeatedly starting when she was 14 and continuing through age 20. After L. died and Mr. S. moved to Anchorage, he insisted that E. come to Anchorage with him while his children stayed with her parents. The sexual assaults were ongoing at this time, although she said they might have appeared “consensual” based on their relationship.
- L. had previously told her that, during a visit by B. to the S. home, she had she found B. naked, crying, and shaking.
- Mr. S. was a drug user, with a history of cocaine, methamphetamine, and heroin use.
- Mr. S. had threatened the M. family that “the cartels” would kill them if they took his children away.
- B. had disclosed the tickling incident from two years prior “about two months ago,” when E. was talking to her about her own relationship with Mr. S.. According to E., she told B. “that he had done something to her a long time [ago],” and that B. then “began to cry and told her K. did something to her too[.]”²¹

iv. M. M. Interview

M. M. was also interviewed by OCS on August 4, 2020, with the OCS worker’s notes reflecting the following statements by Mr. M.:

- Mr. S. had sexually assaulted Mr. M.’s now-adult daughter, E., when she was 13 – 14 years old.
- Mr. S. had sexually assaulted Mr. M.’s granddaughter, B., several years earlier when she was 12. He learned about this because B. had disclosed to E., who had then told the Ms that, “K. messed with B. too.” Mr. M. reported that he “was

¹⁹ AR 23.

²⁰ AR 25. Although the name is redacted in the agency record, the context is clear that D. was referring to her father, Mr. M..

²¹ AR 28 – 29.

told by E. that B. told her that K. started to tickle her and then the tickling turned into fingers in her crotch.”

- Mr. S. physically abused his children and was a drug user who was “reported to be smoking heroin.”²²
- Mr. S. had managed to “beat OCS’s drug test because he bought pee from somebody.”
- Mr. S. was probably sexually assaulting his children.
- He believes L.’s death was not a suicide and feels the police did not fully investigate her case.
- Mr. S. had threatened E. with the “cartels” killing them if they took his children away.
- “Someone really needs to investigate K. because he is getting away with everything[.]”²³

v. *K. S.*

During its investigation, OCS interviewed Mr. S.’s two minor children. There were no signs of abuse, and they made no disclosures of concerning conduct. Mr. S. denied that he had maltreated his children or his niece.²⁴ At hearing, Mr. S. credibly testified that he cooperated with OCS during its investigations of him and the children, including submitting to a drug test. He also denied touching B. inappropriately. He stated that she was not telling the truth in the video, and that she was put up to it by her grandparents, the Ms. He said she was emotional and capable of crying anytime she is in trouble or wanted something.²⁵

vi. *OCS Notice of Substantiated Finding*

In a letter dated August 18, 2020, OCS notified Mr. S. that it had completed its investigation of the July 2020 allegations against him. OCS’s notice stated that the allegation regarding sexual abuse of his niece B., was deemed “substantiated.”²⁶ The allegations regarding Mr. S.’s children were not substantiated.²⁷

E. *The Hearing*

Mr. S. requested a hearing to contest OCS’s finding that he had sexually abused B.. The case went to hearing on December 20 and 21, 2022. OCS, which bears the burden of proof in

²² Mr. M. stated he had received this information from (unidentified) people in City A.

²³ Ex. O (unredacted); AR 26 – 27 (redacted).

²⁴ AR 67.

²⁵ Mr. S.’s testimony.

²⁶ AR 1.

²⁷ AR 67 – 69.

this case, presented one witness, Debra LeFebvre, who was the supervisor of Lisa Yi. Ms. Yi was the Protective Services Specialist who had investigated the allegations in this case. Ms. LeFebvre had no direct knowledge of the case, and no contact with any of the involved parties or witnesses.²⁸ Mr. S. testified on his own behalf and did not present any other witnesses.²⁹

This hearing was conducted by video. Mr. S. was visually observed during the hearing, and is deemed, based upon a physical observation of his demeanor, and the manner in which he answered questions, a credible witness. The pertinent parts of his testimony are provided above in the Facts portion.

III. Discussion

A. Legal framework

Alaska's Child Protection statute, AS 47.17, sets out a framework for OCS to receive and investigate reports of suspected child abuse or neglect.³⁰ The statute defines "child abuse or neglect" to mean "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[.]"³¹ Some but not all of these component parts are then further defined.

The statute defines "maltreatment" to mean "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[.]"³² One of the bases on which a Child in Need of Aid finding may be made is if,

[T]he child has suffered sexual abuse, or there is a substantial risk that the child will suffer sexual abuse, 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 adequately supervise the child.³³

²⁸ Ms. Yi, the caseworker, was not a witness because she no longer works for OCS, and there is no subpoena authority in this category of administrative hearings.

²⁹ Mr. S. had requested subpoenas for witnesses. However, OAH does not have the legal authority to issue subpoenas in these cases.

³⁰ Investigation reports arising out of this statute are maintained in the child protection registry. While the contents of the registry are confidential, substantiated reports of harm may be used by governmental agencies in certain contexts. AS 47.17.040.

³¹ AS 47.17.290(3) (emphasis added). The statute does not separately define "sexual abuse," but prior Commissioner-level decisions have applied "the commonly accepted use of that term." *Matter of C.B.D.*, OAH No. 16-1332-SAN (Dept' Health & Soc. Svcs. 2017).

³² AS 47.17.290(9).

³³ AS 47.10.011(7)

“[S]exual abuse” is then defined as conduct described in or prohibited by certain criminal statutes.³⁴

Relevant to this discussion, “sexual abuse” includes the conduct described in AS 11.41.410 –11.41.460, the statutes setting out the criminal offenses of sexual assault, sexual abuse of a minor, incest, online enticement of a minor, unlawful exploitation of a minor, and indecent exposure. These include AS 11.41.440, sexual abuse of a minor in the second degree, which includes, *inter alia*, sexual contact against a child under 13 years of age by any adult. The term “sexual contact” is defined as including “knowingly touching, direct or through clothing, the victim’s genitals, anus, or female breast.”³⁵

Alaska Statute 47.17.040(c) provides that, “[b]efore a substantiated finding may be placed on the child protection registry and provided as part of a civil history check under AS 47.05.325, the department shall provide the applicant notice of the finding and an opportunity to appeal the finding.” When a parent challenges a substantiated finding 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.³⁶

B. Evidentiary issues

In an administrative proceeding under AS 44.64.060, “[t]he administrative law judge may admit any evidence of the type on which reasonable people are accustomed to rely in the conduct of serious affairs.”³⁷ The rules of evidence used in the judicial system “do not apply to an administrative hearings except as a guide[.]”³⁸ Here, the evidence is comprised chiefly of the one forensic interview, the caseworker’s contemporaneous notes, and Mr. S.’s testimony. While Ms. LeFebvre testified, because she had no direct contact with any of the parties, and her information was gleaned either from discussions with the caseworker and OCS records, including the caseworker’s notes, which are already in the record, her testimony consists of multiple layers of hearsay, and is given minimal weight.

³⁴ AS 47.10.990(33).

³⁵ AS 11.81.900(61)(A).

³⁶ *Matter of E.O.*, OAH No. 16-1407-SAN (Dep’t Health & Soc. Svcs 2017).

³⁷ 2 AAC 64.290(a)(1).

³⁸ 2 AAC 64.290(b).

Neither party objected to the admission of each other's exhibits, so they are all admitted. However, it is noted that Mr. S. requested the issuance of subpoenas. That request was denied, because OAH's hearing statutes do not authorize the issuance of subpoenas in these substantiated child abuse and neglect hearings.³⁹

As a result, the only *direct* evidence of what happened or did not happen was Mr. S.'s testimony.

C. Analysis

In some substantiation of child maltreatment cases, the critical question is whether the facts as alleged rise to the level of the identified maltreatment. That is, if these things occurred as alleged, do they constitute maltreatment under the Child Protection statute? In other cases, such as this one, the outcome turns on a factual dispute about what actually occurred. As OCS has the burden of proof in this administrative hearing, it must meet the factual burden of showing that the incident in question – alleged sexualized touching of B. – more likely than not occurred.⁴⁰

The critical factual issue in this case lies in the discrepancy between Mr. S.'s credible testimony and the statements in B.'s videotaped interview. It must first be noted that B. did not testify. She is certainly of an age to testify. Regardless, her interview is OCS's primary evidence.⁴¹ In assessing the veracity of the statements made in her interview, a key question is whether she had a motive to fabricate.

The factual background that gave rise to the substantiated allegation shows that Mr. M. had a belief that Mr. S. either caused his daughter L. to commit suicide or killed her. Mr. M. wanted custody of the grandchildren. When this did not happen, and Mr. S. filed a restraining order against him and obtained custody of the children, Mr. M. immediately initiated an OCS report against Mr. S. alleging that Mr. S. was a drug user who physically abused his children and possibly sexually abused them. OCS investigated and determined to not substantiate those allegations. It is notable that Mr. M.'s custody petition, which he filed on March 12, 2020, less

³⁹ OAH hearing regulation 2 AAC 64.240(c) authorizes the issuance of subpoenas only for Administrative Procedure Act cases or when "provided in an applicable statute." These substantiated child abuse and neglect cases are not Administrative Procedure Act cases, and the statutes/regulations governing these cases do not provide authority for the issuance of subpoenas.

⁴⁰ It is not necessary to decide, and this decision does not reach, whether the touching as alleged in the interview in fact either constitutes "sexual abuse" or justifies a finding of "attempted sexual abuse."

⁴¹ See *Matter of A.S.W.*, 834 P.2d 801, 804 (Alaska 1992) ("The out-of-court statements of a child in proceedings where abuse is alleged are often quite necessary to the administration of justice.")

than a week after his March 6, 2020 report of abuse to OCS, did not make any allegations that Mr. S. was an unfit or abusive parent.

Then in mid-July 2020, Mr. M. filed a new report with OCS, which repeated the allegations regarding Mr. S.'s children, and an additional allegation, to wit, that Mr. S. had sexually assaulted B.. His interview contained a statement that Mr. S. had threatened E. with "cartels."

The source of the allegation regarding B. was E., according to the record. E., however, had been in a prior relationship with Mr. S. and he ended it. E.'s interview statement contained the allegations that she had been sexually assaulted by Mr. S. as a teenager, and as an adult. It repeated the allegation regarding "cartels" made by her father Mr. M..

The dispute over child custody, Mr. M.'s belief that Mr. S. had either driven his wife to suicide or had killed her, and E.'s animosity, as reflected in her statements to Mr. S. that he had ruined her life and he was going to regret it, along with the improbable allegations regarding "cartels", and the hearsay nature of their reports, make them not credible. Mr. M.'s scattershot unproven allegations of drug use, physical abuse of Mr. S.'s children, and vague speculations of sexual abuse of Mr. S.'s own children render his report particularly suspect. Both Mr. M. and E. had a clear motive to fabricate their statements. This raises the question of whether their lack of credibility should carry over to B.'s interview.

B.'s interview – and the circumstances surrounding it – are problematic.

- First, B. identified her grandfather, whose report was not credible, as being the probable reason for the interview. In the context of the family drama and Mr. M.'s frequent and frankly outlandish accusations against Mr. S., B.'s statement supports a conclusion that B. was aware of Mr. M.'s vendetta against Mr. S. and his campaign to regain custody of the children.
- Second, if, as reported by E., L. had in fact told her that she found B. naked and crying during an earlier incident, it is more likely than not that B. would have reported that prior incident in her forensic interview.
- Third, B. was very emotional during the entire interview, not just in the portions that dealt with the alleged assault. She was obviously under stress, and as noted by both her mother D. and by Mr. S., she is a very emotional child. The emotional display could have resulted from either the stress of being forced by her family to claim that Mr. S. assaulted her when it did not happen, or from the stress of being forced to recount an exceedingly traumatic event. In the full context of this case and the question at issue in this decision, B.'s emotional reaction to the interview, while credible as to the display of believable stress, does not make it more likely that the allegations against Mr. S. are factually accurate.

- Finally, the timing of the report regarding B. is suspect in that it happened only after Mr. M.'s earlier attempt to have OCS pursue Mr. S. for child abuse failed.

In contrast to the lack of credibility of Mr. M.'s and E.'s hearsay statements, Mr. S. was a credible witness, as found above. Given that credibility, the context of the M. family's demonstrated animosity toward Mr. S., and both Ms. M.'s and E.'s statements to Mr. S. that he would regret his actions in taking his children back to City A, the totality of the circumstances forces a reluctant conclusion that B.'s interview statements were likely the result of the pressure she faced from her family and were not factually accurate.

The evidence presented simply does not allow a determination that the events described by B. were more likely true than not true. As a result, OCS, which had the burden of proof in this case, did not meet it.

IV. Conclusion

The August 18, 2020 substantiated finding of maltreatment based on sexual abuse is reversed.

Dated: January 20, 2023

SIGNED
Lawrence A. Pederson
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Family and Community 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 27th day of February, 2023.

By: SIGNED

Name: Chrissy Vogeley

Title: Special Assistant II

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