

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

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IN THE MATTER OF

RW

2017-0362

Fair Hearing Decision

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

Procedural History

On February 23, 2017, the Department received a 51A report from a mandated reporter alleging neglect of the above referenced child by his mother, TM. The allegation was screened in for a Non-Emergency response. During the response period, the allegation of R by Appellant was added and subsequently supported by the Department. 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 C.M.R. 10.06

The Fair Hearing was held on June 1, 2017, at the Department of Children and Families' Lowell Area Office. All witnesses were sworn in to testify under oath. The record officially closed upon conclusion of the second date.

The following persons appeared at the Fair Hearing:

Carmen Colón
RW
NM
MO
LI
VW
LW

Fair Hearing Officer
Appellant
DCF Response Social Worker
DCF Response Supervisor
Witness
Witness
Witness

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 Intake Report of February 23, 2017
- Exhibit B: Non-Emergency Response of March 9, 2017
- Exhibit C: Correspondence from [REDACTED]

For the Appellant:

- Exhibit 1: Affidavit of November 16, 2016
- Exhibit 2: 51B Notes on Response of November 16, 2016
- Exhibit 3: Timeline Diary
- Exhibit 4: Temporary Order dated December 15, 2016
- Exhibit 5: Temporary Order dated January 13, 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 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, 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 parents(s)/ caregiver(s) placed the child (ren) in danger or pose substantial risk to 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 this report, E was 2 years old and R was 6 years of age. The children reside with their mother, TM, full time and have scheduled supervised visit with Appellant per probate court. TM was considered the children's primary caregiver. (Exhibit A, Exhibit B)
2. E and R's father, RW, has not resided with the children since November 2016. Although, the children do not reside with Appellant, he is considered a caregiver in accordance with 110 CMR 2.00 DCF protective Intake Policy #86-015, rev 2/28/16. (Exhibit A, Exhibit B)
3. Appellant and TM were in a long term relationship and married for seven years. On November 2016 the couple's divorce proceedings were initiated after Appellant was arrested for a domestic dispute. TM sought out a restraining order against Appellant in which she included children. (Appellant testimony, Exhibit B, p. 1)
4. Since that incident, the children have had limited contact with their father. The Appellant and TM were before the Probate Court and it was ordered that visits between father and the children be supervised. A court appointed visit supervisor testified to only having supervised two visits between Appellant and the children which took place in February 2017. No visits took place in March, April, May, or June 2016. (Exhibit B, p. 9, LI Testimony)
5. The Appellant and his ex-wife, TM, became known to the Department in 2016 over concerns for the mental health and stability of TM and consumption of alcohol while in a caretaking role of the children. (Exhibit A, p. 1, Exhibit B, p. 1)
6. On February 23, 2017, a 51A report alleging the neglect of E and R by their mother TM was filed by a mandated reporter. Within the allegations, concerns for the children's wellbeing while in the care of their mother, were listed as TM was allegedly presenting as paranoid, mentally unstable and consuming alcohol while breast feeding the children. TM was also said to be non-compliant with her mental health treatment. (Exhibit A, p.1, Exhibit B, p. 13-14, DCF Testimony)
7. During the response period, the DCF Response Social Worker met TM, the Appellant, along with family members and providers involved with the family. The DCF RSW was able to obtain the following information regarding TM:
 - a. TM was not treating her mental illness and had been psychiatrically hospitalized in the past (Exhibit B, p.18)
 - b. TM had a mental breakdown in August of 2016. (Exhibit B, p.11)
 - c. TM has been aggressive towards people who frequented the home and has made threats to "kill" Appellant and his parents. (Exhibit B, p. 13)
 - d. TM's behavior was found concerning and threatening to adults around her. (Exhibit B, P.13-14)

e. R stopped calling Appellant "DAD" per his mother's instructions. R was using adult expressions which mirrored language used by an adult, in this case his mother. R was said to be refusing to eat during visits with his father as the food could be poisoned, telling his father that he "sucks", "Rob steals" or "mom says" and "mom wanted" to name a few. (Exhibit B, p. 11-13)

8. As stated above, since the Appellant and TM began divorce process in November 2016, and to the date of the Fair Hearing, Appellant had access to the children on two separate occasions which were supervised by a court appointed supervisor and father was described as having been "attentive" to the children with "concern for the information mother was sharing with R". (Exhibit B, p. 10-11, LI Testimony, Appellant Testimony)

9. On March 15, 2017, DCF RSW received a report completed by a provider via TM's attorney in which R was said to have disclosed having been spanked by Appellant over "one hundred times", being "locked in a closed for bad behavior", and also having been exposed to fighting between the two parents. R also told provider that his father would be "going to jail for not paying child support" and later admitted to having obtained the information from his mother, TM. (Exhibit B, p. 21)

10. Due to the language used by R, TM's reported decompensation (as reported by collaterals) and the couple's history, I find that the allegations and statements made against the Appellant by TM or R are not credible. (Exhibit B, Appellant testimony)

11. On March 9, 2017, the Department concluded its response period and added the allegation of neglect of R by Appellant and supported the allegation. (Exhibit B, p.1, DCF Testimony)

12. I find that the Department's decision to support the allegation of neglect by the Appellant was not supported by the credible evidence. The Department failed to prove how the Appellant failed to provide minimal care to R at any given time. The evidence gathered was insufficient to support the allegation of neglect of R and therefore the Department's decision was not made in compliance with Departmental regulations, 110 CMR 2.00 DCF Protective Intake Policy #86-015, rev 2/28/16

Applicable Standards

In order for the Department to "Support" an allegation of neglect, the Department must find that there is reasonable cause to believe that the child(dren) 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 Police #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 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, 63-64 (1990) 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 “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. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

“Caregiver” means a child’s: (1) a child’s parent, stepparent, guardian or any household member entrusted with the responsibility for a child’s health or welfare; or, (2) 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 babysitting), a foster home, a group care facility, or any other comparable setting. As such “caretaker” includes (but is not limited to) school teachers, babysitters, 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 him/herself a child (i.e. a babysitter under age 18). 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 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 10.23; DCF Protective Intake Policy #86-015, rev. 2/28/16

Analysis

After review of the evidence provided, it is undisputed that the Appellant and his ex-wife, TM, who is the mother of the reported child, R, have a strained relationship. During the Fair Hearing, the Appellant presented a case in which he disputed the Department's finding and provided additional information on the dynamic of his relationship with TM, as well as how the children have been solely in her care and her influence over R. Appellant also expressed concern for TM's mental health, which was the reason behind the filing of the 51A that prompted the Department's response.

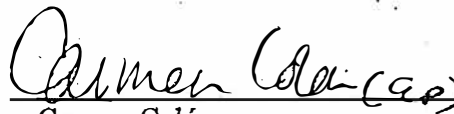
The Department Response SW was able to obtain statements during the response period from collaterals/ family friends that corroborated Appellant's account, yet was not able to show how the Appellant had neglected R given that there was an active restraining order against Appellant since November 2016 which did not allow him to have contact with TM or access to the children unless it was during supervised visitation.

Throughout the evidence presented by the Appellant, it was clear that he had experienced great difficulty in trying to have access to his children and communicate with TM in the past, a contemptuous divorce, along with Appellant's ex-wife's influence on R making any statement made against Appellant by R or TM not credible. (*Covell v. Dept. of Soc.Servs.*, 439 Mass.766(2003))

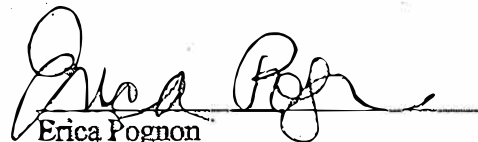
The Appellant has shown by preponderance of the evidence that the Department's decision to support the allegations mentioned above, was not in conformity with the Department's policies and / or regulations and resulted in substantial prejudice to the appellant.

Conclusion and Order

In conclusion, the Department's decision to support the 51A report of neglect of R by the Appellant is **REVERSED**.


Carmen Colón
Fair Hearing Officer

9/13/17
Date


Erica Pognon
Supervisor, Fair Hearing Unit

Date

Linda S. Spears
Commissioner