

**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)
)
 TK) **FAIR HEARING DECISION**
)
 FH # 20171358)
)

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

Procedural History

On August 2, 2017, the Department of Children and Families received a 51A report from a mandated reporter alleging the neglect of A (hereinafter "A" or "the child") by two (2) male staff at the ██████████ Hospital. A response was conducted and on October 5, 2017, the Department made the decision to support the allegations of the neglect of A by GT¹ and TK. 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 January 12, 2018, at the DCF Central Office. All witnesses were sworn in to testify under oath. The record remained open at the conclusion of the hearing for one month to allow the Appellant to submit additional evidence. No additional documentation/evidence was submitted and the record on this matter closed on February 12, 2018.

The following persons appeared at the Fair Hearing:

Laureen Decas	Fair Hearing Officer
TK	Appellant
JS	Department Response Social Worker ²

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.

¹ GT was not a party to this appeal.

² JS presented the Department's information as JN no longer worked for the Department.

The Fair Hearing was digitally recorded 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, Institutional Abuse, dated 8/2/17
- Exhibit B: 51B Report, completed 10/5/17
- Exhibit C: Employment Application, dated 7/11/15
- Exhibit D: Copy of Letter responding to A's grievance filed with [REDACTED] Hospital
- Exhibit E: Bureau of Health Professionals Licensure/Mass Dept. of Public Health Information
- Exhibit F: Employee File

Appellant

None

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. At the time of the filing of the 51A report, A was seventeen (17) years old. She was an in-patient resident in the psychiatric unit at [REDACTED] Hospital in [REDACTED], MA. (Exhibit A)
2. The Appellant was a [REDACTED] working the 11pm to 7am shift and assigned to the unit A was a resident of (Exhibit B); therefore the Appellant was a caregiver pursuant to Departmental regulation and policy. (110 CMR 2.00; DCF Protective Intake Policy #86-015, rev. 2/28/16)

3. On August 2, 2017, 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 A by two (2) male staff at the ██████████ Hospital. Relative to the Appellant, the report alleged TK made A feel uncomfortable when he touched her leg and shoulder, and while giving her medication, told her she was pretty. The report was screened in for an investigative response. (Exhibit A)
4. On October 5, 2017, pursuant to M.G.L. c. 119, §51B, the Department supported the allegation of neglect of A by the Appellant. The Department supported the allegations because the Appellant while in A's bedroom, sat down on her bed, and rubbed her shoulder and mid-thigh area; and told her she was pretty. The Appellant's actions were concerning as he had similar behavior in the past with females; and his actions caused increased anxiety to A for days after the subject incident. The Department found that the Appellant failed to provide A with minimally adequate care and his actions posed significant risk to her well-being. (Exhibit B, p.18)
5. A alleged the Appellant entered her hospital room, sat down on her bed and asked her what was wrong, as her leg was shaking. The Appellant asked if she needed some anxiety medication; talked to her about his own anxiety and issues with his ex-wife. The Appellant rubbed her shoulder and mid-thigh area for several seconds and then asked her to go out into the hallway. When A and her roommate, K (hereinafter "K"), went into the hallway, the Appellant walked away. While A was at the medication window of the nurse's station asking for anxiety medication due to the Appellant causing her anxiety, the Appellant told A she was "so pretty". (Exhibit B, pp. 4- 5)
6. A filed a grievance with the hospital regarding the Appellant's actions of touching her. Additional training was provided to the staff (the Appellant) and the nurse's assignment was changed. (Exhibit D)
7. A also spoke with her clinician, CH (hereinafter "CH"), regarding the incident. CH confirmed A described the Appellant touching her leg and shoulder and A found it "creepy" and called her "pretty". CH reported A presented as anxious and reported increased anxiety and guilt as a result of her interaction with the Appellant. CH reported A had a history of sexual abuse and trauma. (Exhibit B, pp. 12-13)
8. K was interviewed and she described two (2) incidents of the Appellant touching A on her leg. One incident was of the Appellant sitting very close to A on her bed, rubbing A's upper leg over her pajama bottom, which resulted in A shaking as she did not like to be touched. The second incident of touching was observed by K to have happened a few nights later; whereby the Appellant entered their room while sucking on a lemon and asked if they wanted some of it. The Appellant asked A what was wrong and offered her medication; which she said she had already taken. The Appellant sat next to A on the bed, asked how A was doing and rubbed her shoulder and leg. The Appellant asked A to step out of the room but K went with her. While at the medication window A told K the Appellant told her she was pretty. K later questioned if the Appellant had been drinking because of the way he was walking. (Exhibit B, p.10)

9. A separate staff member corroborated A's disclosure of the Appellant calling her pretty. This staff member did not feel the comment was inappropriate; rather it had appeared to her to be supportive. (Exhibit B, p.7)
10. The Appellant denied sitting on A's bed, touching her shoulder or thigh. The Appellant did not recall he told A she was pretty. (Exhibit B, p.11; Testimony of Appellant) I do not find the Appellant to be a credible reporter.
11. At the Fair Hearing, the Appellant "emphatically denied the allegations". The Appellant did not know why his co-worker said she heard him say A was "pretty in med line" as he did not give A her meds. The Appellant testified the adolescent unit, where A was a resident, was a difficult unit to work on and he had not wanted to work on the unit for this type of reason; he had been on the unit for 4 – 5 months at the time of the incident. (Testimony of Appellant)
12. The Appellant was terminated from his position due to concerns he was intoxicated on shift. The Appellant had previously been referred to EAP due to concerns with his drinking; he could not return to work until he engaged in treatment. (Exhibit B, pp. 14, 15)
13. The Department learned that the Appellant had been a [REDACTED] since 2009. The Appellant had a history of complaints, including allegations that he harassed a female co-worker in 1998, and in 2010 had contact with two (2) female patients after they had discharged from an adult psychiatric facility and one had filed a complaint regarding the Appellant touching her knee while she was still a patient at the facility. (Exhibit E)
14. In light of the totality of the evidence in this case, I find that the Department did have reasonable cause to support the allegation of neglect of A by the Appellant.
 - a. 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).
 - b. A's statements about the interaction with the Appellant were consistent and corroborated by her roommate, K, and in part by another staff person. There was no evidence that A had motivation to lie or to harm the Appellant. I find A's statements were reliable and given proper weight by the Department. Edward E. v. Department of Social Services, 42 Mass. App. Ct. 478, 484 (1997)
 - c. The Department had sufficient evidence to support a finding that the Appellant neglected A under Department policies and regulations. The Appellant failed to provide A with minimally adequate emotional stability and growth and the Appellant's actions posed substantial risk to A's safety and well-being. DCF Protective Intake Policy #86-015, rev. 2/28/16.

Applicable Standards

A "support" finding of abuse or neglect means that 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) placed 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

"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. DCF Protective Intake Policy #86-015, rev. 2/28/16; 110 CMR 2.00

"Danger" is 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. DCF Protective Intake Policy #86-015, rev. 2/28/16

"Risk" is defined as the potential for future harm to a child. DCF Protective Intake Policy #86-015, rev. 2/28/16

"Caregiver" means (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; 110 CMR 2.00

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) 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

A Fair Hearing shall address (1) whether the Department's or provider's decision was not in conformity with its policies and/or regulations and resulted in substantial prejudice to the aggrieved party;. . . In making a determination on these questions, the Fair Hearing Officer shall not recommend reversal of the clinical decision made by a trained social worker if there is reasonable basis for the questioned decision. 110 CMR 10.05

Analysis

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

The Appellant contested the Department's decision to support an allegation that he neglected A, a child in his care while he was her caregiver as a [REDACTED] at [REDACTED] Hospital. He argued emphatically that he did not sit on A's bed, did not touch her by rubbing her shoulder and thigh, and did not recall calling her pretty. In making a determination on the matter under appeal, the Hearing Officer shall give due weight to the clinical decision made by a trained social worker, that there is reasonable cause to believe that a child has been abused or neglected. 110 CMR 10.05 The Department's decision was made with reasonable cause to believe, as found in Finding #14. The Appellant did not present persuasive evidence in this matter to allow for a reversal of the Department's support decision for neglect.


This Hearing Officer was duty bound to consider the totality of evidence, and whether there was enough evidence to permit a reasonable mind to accept the Department's decision that TK neglected A. In reaching the instant decision, this Hearing Officer gave substantial weight to the corroboration of A's statements by more than one person and the lack of evidence presented that A had any reason to cause harm to the Appellant. 110 CMR 10.23; M.G.L. c. 30A, §1(6); also see Wilson v. Department of Social Services, 65 Mass. App. Ct. 739, 745-746 (2006) The Department credited and relied upon the statements made by A, her roommate and other professionals involved in A's care. To determine the reliability of multi-level hearsay statements, courts "look to the circumstances under which they were they made" and consider factors such as the hearsay statements themselves, the context in which they were made, and the detail of the statements. Edward E. v. Dep't of Soc. Servs., 42 Mass. App. Ct. 478, 484-485 (1997) In the subject matter, the Department found A was detailed in her statements, had evidence to corroborate her allegations, and appropriately evaluated the context in which her statements were made. That the Departments supported finding had an adverse effect on the Appellant's employment prospects in regrettable. However, the court has concluded that a potential

unfavorable impact of an Appellants professional licensure does not constitute a prejudice to the Appellant, and lies outside the purview of the Fair Hearing. Wilson v. Department of Social Services, 65 Mass. App. Ct. 739 (2006).

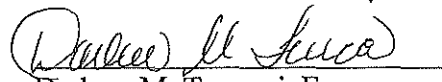
Conclusion

The Department's decision to support the allegation of **neglect** by the Appellant was made with a reasonable basis and therefore, 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, or within Suffolk County, 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.


Laureen Decas
Administrative Hearing Officer

Date: 6/4/18


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