

**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)
)
 SB) **FAIR HEARING DECISION**
)
 FH # 20170334)
)

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

Procedural History

On May 15, 2016, the Department of Children and Families received a 51A report from a mandated reporter alleging the neglect of S and E (hereinafter "S" or "E" or "the children") by their father, SB. A response was conducted and on June 6, 2016, the Department made the decision to support the allegations of the neglect of S and E by SB. 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. The hearing was held on May 30, 2017, at the DCF Plymouth Area Office. All witnesses were sworn in to testify under oath. The record closed at the conclusion of the hearing.

The following persons appeared at the Fair Hearing:

Laureen Decas	Fair Hearing Officer
SB	Appellant
JB	Support
LM	Department Response Social Worker

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 on one compact disk pursuant to Department regulations 110 CMR 10.26.

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

For the Department:

- Exhibit A: 51B Report, dated 5/15/16
- Exhibit B: 51B Report, completed 6/6/16

Appellant

- Exhibit 1: 4/9/16 Affidavit of MB
- Exhibit 2: Abuse Prevention Order
- Exhibit 3: Criminal Docket Offenses
- Exhibit 4: Affidavit of MB to Probate Court
- Exhibit 5: Separation Agreement
- Exhibit 6: Criminal Charges of Appellant
- Exhibit 7: Domestic Violence Report
- Exhibit 8: Victim Witness Statements
- Exhibit 9: Pictures of residence
- Exhibit 10: Copies of text messages
- Exhibit 11: Acuweather report of 5/15/16

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 whether 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. At the time of the filing of the subject 51A report, S was four (4) years old and E was two (2) years old. The children resided in [REDACTED] with their mother, MB, and visited their father, the Appellant, SB. (Exhibit A)
2. The Appellant is the father of the children; therefore he was a caregiver pursuant to Departmental regulations and policies. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16.
3. The family had no history of involvement with the Department. (Fair Hearing Record)
4. On April 8, 2016, SB and MB engaged in a verbal argument after MB discovered inappropriate sexual messages on SB's cell phone. The Appellant threw a picture of the two of them; MB told the Appellant to leave the home and he did. On April 9, 2017, the Appellant returned to the home; MB contacted the police and obtained a 209A (Abuse Prevention Order); which was modified thereafter to allow the Appellant to have unsupervised visits with the children. The Appellant alleged that MB was also having an affair. (Exhibit 1 Exhibit 2; Exhibit B)
5. On May 15, 2016, the Department of Children and Families received a report pursuant to M.G.L. c. 119, §51A from a mandated reporter alleging the neglect of S and E by the Appellant. According to the reporter, the [REDACTED] Police responded to MB's home at 1:10pm after she called the police alleging the Appellant entered her home, threatened her and her male friend while they were locked in her bedroom. The Appellant was arrested in the home; the children were in his car at the time of the incident. (Exhibit A)
6. On May 15, 2016, the Appellant had the children for parenting time. The children had a party to attend at 3:00p.m. which the Appellant confirmed with MB at noon. MB had worked the overnight shift and was going to sleep. At approximately 1:00pm the Appellant arrived at MB's home (his previous residence) to get a jacket for S¹. MB's vehicle was the only vehicle in the driveway. Both children had fallen asleep in the Appellant's vehicle during the ride to MB's home. (Exhibit 10; Exhibit 4; Testimony of SB)
7. The Appellant left the children sleeping in the vehicle, with the vehicle shut off, locked and windows up. The temperature on May 15, 2016, ranged from 40 degrees to 59 degrees. The Appellant went up to the front door to obtain E's jacket; it was locked. The Appellant heard the family dogs out back; knew if they were outside then the slider into the back of the home would be unlocked. The Appellant let the dogs back into the house and went to get E's jacket, whose room is across the hall from MB's bedroom; he heard scrambling noise. The Appellant attempted to open MB's bedroom door and found it locked. (Exhibit 11; Testimony of SB)
8. MB reported to the Court a friend was over to install a ceiling fan and let the dogs out

¹ The Appellant clarified at the hearing it was E's coat not S's coat he was getting at MB's house. (Testimony of SB)

while she left on May 15, 2016. (Exhibit 4) MB reported to the Department her friend was helping her install curtains on May 15, 2016. MB locked her bedroom door, her friend was with her when the Appellant tried to unlock it and threaten her and her friend, while leaving the children in his vehicle. MB reported she was in fear of the Appellant of her life; her friend was in fear for MB, her children, and himself. I do not find MB to be persuasive. (Exhibit B; Exhibit 7; Exhibit 8)

9. The responding police officers observed the children in the Appellant's vehicle, strapped in their child safety seats, with the vehicle not running and the windows up. Although crying, the children were physically unharmed. (Exhibit 7)
10. S attended preschool two (2) times per week. The daycare had no concerns for S. Staff noted S showed no signs of distress after the subject incident. (Exhibit B, p.6)
11. S and E were both up-to-date with routine medicals and their doctor had no concerns for either of them. (Exhibit B, p.6)
12. On May 16, 2016, the Appellant was charged with breaking & entering building in the daytime²; threat to commit a crime; resisting arrest; and violation of an abuse prevention order. On July 22, 2017, the resisting arrest charge was dismissed after a hearing; on September 20, 2016, the breaking & entering charge was dismissed by the court due to lack of prosecution as MB invoked her marital privilege; on October 27, 2016, the threat to commit crime and violation of abuse prevention order was dismissed due to police officer witness not available to testify. (Exhibit 3)
13. The Appellant denied any domestic violence issues with MB. (Exhibit B, p. 5)
14. The DCF Response Worker met with the children. S presented as shy and stated she was "missing Daddy" and that "Daddy was mad." S did not elaborate on what "mad" meant. E was young and not able to be interviewed due to a lack of verbal skills. B, the Appellant's step-daughter, who was not present at the time of the incident, denied the Appellant either made threats or saw him get physical with MB in the past. (Exhibit B, p. 3)
15. On June 6, 2016, pursuant to M.G.L. c. 119, §51B, and based on the evidence gathered during its investigative response, the Department supported allegations of the neglect of S and E by the Appellant for leaving the children in a car for ten (10) minutes when he entered the home and he engaged in a verbal altercation with MB which resulted in his arrest. (Exhibit B, p.8)
16. The Appellant and MB have divorced and share 50/50 joint custody of the children. MB has physical custody of the children. (Testimony of SB, Exhibit 5)
17. The Appellant is a nurse and the Department's decision could impact future employment. (Testimony of SB)

² MB was the owner of the home. The Appellant had lived there prior to the 209A. (Exhibit 5, p.14)

18. After consideration of the relevant evidence, I find the Department's decision to support the allegations of neglect by the Appellant was not based on reasonable cause. In addition, SB's actions or inactions did not place S and E in danger nor posed substantial risk to their safety or well-being. 110 CMR 2.00, 4.32(2); DCF Protective Intake Policy #86-015, rev. 2/28/16.

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 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. 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)

"[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

"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

It is undisputed that Appellant was a caregiver pursuant to Departmental regulations and policies. 110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16

The Appellant contested the Department's decision to support allegations that he neglected his daughters, S and E. The Appellant argued he had no intent of causing a disturbance or incident when he stopped by his children's home to get a jacket, believing the children's mother was sleeping. The Appellant, until recently, resided in the home and had been taking his children for weekend visits and previously had stopped at the home without incident. The Appellant argued the children fell asleep during the car ride and were not impacted or neglected by remaining in the locked car in their driveway. The Appellant maintained the incident was exasperated by his pending divorce and MB being caught with her boyfriend; but once his soon to be ex-wife understood the severity of the situation; she invoked her marital privilege and agreed to shared custody of the children. I find the Appellant's arguments to be persuasive, as the record supported his claims.

In determining whether the Department had reasonable cause to support a finding of neglect, the Hearing Officer must apply the facts, as they occurred, to the Department's regulatory definition of neglect. In order to support a finding of neglect, the Department must demonstrate that neglect *occurred* (emphasis added). The Department's collection of facts, knowledge and observations do not support that neglect occurred in the instant matter. 110 CMR 4.32 While it was reasonable for the Department to be concerned about the subject incident, there was a lack of evidence that S and E were neglected, and no evidence that the Appellant placed S and E in immediate danger or posed substantial risk to their safety or wellbeing.

Leaving the children in the vehicle in order to enter the home, did demonstrate a lack of using good judgment on the part of the Appellant; however the children were strapped into their safety seats, the engine turned off, the windows up and the car locked. With respect to the totality of the evidence and for reasons noted in the above Findings of Fact, this Hearing Officer finds the Department's decision was not reasonable or supported by substantial evidence. 110 CMR 2.00; 110 CMR 10.21(6)

Conclusion

The Department's decision to support the allegations of **neglect** by the Appellant was not made with a reasonable basis and therefore, is **REVERSED**.

Laureen Decas ^(initials)
Laureen Decas
Administrative Hearing Officer

Date: 2/7/18

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

Date: _____

Linda S. Spears
Commissioner