

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
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Commissioner

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IN THE MATTER OF

BW #2017-0117

FAIR HEARING DECISION

BW appeals the Department of Children and Families' (hereinafter "DCF" or "the Department") decision to support allegations of neglect pursuant to G.L. c. 119, §§51A and B.

Procedural History

On January 13, 2017, the Department received a 51A report alleging neglect of I and L by their father, RC. The Department received a second 51A report on January 14, 2017, alleging neglect of I and L by RC. The Department screened-in the reports for an emergency response. On January 17, 2017, the Department made the decision that the allegations of neglect of I and L by RC were supported and that I and L were also neglected by their mother, BW.

The Department notified BW of its decision. BW made a timely request for a Fair Hearing to appeal the Department's decision. A hearing was held at the DCF Framingham Area Office on March 16, 2017. BW, BW's mother, the Department emergency response workers and the Department supervisor testified at the hearing.

The Department submitted the 51A and 51B reports. (Exhibits A, B and C).

The hearing was digitally recorded and transferred to compact disc.

The Hearing Officer attests to having no prior involvement, personal interest or bias in this matter.

Issue to be Decided

The issue presented in this Fair 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, 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, 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) 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. 110 CMR 10.05 DCF Protective Intake Policy #86-015, rev. 2/28/16

Findings of Fact

1. BW (hereinafter "mother") and RC (hereinafter "father") are the parents of two children, I age 1, and L, age 9 months, at the time of the 51B response. At the children's mother, she was a caregiver pursuant to Department regulations and policy 110 CMR 2.00 and DCF Protective Intake Policy #86-105, rev. 2/28/16. (Exhibit A, pp. 1-2).
2. Mother works Tuesday through Friday from 3:00pm to 11:00pm and Saturdays, 10:00am to 6:00pm. (Testimony of mother).
3. Mother took maternity leave after the birth of each child. Mother took an extended maternity leave with L because she was very difficult to care for because she was colicky due to reflux. (Testimony of mother).
4. When mother returned to work after being on maternity leave, father took care of the children while mother worked. (Exhibit C, p. 3; Testimony of mother).

5. Mother and father lived together with the children until August 2016, when mother and father separated. Father continued to care for the children when mother was at work. They had no formal or court ordered custody or child support arrangement. (Exhibit A, p. 3; Exhibit C, p. 3).
6. Father has a history of substance abuse involving alcohol, marijuana and Percocet. Father smokes marijuana several times a day and he drinks heavily several nights a week. Mother does not use any substances and father's substance abuse was one factor that led to their separation. (Exhibit C, p. 3; Testimony of mother).
7. Father has told mother that he needs to smoke marijuana sometimes so he can deal with the baby's crying. (Exhibit C, p. 3).
8. Father has a history of physical violence. When he and mother were together, father has trashed her apartment, broken property, punched her in the leg and head butted his own head into the wall. Father's violent behavior was another factor that led to their separation. (Exhibit C, p. 3).

9. Father has a history of mental health issues. He is depressed and he has threatened to hurt himself. Shortly before the time in question, he was making statements that he was going to crash his car and die. (Exhibit C, p. 3).
10. On January 13, 2017, mother brought the children to the usual place to leave them with father so she could go to work. Father was late and when he arrived, he and mother argued. Father told her to find someone else to watch the children. She put the children back into her car. He then told her he wanted to take the children. She said she would find someone else because he keeps threatening not to watch the children. Father took mother's keys and got into the driver's seat of her car. Mother was afraid father would drive off with her car and the children. She got into the backseat and called 911. When she called 911, father got out of the car and stood in front of it. When the police arrived, the situation de-escalated. Police told father to contact mother the next day to schedule his next pick up of the children. Father said goodbye to the children and mother drove them to her mother's (maternal grandmother) to have her watch them. (Exhibit A, pp. 1-3; Exhibit C, p. 4)
11. On January 13, 2017, the Department received a 51A report alleging neglect of I and L by father due to the above incident. The Department screened-in the report for a non-emergency response. (Exhibit A).
12. On January 14, 2017, mother and father went to the bank in the morning to transfer father's car loan into his name. They spent about an hour at the bank. When they were finished at the bank, mother had to go to work and father was going to watch the children. Father appeared to be under the influence and he smelled of marijuana. Father admitted to smoking marijuana. Mother left the children with father because she had no other child care, she had already called out of work many times and the children were already buckled into their car seats and she did not want to make a scene. She knew it was the wrong things to do, but she figured that the high would wear off in a couple of hours. Father apparently drove home (or elsewhere) with the children while visibly under the influence of marijuana. At some point during the day, father went to mother's apartment with the children. Mother keeps a spare key in the children's diaper bag so that father is able to watch them at her apartment. (Exhibit C, pp. 2, 3; Testimony of mother).
13. During the day, mother and father were arguing about child support via text messages. When mother returned home from work, she and father argued about the text messages and child support. Father did not want to pay child support because of all the time he spent watching the children. Mother asked father to give her back the spare key to her apartment, but he refused to give it to her. Mother was afraid that he would use the key to enter the apartment without permission. They engaged in some level of physical altercation. Father threw mother's phone at her and it hit her in the forehead and then he left. The incident occurred with the children present. Mother called 911. The police responded and mother explained what happened. (Exhibit B, p. 3; Exhibit C, pp. 2, 3).
14. Police contacted father and father agreed to go to the police station and give a statement. Police intended to charge father with domestic assault and battery and assault and battery with a dangerous weapon. (Exhibit B, p. 3).

15. On January 14, 2017, the Department received a 51A report alleging neglect of the children by father due to the incident that night. The Department made the decision to screen in both reports for an emergency response. (Exhibit A; Exhibit B).
16. The Department response workers went to mother's home the next morning. Mother provided some background information consistent with the above findings. (Exhibit C, pp. 2-3, 4).
17. On January 17, 2017, the Department made the decision that father neglected the children and that mother neglected the children primarily by leaving them with father despite her knowledge of his substance abuse but also due to other factors placing the children at risk including father's history of violence and mental health issues. (Exhibit C, pp. 4-6;).
18. Mother testified at the hearing. To some extent, she denied making some of the statements attributed to her in the 51B report. Regarding January 14th, she denied that father appeared to be under the influence or smelled of marijuana when she left the children with him. She said that she and father were at the bank in the morning for about an hour so she knew he had not smoked marijuana for at least an hour. She did notice the smell of marijuana in his car when they put the children in his car, but the smell stays in the car so she doesn't know if he smoked that day. She was also under the impression that the police wanted her to allow him to visit because that is what they said the day before. She doesn't know what father does when he has the children. To the best of her knowledge, she has not left the children in his care when he has been under the influence. Regarding her comment that he said he needs to smoke marijuana sometimes to be able to deal with the baby's crying, she was referring to when they were still together and the baby was colicky and he would leave the home to smoke. She doesn't want the children exposed to his substance use. When they were living together, she never allowed him to smoke in the house or have marijuana in the house. She has always told father that he cannot take care of the children while he is under the influence. Lastly, she stated that he is the children's father and she did not know that she could keep him from taking care of the children. (Testimony of mother). To the extent that mother's testimony is inconsistent with her statements as documented in the 51B report, I do not credit mother's testimony.
19. Considering all of the credible evidence, I find that mother failed to provide minimally adequate care for the children, and her actions placed the children in danger or posed a substantial risk to the children's safety or well-being by leaving them in father's care knowing of his regular and excessive substance use.

Analysis

A support finding of abuse or neglect requires that there be reasonable cause to believe that a child(ren) was abused and/or neglected; *and* that 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 C.M.R. 4.32(2).

“[A] presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of s. 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 s. 51B. Id. at 64; M.G.L. c. 119, s. 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.

As I and L's parent, mother is their caretaker under Department regulations. 110 CMR 2.00(5).

“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. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

The Department determined that mother neglected the children by leaving them in father's care knowing he abuses substances as well as other factors placing the children at risk including his history of violent behavior and his mental health issues.

Mother essentially argues that she has never knowingly left the children in father's care while he was under the influence. She contends that she did not believe that he was under the influence on January 14th and she has no knowledge of what he does when he has the children. Further she contends that she did not know she could prevent him from having visits with the children and, on January 14th, she thought that the police wanted her to allow father to have the children because that is what they said the day before.

As noted above, the Hearing Officer does not credit mother's testimony regarding her assessment of father's sobriety on January 14th or that he made the comment about needing to smoke to deal with the baby crying while she was watching the children when they were still living together.

The credible evidence shows that mother was well aware of the extent of father's substance abuse including that he uses marijuana several times during the day and he drinks heavily several nights a week. Regardless of when father told mother that he needs to smoke to deal with the children crying, she was aware that this is how he coped in those situations. Father has always taken care of the children while mother worked. Mother worked 4 days during the week from 3:00pm to 11:00pm and 10:00am to 6:00pm on Saturdays. Although she could not possibly know exactly what father does when she is not around, she knew or should have known that father's use of substances was likely going to continue once they separated and he continued to watch the children while she worked.

According to mother's statement during the response, she observed father to appear under the influence and he smelled of marijuana on January 14th, when she left the children in his care and in his car. The evidence demonstrates that mother knew that he would be driving while under the influence with the children in the car.


The fact that the police may have advised father on January 13th to contact mother to arrange his next visit does not excuse or justify mother's failure to make a judgment about whether father was a safe and appropriate caregiver for the children. Likewise, mother's contention that she should not be found neglectful because she was not aware that she did not have to allow father to take the children is not persuasive. In this case, the parties had no court orders for custody or visitation in place and, therefore, there was nothing preventing mother from making a judgment that father was not an appropriate caregiver.

Considering all of the credible evidence, Mother failed to provide minimally adequate care for the children, and her actions placed the children in danger or posed a substantial risk to the children's safety or well-being, by leaving them in father's care knowing of his regular and excessive substance use.

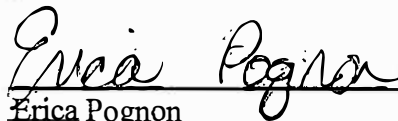
Conclusion and Order

The Department's decision to support allegations of neglect of I and L by mother was made in conformity with Department regulations and with a reasonable basis and therefore, the Department's decision is AFFIRMED.

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he may do so by filing a complaint in the Superior Court for Suffolk County, or within for the county in which he lives, within thirty (30) days of the receipt of this decision. (See, M.G.L. c. 30A, s. 14.)


Anne L. Dale Nialetz,
Administrative Hearing Officer

9/14/17
Date


Erica Pognon
Fair Hearing Supervisor