**THE COMMONWEALTH OF MASSACHUSETTS**
**EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES**
**DEPARTMENT OF CHILDREN AND FAMILIES**
**CENTRAL ADMINISTRATIVE OFFICE**
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**LINDA S. SPEARS**
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( )
( IN THE MATTER OF )
( D.D. )
( FH #2017-0404 )
( )

## HEARING DECISION

### Procedural History

The Appellant, D.D., appeals the decision of the Department of Children and Families [hereinafter "the Department" or "DCF"], to support for neglect of his children, C. and J., pursuant to M.G.L., c.119, §§51A & 51B.

On February 16, 2017, the Department received two 51A Reports from separate mandated reporters alleging neglect of C and J by their father, the Appellant, in connection with an incident involving C viewing his service revolver in the Appellant's home during the morning of February 16, 2017. The 51A Reports were screened in for a non-emergency response and assigned to A.S. On March 9, 2017, following the 51B response, the Department supported for neglect of the children by the Appellant in connection with this incident; specifically, because of his failure to provide the children with minimally adequate supervision, for placing the children at risk of significant injury because the gun was accessible, and for his failure to provide C with minimally adequate emotional stability and growth because C was scared when she saw the gun. The Department closed the family's case because the children knew about firearm safety and the Appellant agreed to lock up his firearms. The Department notified the Appellant of the decision and his right of appeal by letter dated March 13, 2017. The Appellant filed a timely request for Fair Hearing ["Hearing"] on April 5, 2017. [110 CMR 10.06 & 10.08] The Appellant's request for Hearing was granted and held on June 6, 2017 at the Department's South Central Area Office in Whitinsville, MA. Present were the DCF Response Supervisor, E.K.; the DCF Response Social Worker, A.S.; the Appellant's Attorney, M.L.; the Appellant; and the Appellant's Witness/Girlfriend, H.E. The response social worker, Appellant, and the Appellant's witness were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to a CD. Admitted into evidence for the Department was the DCF 51A Report of February 17, 2017, 9:17 a.m. [Exhibit A-1], the DCF 51A Report of February 17, 2017, 7:29 p.m. [Exhibit A-2], and the corresponding 51B Response Supported on March 9, 2017 [Exhibit B]. The Appellant made no submissions and the Hearing record closed at adjournment.

In accordance with 110 CMR 10.03, the Hearing Officer attests to impartiality in this case, having had no direct or indirect interest, personal involvement, or bias in this case.

Pursuant to 110 CMR 10.21 (1), the Hearing Officer need not strictly adhere to the rules of evidence. The Massachusetts Rules of Evidence do not apply, but the Hearing Officer shall observe any privilege conferred by statute such as social worker-client, doctor-patient, and attorney-client privileges. Only evidence, which is relevant and material, may be admitted and may form the basis of the decision. Unduly repetitious or irrelevant evidence may be excluded.

## Standard of Review

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 Reports, 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; DCF Protective Intake Policy #86-015, rev. 2/28/16]

## Findings of Fact

1. The forty two year-old Appellant and his ex-wife, J.D., are the parents of two girls - eleven year-old C and eight year-old J. The children primarily live with their mother and at the relevant time visited with the Appellant on a rotating schedule; once a week and then two nights the following weeks. [Exhibit A-1, p.3; Exhibit B; Testimony of the Appellant]

2. The Appellant is a gun expert. He was in the U.S. military and served oversees for three years in different parts of the Middle East. He was also an armorer in the air force and was trained in every piece of armament that the air force had that did not go on a jet. If it was going on a person, he was in charge. So he "knows his way around a firearm." In addition, he has hunted since he was twelve years-old. So, he is "firmly aware of firearm safety." [Testimony of the Appellant]

3. The Appellant has been a police officer for twenty two years, to include the fourteen years he was married to mother. He would bring his service revolver home after each work shift. When he returned home from work, the Appellant placed that particular gun in its holster "on top of the refrigerator, or cabinet 99% of the time". [Testimony of the Appellant]

4. The Appellant carries his service revolver in a "triple retention holster" while on duty, which requires a "three step" sequential procedure to remove the gun from its holster, so no unauthorized person can access it. The holster encompasses the entire body of the firearm so that only the grip shows and this is the only thing that can be touched. You can't get to the trigger. In order to access the trigger, "you have to push a button, and

tilt it back; it's a rocking motion, and then pull out the firearm." The Appellant has to put it on his belt in order to draw it out. [Testimony of the Appellant]

5. The children do not know how to remove the service revolver from its holster. [Testimony of the Appellant]

6. The children have seen the Appellant's firearm on his person in his uniform as he goes on and off duty, leaving and entering the home, and have seen him shoot his gun before at the gun range. [Exhibit B, p.8; Testimony of the Investigator] The Appellant has taken his children to the range over the years, by their request. They wanted to know what it was like. They shot "little" guns. They understand targeting and not to touch a gun. [Testimony of the Appellant]

7. The children have been trained in firearm safety. They know to always treat a gun, as if it is loaded, i.e. not to touch it or try to take it from someone's hands, and to get an adult right away. There is no dispute on this matter. [Exhibit B, pp. 5-6 & 8; Testimony of the Response Social Worker]

8. On February 15, 2017, the Appellant put his duty service revolver in its holster on top of the refrigerator, when he returned home from work. He usually put it above the counter where it could not be seen, but this time he put it on top of the refrigerator. The gun remained there all night and was not a problem. This is undisputed by the Appellant. [Exhibit B, pp. 8-9; Exhibit A-1, p.7]

9. The incident under review occurred on February 16, 2017 at 6:30 a.m. at the Appellant's home during visitation with the children. [Exhibit B, pp. 2 & 9; Testimony of Appellant]

10. On this occasion, C opened the freezer to get a waffle for breakfast and, being tall enough now to see over the refrigerator, saw something move that was black in color. C got a stool and stood on it, saw the Appellant's service revolver [on top of the refrigerator] in front of the cheese puffs, and took a picture of it. She then called her mother. She put her mother on speaker phone, and sent the picture to her. Her mother then called the Appellant to discuss the situation. [Exhibit B, p.5]

11. The response social worker viewed the photo of the gun and corroborated at Hearing that it was in its holster when found by C. [Testimony of the Response Social Worker]

12. C is aware that the Appellant is a police officer, but had not observed his gun on top of the refrigerator before or anywhere else in the home. [Exhibit B, pp.2 & 5]

13. C was freaking out about the gun, because a boy in her town accidentally killed himself using his father's gun. [Exhibit B, pp. 4 & 6; Exhibit A-2, p.7] This particular incident had "shit ass timing". [Exhibit B, p.8]

14. J was asleep when it all happened. [Exhibit B, p.6; Testimony of the Appellant] Like her sister, she had not seen the gun left out like it was. [Exhibit B, p.6]

15. The Appellant was not aware there was an issue, until mother called him that morning at 6:30 a.m. to let him know what happened. He went downstairs, got the gun, and put it in the safe per her request. [Exhibit A-1, p.7; Exhibit B, pp. 8-9; Testimony of the Appellant].

16. At no point did C go to the Appellant and ask him to move it, which he would have done at her request. [Exhibit B, p.9] The Appellant was mad that C called her mother, instead of going to him. [Exhibit B, p.6]

17. The Appellant has a big safe in the basement of his home and two wall safes in his bedroom closet. They are key and code safes. The children do not have access to the codes. The response social worker, during his visit to the Appellant's home on March 2, 2017, viewed the safes; all of which were closed and locked. [Exhibit B, pp.8-10; Testimony of the Response Social Worker]

18. The Appellant denied that there was anything in his divorce/separation agreement involving guns or gun safety. He and mother were divorced on or about 2015. [Testimony of the Appellant]

19. Mother informed the response social worker on February 27, 2017, that she was in the process of filing papers with the probate court to make sure the Appellant locked his firearms away safely at all times. [Exhibit B, p.4] In turn, the Appellant told the response social worker on March 2, 2017 that, two days prior, he went to court and signed a safety plan and a probate agreement stating, in part, that his firearms will be locked up in the safes. [Exhibit B, p.9]

20. At Hearing, the Appellant acknowledged signing a safety plan with the Department. [Testimony of the Appellant]

21. There were on-going probate issues surrounding the incident; the parties were engaged in litigation. Based on interviews conducted by the response social worker, the Department entertained the possibility of mother having used the children as tools to gain an advantage in court. [Testimony of the Appellant; Exhibit B; Testimony of the Investigation]

22. The two 51A Reports of February 16, 2017 were filed because mother contacted C's assistant principal who, in turn spoke to C, and because mother then went to a police department to report the incident. [Exhibit A-1; Exhibit A-2]

## Analysis

A party contesting the Department's decision, to support the 51A Reports for neglect, may obtain a Hearing to review the decision made by the Area Office. [110 CMR 10.06] The Appellant requested a Hearing, which was granted and held on June 6, 2017.

Regulations, policies, and case law applicable to this appeal include, but are not limited to, the following.

After completion of its 51B investigation, the Department shall make a determination as to whether the allegations in the report received are supported or unsupported. To support a report means that the Department has reasonable cause to believe that an incident (reported or discovered during the investigation) of abuse or neglect by a caretaker did occur. To support a report does not mean that the Department has made any findings with regard to the perpetrator(s) of the reported incident of abuse or neglect. It simply means that there is reasonable cause to believe that some caretaker(s) did inflict abuse or neglect upon the child(ren) in question. Reasonable cause to believe is defined as 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 and supervisor's clinical base of knowledge. [110 CMR 4.32]

"[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

The 51A report under appeal is supported for neglect. Neglect means failure by a caretaker, 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. This definition is not dependent upon location, i.e., neglect can occur while the child is in out-of-home or in-home setting. [110 CMR 2.00]

A Support finding means there is reasonable cause to believe that a child(ren) was abused and/or neglected, and the actions or inactions by the parent(s)/caregiver(s) place the children 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. One such example is neglect that has led to a serious physical or emotional injury. DCF Protective Intake Policy #86-015, rev. 2/28/16

Substantial Risk of Injury: A situation arising either through intentional act or omission which, if left unchanged, might result in physical or emotional injury to a child or which might result in sexual abuse to a child. DCF Protective Intake Policy #86-015, rev. 2/28/16

The Court has held that the Department's determination of neglect does not require evidence of actual injury to the child. Lindsay v. Department of Social Services, 439 Mass. 789 (2003).

Caregiver is defined as:
(1) A child's parent, stepparent or guardian, or any household member entrusted with responsibility for a child's health or welfare; or
(2) Any other person entrusted with responsibility for a child's health or welfare, whether in the child's home, a relative's home, a school setting, a child care setting (including babysitting), a foster home, a group care facility, or any other comparable setting.

As such, the term "caregiver" includes, but is not limited to school teachers, babysitters, school bus drivers and camp counselors. The "caregiver" definition should be construed broadly and inclusively to encompass any person who at the time in question is entrusted with a degree of responsibility for the child. This specifically includes a caregiver who is a child such as a babysitter under age 18. 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, (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]

After review and consideration of the evidence presented by the parties, the Hearing Officer finds for the Department in the matter under appeal. See Findings #1 to #22 and the below discussion.

Pursuant to DCF Protective Intake Policy #86-015, rev. 2/28/16, the Appellant was a *caregiver* of his two children, eleven year-old C and eight year-old J, during the incident of February 16, 2017, as well as at other times.

Based on the record as a whole and giving due weight to the clinical judgment of Department social workers, the Hearing Officer finds that the Department had "reasonable cause to believe" that the Appellant failed to provide the children with minimally adequate supervision, emotional stability and growth, and other essential care, such as a safe home environment free from potential harm, and was therefore neglectful. See Care and Protection of Robert.

The evidence in the record demonstrates that the Appellant, although a gun expert and firmly aware of firearm safety, placed his duty service revolver on top of the refrigerator on February 15, 2017 where it was seen and found by C the next morning, at 6:30 a.m. on February 16, 2017. The child, trained not to touch such a weapon and to get an adult right away, called her mother. Although the Appellant was more accessible to approach and there are issues in the record as to why she chose her mother over the Appellant, the child did in fact correctly and fortunately reach out to an adult. There was no physical harm incurred by the child. Although C had been exposed to guns because the Appellant has been a police officer for twenty two years, to include during his marriage to the children's mother, and had taken the child to the gun range over the years, this particular incident was upsetting to her. According to her sister, C was freaking out about finding the Appellant's service revolver on February 16th, because of a recent incident about a boy in her town having killed himself by handling his father's gun.

The Hearing Officer finds that the Appellant is a gun expert. He has hunted since he was twelve years-old, served in the military oversees for three years and as an armorer in the air force, and has been a police officer for the last twenty two years. He argues that he is therefore firmly aware of firearm safety; yet, he placed his service revolver in its holster on top of his refrigerator accessible to C, even though he had multiple key and coded safes in his home. Although C was trained in fire arm safety, she was not a gun expert and, unlike the Appellant, her knowledge was limited, and she is a child.

Although the Appellant's testimony proves out that it would require a three prong approach to remove the service revolver from its holster and that C does not know how to remove the service revolver from the holster, the risk of a child, such as C, attempting and somehow successfully accomplishing this task cannot be ignored.

Concerning eight year-old J, the evidence in the record demonstrates that this child was sleeping when C found the gun on February 16, 2017. Nevertheless, the Appellant testified at Hearing that, when he returned home from work, he would place that particular gun in its holster "on top of the refrigerator, or cabinet 99% of the time". The danger inherent in owning a gun and the Appellant's routine of not locking his gun up in a safe after returning home from shift, created a situation whereby both children, were put at risk. Pursuant to the Department's Protective Intake Policy, a support finding means there is reasonable cause to believe that a child(ren) was abused and/or neglected, and the actions or inactions by the parent(s)/caregiver(s) place the children in danger, or pose substantial risk to the child(ren)'s safety or well-being as in the instant case.

The Hearing Officer therefore finds that the Department's decision of March 9, 2017, to support for neglect of the children by the Appellant on March 9, 2017, was made in compliance with its regulations and policies, and with a reasonable basis, and therefore affirms the decision. The Appellant failed to meet his burden of proof. [110 CMR 10.23] The Appellant did not dispute the incident of February 16, 2017 occurred.

## Orders

**1. The Department's decision of March 9, 2017, to support the 51A Reports for neglect of C by the Appellant, is AFFIRMED.**

**2. The Department's decision of March 9, 2017, to support the 51A Reports for neglect of J by the Appellant, is AFFIRMED.**

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

Frances Wheat ec

Frances I. Wheat, MPA
Administrative Hearing Officer
Office of the General Counsel

Date: 11/29/2017

Sophia Cho, LICSW
Supervisor, Fair Hearing Unit