

**THE COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
DEPARTMENT OF CHILDREN AND FAMILIES
CENTRAL ADMINISTRATIVE OFFICE
600 WASHINGTON STREET
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**LINDA S. SPEARS
Commissioner**

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(IN THE MATTER OF)
(F.D..)
(FH #2017-1206)
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HEARING DECISION

Procedural History

The Appellant, F.D., appealed the decision of the Department of Children and Families [hereinafter “the Department” or “DCF”], to support for neglect of J, pursuant to M.G.L., c.119, §§51A & 51B.

On June 21, 2017, the Department received a 51A Report alleging neglect of fifteen day-old J by the Appellant, who is her father, as well as by her mother, T.M., in connection with a report of a man and woman physically assaulting each other to which the police responded. The 51A Report was screened in for an emergency 51B response, which was assigned to DCF emergency response social workers C.S and M.H. On June 22, 2017, following the 51B response, the Department supported for neglect of J by the Appellant and her mother due to the substantial risk to the infant’s safety and well-being in connection with the physical assault. This decision was approved by management on June 26, 2017. The family’s case is currently open with the Department.

The Appellant filed a late request for Fair Hearing [“Hearing”] by fax on September 26, 2017, pursuant to 110 CMR 10.06. The Appellant’s request was granted and his Hearing held on January 9, 2018 at the Department’s South Central Area Office in Whitinsville, MA. Present were the DCF emergency response social worker, C.S.; the Appellant; and, the Appellant’s Attorney, A.C. The response social worker and Appellant were sworn in and testified. The proceeding was recorded, pursuant to 110 CMR 10.26, and downloaded to compact disk [CD].

Admitted into evidence for the Department was the DCF 51A Report of June 21, 2017 [Exhibit A], the corresponding 51B Response Supported on June 22, 2017 [Exhibit B], and, a Police Department Narrative of June 21, 2017 [Exhibit C]. Admitted into evidence for the Appellant were the Appellant’s District Court Docket Report [Exhibit 1] and the Appellant’s Hearing Request [Exhibit 2]. The Hearing record was closed on January 9, 2018.

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.

outside. The Appellant said at Hearing we “bickered back and forth”. [Exhibit B; Testimony of the Appellant]

6. Although the Appellant and mother consistently denied engaging in any physical altercation during the domestic of June 21, 2017 and the Appellant denied there was tugging between him and TM as T.M. held the infant, J. [Exhibit B; Testimony of the Appellant], other more credible evidence in the record disputes this:
 - a) Paternal grandmother, C.D., was an eye witness to the incident. She told the police, who responded to her home at approximately 8:30 p.m. on June 21, 2017, that she heard a commotion outside between the Appellant and mother and observed mother scratching at the Appellant and the Appellant with his hands around mother’s throat. Paternal grandmother said the infant was involved in a tussle between the two. [Exhibit C]
 - b) Although the response social worker did not see injuries on the Appellant and mother when she interviewed them on June 22, 2017 [Exhibit B, pp.4-6; Testimony of the Response Social Worker], the police officer, while on scene, saw some redness around mother’s neck and scratches on the Appellant’s neck and arm, which corroborated the witness account. [Exhibit C]
 - c) Although the Appellant denied a history of domestic violence with any other relationship [Exhibit B, p.6], DCF history reflects a prior history of domestic violence with his former girlfriend, M.J. [Ibid, p.2] and his criminal record documents the existence of several restraining orders brought against him by M.J. and other women as well. [Testimony of the Response Social Worker] The Appellant is well known to the police. [Exhibit C]
 - d) The Appellant at the time of the hearing was engaged in domestic violence classes. [Testimony of the Appellant]
 - e) The response social worker found that the Appellant and mother were not forthcoming about the physical aspects of the incident of June 21, 2017, when interviewed during the home visit of June 22, 2017. This conclusion was derived from the eye witness account, the injuries seen on the parties, and the Appellant’s history of domestic violence. [Testimony of the Response Social Worker; Exhibit B] The Hearing Officer concurs with this conclusion and notes other inconsistencies below. See Covell v. Department of Social Services and Edward E. v. Department of Social Services.
 - f) The Hearing Officer found some other inconsistencies: (a) The Appellant told the police that he sustained the scratches from jumping over the fence [Exhibit C], but at Hearing denied having scratches on his neck, and said that the scratches on his arm came from his work as a landscaper. [Testimony of the Appellant] (b) The Appellant denied that mother had a red neck from the domestic [Testimony of the Appellant], although this was seen by the police on scene. [Exhibit C] (c) The Appellant presented a scenario at Hearing of being outside holding the infant and heading toward the car to get J’s formula, when he met up with the police [Testimony of the Appellant]; yet, the officers on scene, when making their presence known, saw the Appellant fleeing toward the back door of the

- house with the infant. Fearing for the safety of J, the officers began a foot pursuit and entered the house to ensure the safety of the infant and all parties inside. The Appellant was instructed to give the child over to mother, which he did. [Exhibit C; Testimony of the Response Social Worker]
- g) The Appellant was arrested for domestic assault and battery on scene [Exhibit C], which was dismissed on September 21, 2017 for lack of prosecution. [Exhibit 1; Exhibit 2] Paternal grandmother did not appear and mother spoke to the district attorney presumably denying the physical aspects of the domestic. [Testimony of the Appellant]
7. The response social worker did not interview the paternal grandmother. [Testimony of the Response Social Worker], however the grandmother's statement is documented in the police report submitted as evidence by the Department at Hearing. [Exhibit C]
 8. The Appellant asserted that paternal grandmother was not a sound witness as she is a schizophrenic, though no documentation was provided to corroborate this; correctly asserted that she has a history of using substances, though there is no proof she was actively using at the time of the domestic of June 21, 2017; and, has a DCF history. [Exhibit B, p.6; Testimony of the Appellant] The Hearing Officer is not convinced that the paternal grandmother's witness testimony lacks merit.
 9. The fifteen day-old infant did not have any physical injuries and was medically cleared by the EMTs on scene. [Exhibit A, p.2; Exhibit B, p.7; Testimony of the Response Social Worker]
 10. The Appellant reported at Hearing that the infant was "not screaming or crying" [Testimony of the Appellant.] The police report and response social worker provided no evidence one way or the other. [Exhibit C; Testimony of the Response Social Worker]
 11. The infant was in good health when seen by the response social worker on June 22, 2017 and appeared bonded to her parents. [Testimony of the Response Social Worker; Exhibit B]
 12. The Department based its support for neglect of J by the Appellant [and mother] on the police report. The Department found that the child was exposed to a physical altercation and was involved in the tussle between the two with each parent pulling on her, and held by the Appellant while he was fleeing from the police on scene. The Appellant's actions presented a substantial risk to the safety and well-being of the child. [Exhibit B; Exhibit C; Testimony of the Response Social Worker]
 13. Although there is no evidence that the infant was physically or emotionally harmed, our courts have repeatedly recognized that witnessing domestic violence has a profound impact on the development and well-being of children and constitutes a "distinctly grievous kind of harm." Custody of Vaughn, 422 Mass. 590,599, 664 N.E. 2nd 434 (1996), cited in John D. v. Department of Social Services, 51 Mass. App. 125 ((2001), Adoption of Ramon, 41 Mass. App. Ct. 709, 714 (1996). Even with no indication or evidence that a child has been injured, either physically or emotionally by the domestic violence, the state need not wait until a child

has actually been injured before it intervenes to protect a child. Custody of a Minor, 377 Mass. 879; 389 N.E.2d 68, 73 (1979). The Court has also 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).

14. By weight of the evidence and testimony the Hearing Officer finds that the Department had reasonable cause to believe that the Appellant failed to take at least minimal action to provide a J with minimally adequate food, clothing, shelter, medical care, supervision, emotional stability and growth, or other essential care. J. *See Analysis.*

Applicable Standards and Analysis

A party contesting the Department's decision, to support a 51A Report 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 January 9, 2018.

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. Protective Intake Policy #86-015 [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. Protective Intake Policy #86-015 [2/28/16]

Danger: A condition in which a caregiver's actions or behaviors have resulted in harm to a child or may result in harm to a child in the immediate future. Protective Intake Policy #86-015 [2/28/16]

Safety: A condition in which caregiver actions or behavior protect a child from harm. Protective Intake Policy #86-015 [2/28/16]

A substantiated concern finding means there was reasonable cause to believe that the child was neglected and the actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being. Examples include neglect that resulted in a minor injury and the circumstances that led to the injury are not likely to recur, but parental capacities need strengthening to avoid future abuse or neglect of the child; neglect that does not pose an imminent danger or risk to the health and safety of a child; and, educational neglect. Protective Intake Policy #86-015 [2/28/16]

The Supreme Judicial Court, in Covell v. Department of Social Services, 439 Mass. 766 (2003), held that substantial evidence may be based on hearsay, if that hearsay has "indicia of reliability".

Edward E. v. Department of Social Services, 42 Mass. Appt. Ct [1997] where the question before the Court was not whether the administrative record was based exclusively upon uncorroborated hearsay but whether the hearsay presented at the Hearing was reliable.

Our courts have repeatedly recognized that witnessing domestic violence has a profound impact on the development and well being of children and constitutes a "distinctly grievous kind of harm." Custody of Vaughn, 422 Mass. 590,599, 664 N.E. 2nd 434 (1996), cited in John D. v. Department of Social Services, 51 Mass. App. 125 ((2001), Adoption of Ramon, 41 Mass. App. Ct. 709, 714 (1996). Even with no indication or evidence that a child has been injured, either physically or emotionally by the domestic violence, the state need not wait until a child has actually been injured before it intervenes to protect a child. Custody of a Minor, 377 Mass. 879, 389 N.E.2d 68, 73 (1979).

The Court has also 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).

Caretaker 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, "caretaker" includes (but is not limited to) school teachers, baby-sitters, school bus drivers, camp counselors, etc. The "caretaker" 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 baby-sitter. [110 CMR 2.00]

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 another 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 the age of 18. [Protective Intake Policy, #86-015, Revised 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]

The Appellant was a *caretaker/caregiver* of his fifteen day-old daughter, J, consistent with that term as defined herein and at 110 CMR 2.00 and within the Department's Protective Intake Policy.

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 J with minimally adequate other essential care, such a safe

and stable environment, when she was exposed to the verbal and physical altercation between the Appellant and mother on June 21, 2017 at the paternal grandmother's home. Reasonable cause to believe" is a relatively low threshold. See Care and Protection of Robert.

The credible and reliable evidence in the record demonstrated that the Appellant, despite his denial, did engage in a physical altercation with the infant's mother during which time the infant was involved in the tussle between the two and was held in the Appellant's arms, when he was engaged in a foot pursuit by the police on scene, due to the police officers concern about the safety of the child. Although there is no evidence this infant was physically or emotionally injured, case law emphasizes the impact of exposure to violence on the development and well-being of a child and the need to intervene and protect that child even if no injuries. See Finding #13.

Although it was argued at Hearing that the Department, in lieu of a support, could have made a determination of substantiated concern. A substantiated concern finding means there was reasonable cause to believe that the child was neglected and the actions or inactions by the parent(s)/caregiver(s) create the potential for abuse or neglect, but there is no immediate danger to the child(ren)'s safety or well-being. In the instant case, however, the Hearing Officer is troubled that: Appellant had a history of domestic abuse of several woman over a substantial period of time: the infant child was totally dependent on her caregivers; and the infant was involved in a tussle between the two adults each pulling on her, and was held in the Appellant's arms when he was fleeing from the police. This domestic, given the overall evidence, clearly placed J at imminent risk and harm. She was only fifteen days-old when the domestic occurred, and had been born a substance exposed newborn.


The Hearing Officer has no reason to doubt the clinical experience and judgment of the Department in the instant matter. The Hearing Officer did not find any information offered by the Appellant to be substantial or compelling or reliable to such an extent that the Department acted unreasonably and/or abused its discretion in making a decision to support for neglect of J. Based upon a review of the evidence presented at the Hearing, including testimony from the parties and documents submitted, the Hearing Officer finds that the Department's decision, to support for neglect of J by the Appellant, was made in conformity with its regulations and policies, supported by sound clinical judgment, and there was a reasonable basis for the decision. The Department correctly argued that the Appellant's actions, given his daughter's young age and vulnerability, posed a substantial risk to J's safety and well-being.

The Appellant failed to meet his burden of proof. [110 CMR 10.23] The Appellant's denial relative to his culpability as a perpetrator of physical violence against mother during this domestic and the involvement of J in the tussle between the two, is without merit..

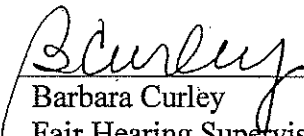
Order

1. The Department's decision of June 22, 2017, to support the 51A Report for neglect of J by the Appellant, her Father, is AFFIRMED.

This is the final administrative decision of the Department. If the Appellant wishes to appeal this 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. [(M.G.L. c. 30A, §14)]


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

Date: February 27, 2018


Barbara Curley
Fair Hearing Supervisor