

**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)
)
 BD) **FAIR HEARING DECISION**
)
 FH # 20191584)
)

The Appellant in this Fair Hearing was BD (hereinafter "BD" 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 October 13, 2019, the Department of Children and Families received a 51A report alleging the neglect of P, C, and W (hereinafter "the children") by BD. A non-emergency response was conducted and on November 4, 2019, the Department made the decision to support the allegation of the neglect of the children by BD. The Department notified the Appellant of its decision and his right to appeal.

The Appellant made a timely request for a Fair Hearing under 110 CMR 10.06. The hearing was held on March 11, 2012, at the DCF Cape Cod 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
BD	Appellant
KD	Witness
GF	Department Social Worker
JP	Department Supervisor

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 pursuant to 110 CMR 10.26.

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

For the Department:

Exhibit A: Intake report dated 10/13/19

Exhibit B: Child Abuse/Neglect Non-Emergency Response completed 11/4/19

Exhibit C: Police report dated 10/13/19

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 subject 51A report, P was five (5) years old, C was three (3) years old and W was one (1) year old. The children resided with their mother, KD, and the Appellant, BD. (Exhibit A)
2. The Appellant is the father of W, and the stepfather to P and C; therefore, he 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 October 13, 2019, 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 P, C, and W by the Appellant. According to the reporter, BD was arrested for operating under the influence (OUI) with the children in the vehicle on that date. BD was intoxicated, empty nip bottles were found in the car, and it was noted BD had a prior OUI from out of state. This report was screened in for an investigatory response. (Exhibit A)

4. Upon completion of the investigative response on November 4, 2019, the aforementioned report was supported for the neglect of the children by the Appellant. The Appellant was the caregiver for the children when he was pulled over by police for speeding. The Appellant failed several field sobriety tests, blew a .128 into a breathalyzer administered by police, and was found with empty nip bottles. (Exhibit B, p.6)

5. The Appellant consumed a coffee drink mixed with coconut rum in the late morning, as well as "a few nips" later in the day. One nip spilled on his shirt which caused an odor of alcohol to emanate from him. (Exhibit B, p.2)

6. According to the Appellant, the night before the subject incident, a friend spilled a nip in the Appellant's car, which caused the car to smell of alcohol. (Exhibit B, p.2)

7. The Appellant was operating the vehicle at sixty-one (61) miles per hour in a forty-five (45) mile an hour zone. (Exhibit B, p.3)

8. P reported the Appellant drank "little drinks.". (Exhibit B, p.3)

9. The responding police sergeant noted a strong odor of alcohol when he approached the vehicle after initiating a stop for speeding. The Appellant was noted to have red, blood shot, glassy eyes, and slurred words. (Exhibit C)

10. The Appellant was asked to recite the alphabet without singing it. He did so up until the letter T then stopped. (Exhibit C)

11. The responding sergeant then asked the Appellant to count backwards from 69-54. The Appellant went from 67-65 and stopped. (Exhibit C)

12. The Appellant was asked to complete field sobriety testing by an officer, he reported he had a previous back injury but walked every day. The cruiser's emergency front lights were stopped and a spot light was utilized at the testing area. The Appellant was given the Horizontal Gaze Nystagmus test, where he was unable to follow the officer's finger without moving his head. All six clues to the test were observed. (Exhibit C)

13. During a Walk/Turn test where the roadway was free of pot holes and debris, the Appellant walked off the line twice, using his arms for balance. (Exhibit C)

14. The Appellant was placed under arrest. In his back pocket was an empty Dr. McGillicuddy nip bottle. The Appellant informed the responding officers there were additional nips in the center console. (Exhibit C)

15. The Appellant left the home at 5:00pm with the children in his vehicle. His wife saw him at that time and did not feel he was intoxicated. (Testimony of Appellant, Testimony of KD)

16. In light of the totality of the evidence in this case, I find that the Department did have reasonable cause to support the allegations of the neglect of the children by the Appellant.

a. "If children are to be protected from neglect, it makes no sense for the department to wait until neglect has already run its course to the point of producing a physical or emotional injury." Lindsay v. Department of Social Servs., 439 Mass. 789, 795 (2003);

b. The Department had sufficient evidence to support a finding that the Appellant neglected the children under Department policies and regulations. The Appellant blew a .128 into a breathalyzer administered by trained police, he failed numerous field sobriety tests while emanating an odor of alcohol and admitted having consumed alcohol prior to transporting the children.

c. The Appellant failed to provide minimally adequate care to the children on October 13, 2019. His actions posed a substantial risk to their safety. DCF Protective Intake Policy #86-015, rev. 2/28/16;

d. The Department had reasonable cause to intervene with this family in order to ensure the children's safety and well-being.

17. Therefore, the Department's decision to support allegations of neglect was made in conformity with its policies and regulations. (110 CMR 2.00; 110 CMR 4.32; 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. 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

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

“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

Analysis

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

The Appellant contested the Department's decision to support allegations that he neglected his daughter and stepdaughters when he operated a vehicle after consuming alcohol. The Appellant argued he was not intoxicated, despite blowing a .128 on a police administered breathalyzer test, despite three (3) separate officers of the law observing him exhibiting signs of intoxication, and despite his own admittance that he had consumed alcohol during the day before driving the children. The Appellant's argument was not persuasive and the submitted evidence in this matter does not allow for a reversal of the Department's support decision.

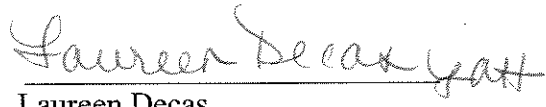
The burden was on the Appellant to show, by a preponderance of the evidence that the Department's decision was not in conformity with Department regulations and/or policy and/or with a reasonable basis. The Investigator relied on professional opinions and recommendations, available documentation, observable indicators, P's statement that the Appellant drank "little bottles," and her clinical knowledge to support the decision made. The Department credited and relied upon the statements made by police officers, P and the Appellant. I find that the Department's decision to do so was reasonable as there was no evidence that P or the police were motivated to make false allegations against the Appellant or that she/they had done so before. Edward E. v. Department of Social Services, 42 Mass.App.Ct. 478 (1997).

Based on the totality of the evidence gathered, the Department's finding that the Appellant's actions constituted neglect was based on "reasonable cause" and was made in conformity with Departmental regulations. There was no evidence that the Department acted unreasonably when supporting this report, the Appellant was not substantially prejudiced by the Department's decision, and the Appellant has not shown by a preponderance of the evidence that the Department failed to comply with its regulations and policy when it made a finding to support the allegations of neglect. "Reasonable cause" implies a relatively low standard of proof which, in the context of the 51B, serves a threshold function in determining whether there is a need for further assessment and/or intervention. Care and Protection of Robert, 408 Mass. 52, 63-64 (1990). "{A} presentation of facts which create a suspicion of child abuse is sufficient to trigger the requirements of § 51B." Id. at 64; G.L. c.119, s 51B.

Conclusion

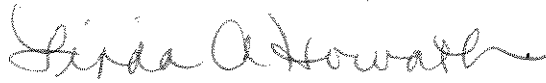
The Department's decision to support the allegations of **neglect of P, C and W** by the Appellant was made with a reasonable basis and therefore, is **AFFIRMED**.

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.



Lauren Decas
Administrative Hearing Officer

Date: 7/31/2020



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