

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

Linda S. Spears
Commissioner

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

IN THE MATTER OF

Mr. D.H.

FH # 2017-0215

)
)
)
)
)
)

FAIR HEARING DECISION

The Appellant in this Fair Hearing is the Father, hereinafter referred to as DH or the Appellant. The Appellant appealed the Department of Children and Families' decision to support the allegation of sexual abuse pursuant to M.G.L. c. 119, §§51A and B.

Procedural History

The Department received the first of two 51A reports on December 22, 2016, alleging the sexual abuse of the child (N) by the Appellant. The Department conducted a response and, on January 13, 2017, a subsequent 51A was filed which also alleged the sexual abuse of the child by her father. On January 24, 2017, the Department made the decision to support the allegation of sexual abuse of the child by the Appellant and referral was made to the District Attorney. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was held at the DCF Cape Ann Area Office in Salem, Massachusetts. All witnesses were sworn in to testify under oath. The record remained open to allow the Appellant's Counsel to submit additional evidence. The record was scheduled to close on June 16, 2017, however Counsel requested an extension until June 21, 2017, which this Hearing Officer granted. Although the documents were received after the record closed the Hearing Officer reviewed them prior to issuing a decision.

The following persons appeared at the Fair Hearing:

Ms. Lisa Henshall
Mr. D.H.
Mr. M.S.
Ms. R.U.
Ms. A.H.

Fair Hearing Office
Appellant (father)
Appellant's Counsel
Supervisor
Appellant's Witness1

Ms. N.G.

Appellant's Witness2

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 dated 12/22/16
Exhibit B 51A dated 1/13/17
Exhibit C Child Abuse/Neglect Non-Emergency Response dated 1/24/17

Appellant:

Exhibit 1 Text messages between the Appellant and child (N)
Exhibit 2 Facebook picture of the Appellant and the child
Exhibit 3 Picture of the Appellant and the child after the alleged incident
Exhibit 4 Picture of the Appellant and the child after the alleged incident
Exhibit 5 Picture of the Appellant and the child after the alleged incident

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) 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 Appellant (DH) is the father of the child (N) who was fourteen years old (14) at the time of the response and 11 years old (11) at the time of the incident. (Exhibit A & B, p. 1; Exhibit C, p. 4)
2. The Appellant, as the child's father, was a caregiver for the child as defined by DCF regulation 110

CMR 2.00 and policy. DCF Protective Intake Policy #86-015, rev. 2/28/16 (Testimony of the Appellant; Fair Hearing Record)

3. On December 22, 2016, the Department received a 51A report pursuant to M.G. L. c. 119, §51A, alleging the sexual abuse of the child by the Appellant. The report alleged that the Appellant "sexually abused her" once when she was 11 years old; she was currently 14 years old. The child reported being reluctant to come forward as a relative had disclosed sexual abuse by the Appellant and was "shunned" by the Appellant's family. The Appellant was described as being an alcoholic. The Department screened the report in pursuant to M.G.L. c. 119, §51B and assigned it for a response. A referral was made to the District Attorney. (Exhibit A, p. 3; Testimony of the Supervisor)
4. During the response, a subsequent 51A report was filed on January 13, 2017, pursuant to M.G. L. c. 119, §51A, which also alleged the sexual abuse of the child by the Appellant. The child's mother had secured a 209A on behalf of the child and it was reported that the child had disclosed "inappropriate touching" by the Appellant. This report was screen-in and incorporated, as permitted by Department policy, into the pending response. There was also a referral made to the District Attorney. (Exhibit B, pgs. 3 & 5; Exhibit C, p. 7; Testimony of the Supervisor)
5. The Appellant appeared to be under the influence of alcohol at the time of the fair hearing. There was a strong smell of alcohol in the room emanating from the Appellant. The Appellant disputed this and noted he was ingesting "candy," which was observed to be Altoids (mints), for his Diabetes, which was diagnosed as a result of the alcohol abuse. (Testimony of the Appellant)
6. It was undisputed that the Appellant has a problem with alcohol. At the time of the response, the Appellant has "recently" been arrested for operating under the influence (OUI) and was on probation. The court orders were to refrain from drinking, loss of his license for 6 months and attended "classes." (Exhibit C, p. 8; Testimony of the Supervisor)
7. At the time of the reported incident that Appellant was actively drinking. The Appellant gave conflicting testimony about when he stopped drinking alcohol indicating it was 2, later, 3 years ago when he was diagnosed with Diabetes. (Exhibit C, pgs. 2, 3, 4; Testimony of the Appellant; Testimony of Witness1; Testimony of the Supervisor)
8. It was undisputed that the child had an argument with her mother prior to disclosing to her school guidance counselor about the incident of abuse by the Appellant. (Exhibit C, Testimony of the Supervisor)
9. The child was aware that the Appellant had a problem with alcohol and was loud when drinking and would fall down when intoxicated. (Exhibit C, p.4; Testimony of the Supervisor)
10. The Appellant disputed that he ever slept in the same bed as the child (N) at the time in question. There was conflicting testimony about where the Appellant's room was located at the time and if the child ever slept with the Appellant. (Testimony of the Appellant; Testimony of the Witnesses; Exhibit C, pgs. 4, 8, & 9)
11. The Appellant refuted the allegations that he sexually abused his child. Witnesses for the Appellant had no concerns about the Appellant's behaviors or interactions with the child. (Exhibit C, p. 9; Testimony of the Appellant; Testimony of the Witnesses)

12. At the time in question I find that the child had been sleeping in the Appellant's bed when the Appellant arrived home. The Appellant was under the influence and was touching her breast area over her clothes (tank top and shorts). (Exhibit C, p. 4)
13. The child was interviewed by a forensic interview at a Sexual Abuse Intervention Network (SAIN). (Exhibit C) I found the child credible. There was no evidence that the child was motivated to lie. The child's statements were "clear and consistent". There was no information to indicate that she was not a reliable reporter. Edward E. v. Department of Social Services, 42 Mass. App. Ct. 478, 484 (1997)
14. The child's mother secured a restraining order on behalf of the child after learning of this incident. The child has not had contact with the Appellant since the allegation was reported. (Exhibit C, p. ; Testimony of the Supervisor)
15. At the end of its response, the Department supported the aforementioned report for sexual abuse of the child by the Appellant. The Department based this determination on the child's disclosure at a SAIN interview. The child indicated that the Appellant was under the influence of alcohol at the time in question and felt her breast area and he stopped when she "startled." The Department concluded this constituted sexual abuse as defined by its regulations. 110 CMR 2.00 The case was closed following the response as the Appellant did not have access to the child. (Exhibit C, p.10; Social Worker)
16. Based on the credible evidence, I find that the Department did have reasonable cause to believe that child was sexually abused per the Department's definition and that the Appellant's actions placed the child in danger or posed a substantial risk to the child's safety or well-being. 110 CMR 2.00

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 caretaker occurred.

- There is 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; 110 CMR 4.32 (2)

"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)

"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 s. 51A." Id. at 63 This same reasonable cause standard of proof applies to decisions to support allegations under s. 51B. Id. at 64;

A "caregiver" means a child's (a) parent, (b) stepparent, (c) guardian, (d) any household member entrusted with the responsibility for a child's health or welfare, and (e) any other person entrusted with the responsibility for a child's health or welfare whether in the child's home, a relative's home, a school setting, a day care setting (including baby-sitting), a foster home, a group care facility, or any other comparable setting. As such, "caregiver" includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The "caregiver" definition is meant to be construed broadly and inclusively to encompass any person who is, at the time in question, entrusted with a degree of responsibility for the child. This specifically includes a caretaker who is himself/herself a child (i.e. baby-sitter). 110 CMR 2.00

"Sexual Abuse" a non-accidental act by a caregiver upon a child that constitutes a sexual offense under the Law of the Commonwealth or any sexual act between a caregiver and a child for whom the caregiver is responsible. 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, (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

The Appellant, as argued by Counsel, contested the Department's decision to support the allegation of sexual abuse on behalf of the child and maintained that there was no evidence that the child was abused by the Appellant and in fact the child's actions for the past three years have demonstrated that she has no fear of the Appellant. Counsel implied that if the altercation was to have occurred the child would have demonstrated fear of the father and in fact she did not; texting him and visiting him since the alleged incident. (See Exhibits 1-5) The Appellant's counsel argued that there was no information to determine that this was anything more than "incidental" and referred to the child as being prepubescent and "flat chested" thus inferring that the incident was not sexual in nature. These arguments were not persuasive. The Appellant's testimony was contradictory to what he said at the time of the response (specific to alcohol use and if she ever slept with the child) as well as during the fair hearing.

The Department argued that the Appellant while under the influence of alcohol got into bed with the child, his daughter, and touched her breast area over her clothes. The Appellant stopped touching the child when the child "startled." The Department referred to a situation in which another family member had allegedly accused the Appellant of sexual abuse in the past however, I did not find evidence to support this.

As set forth in the findings, the child was determined to be credible. The child's statements were

consistent and there was no evidence that she was motivated to lie about her father, the Appellant. The child disclosed the incident with the Appellant to her school guidance counselor indicating that it occurred three years ago when she was 11 years old.

There was also no evidence that the Appellant had ever sexual abused the child prior to, or after the incident. The child was clear that this happened on this one occasion. Subsequent to the disclosure, a restraining order was granted and the child has not had contact with the Appellant since the time of the response.

Upon review of the evidence presented, in its totality, this Hearing Officer finds that there was sufficient evidence that the Appellant's actions while under the influence of alcohol constituted sexual abuse. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 4.32 (2) (See Findings)

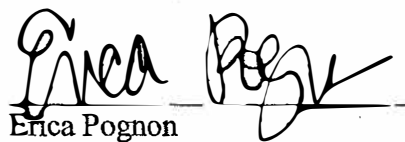
Conclusion and Order

The Department's decision to support the 51A report of sexual abuse on behalf of the child (N) by the Appellant is **AFFIRMED**.

This is the final administrative decision of the Department. If the Appellant wishes to appeal this decision, he/she may do so by filing a complaint in the Superior Court in Suffolk County, or in the county in which he/she resides, 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.



Lisa A. Henshall
Administrative Hearing Officer



Erica Pogon
Fair Hearing Supervisor

1/11/18

Date