

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 S. SPEARS
Commissioner

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

(
(IN THE MATTER OF)
(MM)
()
(FH # 2017-0066)
()

HEARING DECISION

Procedural History

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

On November 25, 2016 the Department received a 51A report from a mandated reporter alleging neglect of O and D (hereinafter "O" or "D" or "the children") by MM. On ; the allegation was subsequently supported. The Department informed the Appellant of its decision and of his right to appeal the Department's determination. The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06

The Fair Hearing was held on March 2, 2017 at the Department of Children and Families' Worcester East Area Office. All witnesses were sworn in to testify under oath.

The following persons appeared at the Fair Hearing:

NH	Administrative Hearing Officer
MM	Appellant
LK	Response Worker
TF	Supervisor

In accordance with 110 C.M.R. 10.03, the Administrative Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement or bias in this case.

The Fair Hearing was recorded on a digital voice recorder, pursuant to 110 CMR 10.26

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

For the Department:

Exhibit A: 51A Report
Exhibit B: 51B Response
Exhibit C: Police Report

For the Appellant:

Exhibit 1: Timeline of the Appellant's interactions with DCF
Exhibit 2: DCF Case Closing letter

The Record remained left open until March 16, 2017 for additional submission of court documents related to the criminal proceeding by the Appellant. No additional documents were submitted relating to the criminal proceeding; therefore the record closed on March 16, 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

Statement of the Issue

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) 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. MM is the father of O and D. At the time of the 51A report, O was nine (9) years old and D was six (6) years old. I find that MM was a caregiver for O and D in accordance with the regulations and policies that govern these proceedings. (Exhibit A pp.1-3; Exhibit B p.1; Testimony of LK; Testimony of MM)

2. MM was divorced from O and D's mother, MC. MC had physical custody and both the Appellant and MC shared legal custody of the children. MM had regular visitation with the children. (Exhibit B p.4; Testimony of LK; Testimony of MM)
3. On November 24, 2016, Thanksgiving Day, MM visited with the children. After Thanksgiving meal, MM drove the children in his car to a movie theater. (Exhibit A pp.1-3; Exhibit B pp.2-7; Testimony of MM)
4. According to the Police Report, while on route to the theater, another motorist contacted the police and reported MM to be driving erratically. MM and the children entered the theater; but emerged before the movie started in order to retrieve an iPad for O from MM's vehicle. The police officer confronted MM and the children, following up on the report. MM was observed to be unsteady on his feet and slurring his speech. The police officer conducted field sobriety tests, which MM failed. The police officer observed a half-full vodka bottle in a gym bag in the Appellant's vehicle. MM was charged with OUI and Child Endangerment. The arrest gave rise to a 51A report. (Exhibit A p.3; Exhibit B p.2; Exhibit C; Testimony of LK; Testimony of MM)
5. The Department interviewed by the children. They recalled hitting a large bump on the way to the theater; however could not recall why their car hit a bump. They thought another family in another car had caused it. The children denied their father was slurring his speech or driving erratically. The Department did not ask either child if they had observed their father drinking that evening. MC denied any history of alcohol or substance abuse by MM. (Exhibit B pp.3-5; Testimony of LK)
6. The Department did not obtain any evidence to indicate that the Appellant had a history of alcohol or substance abuse. (Exhibit B; Testimony of LK)
7. Initially, the DCF Response Worker and Supervisor decided the 51B outcome was a Substantiated Concern. However after consulting with the DCF Area Program Manager, it was determined that the allegation of neglect was to be supported. The Department's decision was based on the information contained in the police report and the significance that it presented to the safety of the children. (Testimony of LK; Testimony of TF)
8. The Appellant testified he swerved in his car as he was unfamiliar with the area. He was driving, while looking up directions with the GPS application on his cell phone; with his sons arguing in the back seat which distracted him. The Appellant acknowledged he had a bottle of vodka, as well as two other bottles in the back of the car; however he denied the bottle of vodka was half full; testifying he did not drink Vodka. He testified he planned to bring the children to his parents' home later and give them the bottles of alcohol. (Testimony of Appellant)
9. The Appellant testified he had passed the sobriety tests and was told so by the police officer. He reported there was a video from this incident and other potential

documents related to the incident/criminal charges that would support a reversal of the Department's decision to support the allegations of neglect. The Record was left open for the Appellant to submit this evidence; however none were received. (Testimony of Appellant)

10. In light of the totality of the evidence in this case, I find that the Department did have reasonable cause to support the allegations of neglect.
- a. A determination of neglect does not require evidence of actual injury to the child. *Lindsay v. Dep't of Soc. Servs.*, 439 Mass. 789, 794-795 (2003).
 - b. The Department had sufficient evidence to support a finding that the Appellant neglected O and D under Department policies and regulations. The Appellant was observed to be driving erratically while the children were in his vehicle. The Appellant was observed to be slurring his speech and unsteady on his feet. At the time of his arrest, MM was the sole caregiver for O and D. The Appellant was arrested for OUI and Child Endangerment.
 - c. The Appellant failed to provide O and D with minimally adequate care and his actions placed the children in danger or posed substantial risk to the children's safety or well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16

Applicable Standards

A "support" finding of abuse or neglect means there is 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. 2/28/16.

"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) Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caretaker; physical evidence of injury or harm; observable behavioral indicators; corroboration by collaterals (e.g. professionals, credible family members); and the social worker's and supervisor's clinical base of knowledge. 110 CMR 4.32(2)

"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. *Care and Protection of Robert*, 408 Mass. 52, 63-64 (1990). "[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of §51A." *Id.* at 63. This same reasonable cause standard of proof applies to decisions to support allegations under §51B. *Id.* at 64; M.G.L. c. 119, §51B

“Caregiver” means a child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or 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

“Neglect” is defined as 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; DCF Protective Intake Policy #86-015, Rev. 2/28/16

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, or (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, or (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. 2/28/16

Analysis

At the time incident which led to the Department investigation, MM was the caregiver for his sons as he drove them to the theater. The Appellant witnessed driving erratically, and his sons remember a substantial bump during the drive. The police officer who responded made several observations about the Appellant's behaviors, including unsteady walk and slurring speech. The police officer conducted field sobriety tests, which the Appellant failed. The Appellant was arrested and charged with OUI and Child Endangerment.


The Appellant denied the allegations of neglect and that he was intoxicated; he had not provided sufficient evidence to refute the allegations. The Department relied upon the police officer's detailed report of the response and subsequent arrest of the Appellant. It

is reasonable for the Department to rely on a detailed account by a police officer while conducting a 51B Response. Although O and D subsequently told the DCF worker that they did not remember their father slurring his speech, it was reasonable for the Department to rely on the recorded observations of a law enforcement professional.


Conclusion and Order

The Department's decision to support the allegations of neglect of O and D by the Appellant are hereby **AFFIRMED**.

This is the final administrative decision of the Department. If Appellant wishes to appeal this decision, she may do so by filing a complaint in the Superior Court for the county in which she lives, or in Suffolk County, within thirty (30) days of the receipt of this decision. (See, M.G.L. c.30A, §14). In the event of an appeal, the Hearing Officer reserves the right to supplement the findings.


Nicholas Holahan
Administrative Hearing Officer

1/2/18
Date


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