

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
600 WASHINGTON STREET, 6TH FLOOR
BOSTON, MASSACHUSETTS 02111**

**Linda Spears
Commissioner**

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IN THE MATTER OF

AG #2017 0152

FAIR HEARING DECISION

Appellant, AG, (“Appellant”), appeals the Department of Children and Families (hereinafter “DCF” or “the Department”) decision to support allegations of abuse and neglect pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

On December 8, 2016, the Department received a report which alleged neglect and physical abuse of J by the Appellant, a DYS staff member in J’s DYS facility. The basis of the reporter’s concern was an incident the previous evening during which the Appellant shoved J and J hit a wall and chipped his two front teeth. The Department’s Special Investigation Unit (SIU) conducted a response and on January 3, 2017, made the decision to support allegations of neglect and physical abuse of J by the Appellant. The Department notified the Appellant of its decision and his right to appeal.

Appellant made a timely request for a Fair Hearing under 110 CMR 10.06(4)(b). A hearing was held at the DCF Springfield Area Office on April 13, 2017. In attendance were Maura Bradford, Administrative Hearing Officer; TB, DCF Special Investigation Unit (SIU) Investigator; AG, Appellant.

In accordance with 110 CMR 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 digitally recorded and transferred to one (1) Compact Disc. The witnesses were sworn in to testify under oath.

Prior to the completion of the hearing the record was left open until April 28, 2017 to allow the Appellant time for additional submissions, including a written response if

desired. The Appellant was provided with a copy of the DYS video submitted by the Department.

The Hearing Officer need not strictly follow the rules of evidence. The Massachusetts Rules of Evidence do not apply; only evidence which is relevant and material may be admitted and may form the basis of the decision. 110 CMR 10.21

The following evidence was entered into the record:

For the Department:

Exhibit A: 51A Report of December 8, 2016

Exhibit B: 51B Report completed on January 3, 2017 by TB with Appended CD and DYS Incident Reports

For the Appellant(s):

No Documentary Exhibits were submitted by Appellant

Issue to be Decided

The issue presented in this Hearing is whether, based upon the evidence and the Hearing record, 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. 110 CMR 10.05

Findings of Fact

1. The Appellant was a Shift Supervisor at the [REDACTED] ([REDACTED]), a Department of Youth Services (DYS) locked facility where he worked for 2 ½ years prior to the report in question. 14-year-old J was a resident in the program. (Exhibit B; Testimony of Appellant)
2. As a Shift Supervisor/DYS Staff, the Appellant was a caregiver for J under Department regulations. 110 CMR 2.00
3. The Appellant was not involved with the Department. Prior to the reported incident, the Appellant had an "impeccable work record" and his supervisor spoke well of him; the Appellant does not have any history of disciplinary action. (Exhibit A; Testimony

of TB and Appellant)

4. J was placed at [REDACTED] under a Child Requiring Assistance (CRA) petition. J has a criminal history, mental health and behavioral issues and has a "bad track record" at the program due to his behavior.¹ (Exhibit B, p. 1; Testimony of TB and Appellant)
5. On December 7, 2016, the Appellant was the Shift Supervisor on [REDACTED]. The Appellant was responsible for administering medication to the residents. The Appellant stood at a cart with a chart, which residents signed after their medication was administered. Staff member AS stood near the Appellant and observed and chatted with residents. At 8:41PM, the Appellant called J down to the medication cart. The following occurred between 8:41PM and 8:46PM (Exhibit B, Appended Video; Testimony of TB):
 - a) 8:41PM, J came down the hall to the cart;
 - b) At 8:42:59, J received his medication in hand, gets a cup of water from the water cooler then steps back to the kiosk to sign the book. There appears to be conversation between J and the Appellant. When J signed the book, he was close to the Appellant and their backs are to the camera;
 - c) At 8:43:14, J throws away the cup in a receptacle near the water cooler, then turns back toward the Appellant. J does a quick stutter step² toward the Appellant. The Appellant grabbed J by the sweatshirt and pushed him into an alcove adjacent to the cart where there is not a camera. AS stepped up to the cart in the Appellant's absence, looked into the alcove and does not intervene during the time the Appellant is off camera. The Appellant and J remained off camera for 41 seconds³;
 - d) A third staff member, PS, walks down the hall toward the cart, looked into the alcove and appears to talk to Staff AS;
 - e) At 8:43:55 the Appellant and J emerge from the alcove. The Appellant has his arm around J. The Appellant unlocked the bathroom for J to go in [and check his mouth];
 - f) The Appellant goes off camera and returns at 8:44:56 with a bag of ice, checks the alcove, then escorts J down the hall with PS to his room;
 - g) At 8:46:43, the Appellant comes back down the hall and checks the alcove a second time.
6. It is undisputed that J was in a "feisty" mood. When he turned back toward the Appellant, J called the Appellant a "bitch ass nigga", which is what precipitated the Appellant's reaction. J initially believed the Appellant was "fooling around" and did not think the Appellant was angry. When the Appellant pushed J against the wall, J struck his mouth on the wall and broke his two front teeth. The Appellant repeatedly

¹ The Appellant testified that J threatened other residents.

² The Appellant used the term "joked" to describe J's action. (Exhibit B, p. 5)

³ Here the SIU Investigator noted in his narrative that the Appellant and J were in the alcove approximately 20 seconds. (Exhibit B, p. 3)

said "My bad" after he realized J's teeth were broken. (Exhibit B, pp. 3, 5, 6; Testimony of TB)

7. On December 7, 2016, the Appellant filled out an incident report. In his report, he wrote that JS "slipped and fell and hit his teeth against the wall chipping his teeth." The Appellant called the duty nurse and told the nurse that J "fell in the gym and cracked his teeth." AS also wrote an incident report and stated that J "teeth chipped [because of] 'horseplay' with the Appellant." (Exhibit B, Appended Incident Reports, Internal Investigation Report and Telephone Triage Notes)
8. Due to the damage, J's teeth had to be capped. (Exhibit B, p. 6; Testimony of TB)
9. J considered the Appellant a mentor. J's version of the reported incident was that it was "horseplay" between him and the Appellant, which is consistent with Staff AS's statements to the DCF Investigator. The Appellant denied that he intended to harm J. J was upset with the Appellant due to the damage to his teeth but the incident did not trigger an emotional crisis or necessitate any other staff intervention. Regardless of how J's teeth were broken, the Appellant delivered appropriate first aid. (Exhibit B, Appended Telephone Triage Notes; Testimony of TB and Appellant)
10. On December 8, 2016, the Department received a report which alleged neglect and physical abuse of J by the Appellant after J broke two teeth after the Appellant "shoved [J] very hard against the wall." The Department screened-in the report which was assigned to the Department's Special Investigation Unit for an investigation response. (Exhibit A; Testimony of TB)
11. On December 14, 2016, SIU Investigator TB visited the ██████████ program with DYS Investigator KS, where they interviewed J, AS, PS and the Appellant. The Appellant prefaced his interview by stating "I made a bad decision and reacted to verbal abuse from [J]". During the interview, the Appellant admitted he intended to push J but not hurt him and recalled he only pushed J once. The Appellant denied that he told the duty nurse that J fell in the gym. When asked about his incident report and discrepancies in his report, the Appellant admitted he falsified his incident report to avoid having a 51A report filed against him and conceded the incident "looked bad" and he was scared he would lose his job. (Exhibit B, p. 4; Testimony of TB and Appellant)
12. On January 3, 2017, the Department supported allegations of neglect and physical abuse of J by the Appellant. The Department determined that the Appellant neglected J by failing to provide minimally adequate supervision, emotional stability and growth⁴ for J and physically abused J when he pushed J into a wall with enough force to break J's front teeth. The Department determined that the Appellant's actions created a substantial risk to J safety and well-being.⁵ (Exhibit B, p. 7; Testimony of

⁴ TB testified that the Appellant did not provided an "emotionally appropriate" environment for J.

⁵ TB testified that staff in the facility are trained not to react to verbal abuse by residents and understood that is difficult having worked in a similar type of facility.

TB)

13. I find the Department conducted the response in accordance with Department regulations and applicable statutes. 110 CMR 4.27; M.G.L. c. 119 §51B et seq.; DCF Protective Intake Policy #86-015, rev. 2/28/16
14. Under [REDACTED] program policy, "horseplay" between staff and residents is prohibited due to inherent risks involved. Rather than engage in horseplay, the Appellant admittedly reacted angrily to J's disrespectful statements, grabbed J and pushed him toward a wall. It appeared to a witness and to J, that the Appellant pushed him twice and he was unable to prevent himself from hitting the wall. Although the Appellant did not intend to hurt J and apologized for hurting him, the Appellant nonetheless engaged in an act that caused and created a substantial risk of injury. (110 CMR 2.00 and 4.32; Exhibit B, Appended Internal Investigation Report)
15. After a review of all the evidence and for the following reasons, I find the Department had reasonable cause to support an allegation of physical abuse of J by the Appellant for the following reasons:
 - a) Absent any legitimate reason for using physical force against J (e.g., to quell a threat, restrain an out of control resident, etc.), the Appellant grabbed J and pushed him into a wall with enough force to break his front teeth;
 - b) The Appellant's actions constitute abuse under Department regulations. (110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16)
16. After a review of all the evidence and for the following reasons, I find the Department had reasonable cause to support an allegation of neglect of J by the Appellant for the following reasons:
 - a) As a residential staff member, the Appellant was responsible for maintaining a safe and orderly environment for residents in his unit;
 - b) The Appellant failed to provide a minimally adequate safe environment for J, when the Appellant reacted to J's disrespectful language and "joking" by grabbing him and forcefully pushing him into a wall;
 - c) The Appellant neglected J under Department regulations (110 CMR 2.00 and 4.32); and,
 - d) The Appellant's actions posed substantial risk to J's safety and well-being. (DCF Protective Intake Policy #86-015, rev. 2/28/16)
17. In making a determination on the matter under appeal, the Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker, if there is a reasonable basis for the decision. 110 CMR 10.05

Applicable Standards

In order to "support" a report of abuse or neglect, the Department must have reasonable

cause to believe that an incident of abuse or neglect by a caregiver occurred 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 2.00 and 4.32; 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.” Factors to consider include, but are not limited to, the following: direct disclosure by the child(ren) or caregiver; 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

“Neglect means 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; provided, however, that such inability is not due solely to inadequate economic resources or solely to the existence of a handicapping condition.” 110 CMR 2.00

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 investigation, 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. 110 CMR 10.05

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. 110 CMR 10.23

Analysis

As a residential program staff member, the Appellant was a caregiver under Department regulations. 110 CMR 2.00

On January 3, 2017, the Department supported allegations of neglect and physical abuse of J by the Appellant. The Department determined that the Appellant neglected J by failing to provide minimally adequate supervision, emotional stability and growth for J and physically abused J when he pushed J into a wall with enough force to break J's front teeth. The Department determined that the Appellant's actions created a substantial risk to J safety and well-being. 110 CMR 2.00 and 4.32; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant argued that while he made a mistake when he pushed J, that he did not intend to harm J and his personal work history is contrary to a finding of abuse. The Appellant does not dispute that the Department's investigation was complete and thorough, only that considering all the evidence, the Department's decision was not reasonable.

First, this Hearing Officer appreciates the Appellant's positive work history, lack of previous disciplinary action and 2 ½ years of service to youths under challenging circumstances prior to the report in question. This Hearing Officer appreciates that the Appellant ultimately acknowledged and regrets hurting J. However, despite accolades and apologies, the Appellant admittedly grabbed and pushed J with enough force to break his front teeth. Then, in an act which defies the Appellant's stellar employment record, he admittedly falsified incident reports because he knew what had happened would reflect badly upon him and likely result in his termination, an act which undermines his credibility.

This Hearing Officer is obliged to consider the entire administrative record, including evidence that may cut other ways. In the instant case, the evidence suggests that the Appellant's behavior was an isolated incident. This Hearing Officer is not obliged to forgive the Appellant for his mistake, but whether the evidence supports the Department's decision that the Appellant abused and neglected J under Department regulations. With respect to the totality of the evidence, including the basic undisputed facts, this Hearing Officer finds the Department's decision was reasonable and made in accordance with Department regulations and the Appellant did not present persuasive evidence in this matter to allow for a reversal of the Department's support decision. 110 CMR 10.23; M.G.L. c. 30A, § 1(6); Wilson v. Department of Social Servs., 65 Mass.App.Ct. 739, 744-745 (2006)

Conclusion and Order

Appellant has not shown by a preponderance of the evidence that the Department's decision to support allegations of neglect and abuse on behalf of J was not in conformity with Department regulations or without a reasonable basis, therefore the Department's decision is AFFIRMED.

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

12-11-17
Date

Maura E. Bradford
Maura E. Bradford
Administrative Hearing Officer

Susan Diamantopoulos
Susan Diamantopoulos
Fair Hearing Supervisor