

**THE COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES  
DEPARTMENT OF CHILDREN AND FAMILIES  
CENTRAL ADMINISTRATIVE OFFICE  
600 WASHINGTON STREET  
BOSTON, MASSACHUSETTS 02111**

Linda Spears  
Commissioner

Voice: (617) 748-2000  
FAX: (617) 261-7428

IN THE MATTER OF )  
JM ) **FAIR HEARING DECISION**  
)  
FH #2017-0051 )

The Appellant in this Fair Hearing is JM (hereinafter "JM" or "Appellant"). The Appellant appealed the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support the allegation of neglect pursuant to M.G.L. c. 119, §§51A and B.

**Procedural History**

On November 10, 2016, the Department received a 51A report alleging neglect of G (hereinafter "G" or "the children"), R (hereinafter "R" or "the children"), M (hereinafter "M" or "the children" and T (hereinafter "T" or "the children") by the Appellant. The Department conducted a response and, on December 19, 2016, the Department made the decision to support the allegation of neglect by the Appellant. The Department notified the Appellant of its decision and her right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06.

The Hearing originally scheduled for March 2, 2017 was rescheduled at the request of Counsel for the Appellant. The Hearing was held on March 16, 2016 at the DCF Coastal Area Office. All witnesses were sworn in to testify under oath.

The record remained open at the conclusion of the Fair Hearing to afford the Appellant the opportunity to submit additional information. The Appellant, through Counsel, submitted the DCF Assessment Worksheet, which was reviewed, entered into evidence and considered by the Hearing Officer in the decision making of the instant case. The record closed on April 14, 2017.

The following persons appeared at the Fair Hearing:  
Carmen Temme Fair Hearing Officer  
JM Appellant<sup>1</sup>  
MM Children's father  
JI Counsel for Appellant  
JM Department Supervisor<sup>2</sup>

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this matter, having no direct or indirect interest, personal involvement, or bias in this case.

The Fair Hearing was recorded pursuant to DCF regulations. 110 CMR 10.26

The following documentary evidence was entered into the record for this Fair Hearing:

For the Department:

Exhibit A 51A Report, dated 11/10/2016  
Exhibit B 51B Report, completed 12/19/2016<sup>3</sup>  
Exhibit C ██████████ report, dated 11/15/2016<sup>4</sup>

For the Appellant:

Exhibit 1 DCF Assessment Worksheet, completed 2/5/2017

The Hearing Officer need not strictly follow the rules of evidence....Only evidence which is relevant and material may be admitted and form the basis of the decision. 110 CMR 10.21

**Issue to be Decided**

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record as a whole, and on the information available at the time of and subsequent to the response, the Department's decision or procedural action, in supporting the 51A report, violated applicable statutory or regulatory requirements, or the Department's policies or procedures, and resulted in substantial prejudice to the Appellant. If there is no applicable statute, policy, regulation or procedure, the issue is whether the Department failed to act with a reasonable basis or in a reasonable manner, which resulted in substantial prejudice to the Appellant. For a decision to support a report of abuse or neglect, giving due weight to the clinical judgments of the Department social workers, the issue is whether there was reasonable cause to believe that a child had been abused or neglected and the actions or inactions by the parent(s)/caregiver(s)

<sup>1</sup> Will be referred as Appellant when citing in this decision.

<sup>2</sup> JM presented the 51A and 51 B reports; JM supervised the assigned Response Social Worker. (Testimony JM)

<sup>3</sup> The Appellant and MM expressed frustration with the response worker when she did not follow through with her assurance that she would contact them and when they received notification of the decision. The Appellant and MM learned of the support decision from the assigned assessment social worker. (Testimony Appellant; Testimony MM) The Hearing Officer noted that the due date was for the completion of the 51A response was December 5, 2016, the approval date was December 19, 2016; the written notification was dated December 20, 2016. (Exhibit B; DCF notification letter)

<sup>4</sup> Counsel for the Appellant objected to the Department's submission of said police report and reading portions thereof into the Record. (See Analysis)

placed the child(ren) in danger or posed substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 10.05; DCF Protective Intake Policy #86-015, rev. 2/28/16

### **Findings of Fact**

1. The subject children of this Fair Hearing were G (aged 9), R (aged 8), M (aged 6) and T (aged 3). (Exhibit A, p.1; Exhibit B, p.2; Testimony MM)
2. The Appellant and MM (hereinafter "MM") were married for ten (10) years. (Testimony MM) The children lived with MM and the Appellant. The Appellant was the children's mother; therefore, she was deemed a caregiver pursuant to Departmental regulation and policy. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/2016)
3. The Appellant and her family had no prior involvement with the Department. (Exhibit A, p.5; Exhibit B, p.1)
4. The Appellant and her family had no previous involvement with the police. (Testimony MM; Testimony JM)
5. It is undisputed there were no concerns for the children's care or well-being. (Testimony JM; Exhibit B)
6. On November 10, 2016, the Department received a report pursuant to M.G. L. c. 119, §51A, alleging neglect of the children. On November 10, 2016, the ██████████ responded to ██████████ (hereinafter "██████████") at 5:43 pm due to concerns of "a mother possibly under the influence" with children present. ██████████ does not serve alcohol. The Appellant reportedly had an "odor of alcohol coming from her person." The Appellant was not cooperative. MM was contacted who came to pick up the Appellant and the children; the Appellant was not arrested or charged. (Exhibit A, p.3; Testimony JM)
7. The 51A report was assigned for a response, pursuant to M.G.L. c. 119, § 51A to LS (hereinafter "LS"), Response Social Worker from the DCF Coastal Area Office. (Exhibit B; Testimony JM)
8. On November 10, 2016, the Appellant and her friend AS (hereinafter "AS") went to lunch and shopping. The Appellant left her home at approximately 12:30 pm. MM was present at the residence when the Appellant left the home and when she returned. The Appellant acknowledged having one (1) large glass of wine at lunch. Lunch consisted of oysters, calamari and flatbread at ██████████. The Appellant is "very slim and petite." The Appellant was mindful to eat as she was driving that day. (Exhibit B, pp.4, 5, & 7; Testimony MM; Testimony Appellant)
9. The Appellant and AS, who according to the Appellant may have had more than one (1) drink during lunch, returned to the Appellant's residence at approximately 3:00 pm to pick the children up from the bus stop. The Appellant denied she felt impaired. (Exhibit B, pp.4-5) MM was in the

garage working and did not have much interaction with the Appellant when she returned to the residence. (Testimony MM; Exhibit B, p.4)

10. The children returned home from school at 3:40 pm. The children received good grades in school and G was voted class president, the Appellant took them to [REDACTED] for celebratory ice cream. The Appellant and the children told MM of their plan. [REDACTED] Restaurant was five (5) to seven (7) minutes from the Appellant's residence. AS and her son accompanied them to [REDACTED]. (Testimony Appellant; Testimony MM; Exhibit B, p.4)

11. The Appellant and MM maintained they were social drinkers having a glass of wine or beer with friends and arrangements were made for a "sober driver if they {were} out" or for a car service. (Exhibit B, p.4; Testimony MM; Testimony Appellant) The Appellant maintained she had one (1) glass of wine at lunch. (Exhibit B, pp. 4-5; Testimony Appellant) MM testified the Appellant did not drink often or to excess, limiting herself to one (1) glass of wine if caretaking the children. MM denied that neither he nor Appellant had a problem with alcohol or addiction issues. (Exhibit B, p.2; Testimony MM)

12. G informed LS the Appellant drank wine if her friends came over; this occurred once every few weeks and occurred at night. He stated his parents voices got "low" when they drank, but their speech remained clear and they had no difficulty walking or performing tasks. G reported the Appellant was "talking low" the day of the reported incident.<sup>5</sup> G thought "maybe" the Appellant and her friend had drunk alcohol, but "seemed alright to drive." He denied he was worried or felt unsafe when the Appellant drove. G recalled the reason for the police going to [REDACTED] was because AS's son was urinating in the [REDACTED] parking lot. G knew the Appellant was upset when the police arrived. MM picked them up. They returned home, he and his brother went to their rooms and he could hear his parents yelling. (Exhibit B, p.5; Testimony JM)

13. Initially, R denied that his parents drank alcohol. When informed that his parents had acknowledged that they drank alcohol, R stated that he Appellant would have one (1) glass of wine "once in a while, usually when she had friends over". R denied seeing any behavioral changes in either parent. (Exhibit B, p.5) R recalled the reported incident and the police responding because the AS's son urinated outside. He stated the bathroom was "disgusting." R thought the Appellant might have had a drink; however, denied he saw her or smelled alcohol on the Appellant.<sup>6</sup> R denied anything upset him about the reported incident. (Exhibit B, p.5; Testimony JM)

14. G and R reported feeling safe and well cared for by their parents. T and M would not meet with LS. (Exhibit B, p.5)

15. At the end of its response, the Department supported for neglect of the children by the Appellant. The Department based this determination on the following:

---

<sup>5</sup> The Department did not clarify what G meant or the significance of the Appellant "talking low." MM heard the assigned response worker specifically ask G if the Appellant's voice became "low." (Testimony MM)

<sup>6</sup> The record is absent information clarifying why R "thought" this.

- The Appellant “displaying indicators of being impaired by alcohol” after driving the children several miles to ██████████ restaurant.
- While the Appellant reported having only one (1) glass of wine hours before transporting the children, the police and the manager of ██████████ described the Appellant as having “an odor of alcohol, glassy eyes, slow and deliberate speech and delayed responses.”
- The Appellant’s failure to cooperate with efforts made by the police to assess her sobriety. The Appellant’s interaction with the police was described as “hostile.”
- The Appellant’s attempt to “convince DCF that the police report was wrong and that her friend and not her was the subject of their scrutiny and concern.” [sic]The police report and LS’s conversation with Friendly’s staff “clearly indicate that {JM} was impaired when she drove the children to the restaurant.”
- The children’s belief that “it was possible, if not likely that she had alcohol before she drove them to ██████████ and their description of her pattern of drinking is more significant than that reported by {JM} and {MM}. (Exhibit B, p.7; Testimony JM)

16. In light of the following evidentiary testimony, documentation and Findings #8-#12, I find there was insufficient evidence to support the allegation of neglect per 110 CMR 2.00.

17. JM noted concern that the Appellant drove the children while impaired; “fortunately there was no accident.” (Testimony JM) The record however is absent any information that there were any concerns regarding the Appellant’s driving to ██████████ (Exhibit B) There was no evidence of any neglect of the children while at ██████████ restaurant. (Testimony JM; Exhibit B)

18. The Appellant and children arrived at ██████████ between 4:30 and 5:00 pm. After repeated knocking at the take out window, no staff responded. They went to the inside counter to place their order and were told they needed to be seated. Sitting was not planned. Appellant testified the staff became annoyed when they sat down to wait for their order in a server’s section; they were told that a waitress needed to serve them. (Testimony Appellant)

19. At one point, Appellant went outside to get AS’s phone from her car and returned back inside. AS went outside with her son so he could go to the bathroom, as the bathrooms inside were unclean. The police arrived and Appellant saw them outside with AS and her son. The police came inside and advised Appellant that staff from ██████████ contacted them and reported Appellant and AS were banging on the window and under the influence of something. The Appellant was upset and felt wrongly accused. The Appellant contacted MM as Officer H (hereinafter “Officer H”) stood next to her. (Testimony Appellant)

20. Appellant informed LS of the aforementioned issues at ██████████ (Testimony Appellant) this information was not documented in the 51B report. (Testimony Appellant; Exhibit B)

21. MM was contacted by Appellant by phone and spoke with Officer H who stated that although the Appellant “seemed fine” to drive home, she was upset and Officer H requested MM pick up the Appellant and the children. Officer H did not inform MM that the Appellant was intoxicated or impaired but referenced AS being impaired. (Testimony MM; Exhibit B, p.5)

22. The Appellant’s interaction with the police “switched” when she “continued to run her

mouth.” (Testimony Appellant) Officer H told MM if the Appellant continued to talk, it “could be bad for her.” (Testimony MM) The Appellant admitted she was “very emotional and upset and did get defensive...she did speak harshly and defensively to the police and realizes this was a mistake.” (Exhibit B, p.5) MM stated Appellant was upset because she was being wrongly accused of being intoxicated. (Testimony MM)

23. MM picked up the Appellant and the children. He did not smell alcohol when they were in the car, nor did he see signs that the Appellant had been drinking. (Testimony MM) They arrived home, the children went to their rooms and MM and the Appellant spoke about the reported incident. (Testimony MM)

24. Officer H’s reported information is inconsistent with the [REDACTED] Police report.<sup>7</sup> (Testimony MM; Testimony Appellant; Exhibit C) The author of the police report, believed to be Officer B, (Testimony JM; Exhibit C) wrote that due to “an odor of an alcoholic beverage coming from her person”, showing “signs of impairment, (smell from breath, glassy eyes and slow and deliberate speech” and “resistance to perform any FST to properly judge her level of intoxication” she was “not permitted to drive home.” The Department did not speak with Officer H. (Exhibit B)

25. During the 51A response and Fair Hearing, the Appellant repeatedly contended that the police mixed up the Appellant with AS. The Department did not contact AS during the course of its response. (Exhibit B; Testimony JM) AS was not mentioned in the [REDACTED] Police Report and the Department did not know if a separate police report had been filed on her behalf. (Exhibit C; Testimony JM)

26. LS spoke with the [REDACTED] manager on duty the day of the reported incident. The manager referred to one (1) mother as blonde with four (4) children and the other women with one (1) child;<sup>8</sup> the manager did not know names. They all arrived at [REDACTED] in a white SUV, which belonged to the “blonde mother.” The Department noted that the Appellant had bright blond hair. Staff immediately smelled alcohol on the “mother of one and observed her to have glassy eyes and slow speech.” The narrative goes on to say that the manager did not notice that “the blonde women” smelt of alcohol, but she “definitely looked and acted high on something...her eyes and expression were vacant, she was moving and speaking slowly and did not seem fully aware of where she was or where her children were.” (Exhibit B, p.3) The manager’s report that she did not smell alcohol on the “blonde mother” conflicts with the statement that she provided to the [REDACTED] police wherein she informed the police that she could smell alcohol on her when she placed her order. (Exhibit C)

27. The Appellant spoke of her role as a stay at home mother, caretaking the children and the extent of her involvement in the children’s many activities. The Appellant volunteered at the children’s school, sports and play groups; MM coached sporting activities. (Testimony Appellant; Testimony MM) The Department’s decision to support neglect could result in a substantial prejudice against the Appellant. I find the Appellant and MM to raise reasonable concerns regarding the need for additional inquiry and corroboration by the Department. They presented as sincere parents, committed to ensuring the safety and well-being of their children. I

<sup>7</sup> Counsel for the Appellant objected to the Department reading from and submitting the [REDACTED] Police Report. (See Analysis)

<sup>8</sup> Appellant testified AS had brown hair. (Testimony Appellant)

found MM's corroborative testimony to be balanced, thoughtful and credible.

28. The Department conducted an assessment of the family and their functioning. The children did well in school, were involved in community activities and demonstrated no behavioral problems. The Department described the family as close knit and "high functioning." Appellant and MM reported their children were their most important priority. Following the DCF support decision, Appellant and MM engaged in couples counseling due to the stress this caused within their relationship. The Appellant agreed that she would not drink and drive with the children even after one glass of wine. The Department closed its case following the completion of the Assessment. (Exhibit 1)

29. In light of the totality of evidence in this case, I find there was insufficient evidence to support the allegation of neglect of the children by the Appellant. There was no reasonable cause to believe that neglect occurred. 10 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16 (Fair Hearing Record)

### Applicable Standards

Caregiver is defined as:

- (1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
- (2) Any other person entrusted with responsibility for a child's health or welfare, whether in the child's home, a relative's home, a school setting, a child care setting (including babysitting), a foster home, a group care facility, or any other comparable setting.

As such, the term "caregiver" includes, but is not limited to school teachers, babysitters, school bus drivers and camp counselors. The "caregiver" definition should be construed broadly and inclusively to encompass any person who at the time in question is entrusted with a degree of responsibility for the child. This specifically includes a caregiver who is a child such as a babysitter under age 18. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

"[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §51A." Care and Protection of Robert, 408 Mass. 52, 63 (1990) This same reasonable cause standard of proof applies to decisions to support allegations under §51B. Id. at 64; M.G.L. c. 119, §51B "Reasonable cause" implies a relatively low standard of proof which, in the context of 51B, serves a threshold function in determining whether there is a need for further assessment and/or intervention. Id. at 64

"Reasonable cause to believe" means a collection of facts, knowledge or observations which tend to support or are consistent with the allegations, and when viewed in light of the surrounding circumstances and credibility of persons providing information, would lead one to conclude that a child has been abused or neglected. 110 CMR 4.32(2)

Neglect is the failure by a caregiver, either deliberately or through negligence or inability, to take those actions necessary to provide a child with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care; malnutrition;

or failure to thrive. Neglect cannot result solely from inadequate economic resources or be due solely to the existence of a handicapping condition. 110 CMR 2.00

A finding of support requires that there be: reasonable cause to believe that a child(ren) was abused and/or neglected; and the actions or inactions by the parent(s)/caregiver(s) place the child(ren) in danger or pose substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. DCF Protective Intake Policy #86-015, rev. 2/28/2016

“Danger” is defined as a condition in which a caregiver’s actions or behaviors have resulted in harm to a child or may result in harm to a child in the immediate future. DCF Protective Intake Policy #86-015, rev. 2/28/2016

“Risk” is defined as the potential for future harm to a child. DCF Protective Intake Police, rev. 2/28/2016

The Hearing Officer shall have the duty to conduct a Fair Hearing so as to ensure that the rights of all parties are protected, and to render an impartial decision based upon the issues and evidence presented at the hearing and in accordance with the law. He or she shall have the following specific duties:

- (4) receive, rule on, exclude, or limit evidence (which shall include the right to request that any party produce additional evidence such as witnesses, documents, etc. but shall not include the right to require any party to do so) 110 CMR 10.20:

“... When reviewing a support decision or an Alleged Perpetrator listing, the hearing officer may consider information available during the investigation and new information subsequently discovered or provided that would either support or detract from the Departments decision.” 110 CMR 10.21 (6)

To prevail, an Appellant must show based upon all of the evidence presented at the hearing, by a preponderance of the evidence that: (a) the Department’s or Provider’s decision was not in conformity with the Department’s policies and/or regulations and/or statutes and/or case law and resulted in substantial prejudice to the Appellant, (b) the Department’s or Provider’s procedural actions were not in conformity with the Department’s policies and/or regulations, and resulted in substantial prejudice to the aggrieved party, (c) if there is no applicable policy, regulation or procedure, that the Department or Provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party; or (d) if the challenged decision is a supported report of abuse or neglect, that the Department has not demonstrated there is reasonable cause to believe that a child was abused or neglected and the actions or inactions by the parent(s)/caregiver(s) placed the child(ren) in danger or posed substantial risk to the child(ren)'s safety or well-being; or the person was responsible for the child(ren) being a victim of sexual exploitation or human trafficking. 110 CMR 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/2016



### Analysis

It is undisputed that the Appellant was a caregiver for the children. 110 CMR 2.00

The issue for resolution in the instant case is whether the Appellant's consumption of alcohol on November 10, 2016 constituted neglect per the Department's regulations and policies. In coming to its decision, the Department relied on information provided by a manager at ██████████ restaurant and information obtained from the ██████████ Police report. Counsel for the Appellant objected to the Department reading from and submitting the ██████████ Police report dated November 10, 2016. The Department received and considered the ██████████ Police report in the decision making of the subject 51 response. The Hearing Officer is permitted to consider and or request information obtained during and subsequent to the Department's decision to support neglect. 110 CMR 10.20; 110 CMR 10.21 (6) The submission of the aforementioned information and testimony is Allowed.

The ██████████ Police report and the information obtained from the manager at ██████████ do not corroborate one another. Additionally, a second responding police officer spoke with MM via phone during the course of the police response to ██████████. MM and the Appellant were clear that Officer H did not find the Appellant to be impaired. By not contacting Officer H and Officer B, I find that the Department did not comply with 110 CMR §4.27(2) by not pursuing obvious contact(s) which were likely to yield some information to corroborate or disprove the allegations. I find no reason to discredit the Appellant and MM's version of events, having found their testimony to be credible. The Appellant's heightened level of irritation at the Friendly's staff and the police likely played a role in the reported incident. (Fair Hearing Record)

This Hearing Officer gave significant weight to G and R's account of the reported incident. Neither G nor R voiced or described any unusual or concerning behaviors regarding the Appellant while at home, during the drive to, or while they were at ██████████. G and R noted no concerns regarding the Appellant's drinking. In upholding a finding of abuse or neglect, the Department must consider the entire record, including evidence that detracts from findings that support its conclusion. Amone v. Dep't of Soc. Servs., 43 Mass. App. Ct. 33, 34 (1997) Both the Appellant and MM credibly maintained that they are social drinkers who make responsible decisions if they are to consume alcohol. Barring the reported incident, the Department had no concerns for the children's safety or well-being. The children reported feeling safe while in the Appellant's care on November 10, 2016.

"...When reviewing a support decision or an Alleged Perpetrator listing, the hearing officer may consider information available during the investigation and new information subsequently discovered or provided that would either support or detract from the Departments decision." (110 CMR 10.21 (6))

The evidence was insufficient to determine that the Appellant failed to provide less than "...minimally adequate...care" of the children. (110 CMR 2.00)

Considering all the evidence and the circumstances, the Department did not have reasonable cause to believe and the decision to support the allegation of neglect was not in conformity with

its policies and/or regulations. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

**Conclusion and Order**

The Department's decision to support the 51A report of neglect on behalf of G, R, M and T by the Appellant is **REVERSED**.



Carmen Temme  
Administrative Hearing Officer

12/7/17  
Date



Darlene M. Tonucci, Esq.  
Supervisor, Fair Hearing Unit

\_\_\_\_\_  
Date

\_\_\_\_\_  
Linda Spears  
Commissioner