

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF ADMINISTRATION

In the Matter of Appeal of
the Determination of the
Responsible Authority for the
Hennepin County Community
Services Department that
Certain Data Concerning
Jane E. Johnston is Accurate
and/or Complete.

FINDINGS OF FACT.
CONCLUSIONS AND
RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck commencing at 9:00 A.M. on Wednesday, November 9, 1988 in Courtroom No. 18, Fifth Floor, Flour Exchange Building, in the City of Minneapolis, Minnesota. The hearing continued on the following day. The record closed on December 16, 1988, upon submission of the final post-hearing brief.

Arthur Katzman, Assistant Hennepin County Attorney, 2000A Government Center, Minneapolis, Minnesota 55487, appeared on behalf of the Hennepin County Community Services Department. Donald E. Horton, Attorney at Law, Suite 1230, 625 Fourth Avenue South, Minneapolis, Minnesota 55415, appeared on behalf of Jane E. Johnston.

This Report is a recommendation, not a final decision. The Commissioner of Administration will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. sec. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report

to file exceptions and present argument to the Commissioner.
Parties should
contact Sandra J. Hale, Commissioner, Minnesota Department of
Administration,
Administration Building, 50 Sherburne Avenue, St. Paul,
Minnesota 55155, to
ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issue in this contested case proceeding is whether or
not the data
contained in the report submitted to Hennepin County District
Court Judge
Charles Porter by Hennepin County Community Services Department
is accurate
and/or complete within the meaning of Minn. Stat. sec. 13.04, subd. 4.

Based upon all of the files, records and proceedings
herein, the
Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Jane E. Johnston, (hereinafter "Appellant" or "Ms. Johnston") holds an M.S.W, degree which she obtained in 1976. On September 13 1982 she obtained her first employment as a psychotherapist with Michael Shea and Associates, a clinic of approximately eight therapists then located in downtown Minneapolis. During early 1983 the Appellant was seeing approximately 35 clients per week at the clinic. .

2. In January of 1983, Susan DeVries, a licensed psychologist with the clinic, referred a 5-year-old girl, R., to the Appellant for therapy. R. and her 4-year-old sister, C., had been referred to the clinic: with other family members by the Hennepin County Community Services Department after the court had ordered therapy for them because a third child in the family had been the victim of sexual abuse by an unknown person while in the family home. R. and C. came from an economically disadvantaged family. Their therapy was paid for by the Medical Assistance program.

3. The Appellant saw R. individually five times during January through March of 1983. From January to March of 1983, C. was seen by Bart Main, a psychiatrist with the clinic. C. was sometimes shy and anxious at separating from her mother to participate in the therapy session. (Ex. 2).1 In March of 1983, after Dr. Main left the Clinic, the Appellant began to see C. She then saw R. and C. together nine times from March through May of 1983. (Ex. 2).

4. The Appellant was told by Ms. DeVries orally that there was physical abuse in the family. She does not recall any mention of sexual abuse. Several weeks prior to mid-May of 1983, the Appellant told Susan DeVries that she thought the girls' mother was involved in the abuse. DeVries was the mother's therapist.

5. In early May of 1983, Appellant and two other therapists at the Shea

clinic announced that they would be leaving to establish their own practice. The Appellant's financial arrangement with the clinic was that she would receive 50% of her billings and -the clinic would receive 50%. Generally, a client is free to stay with a therapist who leaves a clinic or to stay with the clinic.

6. On May 17, 1983, Deborah Silverstein, a social worker with Hennepin County Child Protection Services attended a quarterly staffing meeting at IV and C. Is day care center. After the meeting, a day care teacher told her that R. and C.'s parents, who were present, had a matter they wished to discuss with her. R. and C. and their family were a part of Ms. Silverstein's caseload.

lthe Findings of Fact are based upon both testimony and written exhibits. No transcript was prepared in this case. Although written exhibits are cited where relied upon, those Findings may also be supported by oral testimony.

7. The day care center had earlier shown a film strip to the parents concerning sexual abuse and exploitation of children. Following the film strip, R. and C.'s parents talked to the day care teacher about changes in their daughter's behavior in the prior two weeks. (Ex. J). The mother told the teacher that one child had rubbed the other child's breast and explained to the mother that, "Jane does this." The mother also stated that the girls had told her that 'Jane plays poking games.' The mother stated that the only "Jane" they knew was Jane Johnston. (Ex. J). The mother repeated these statements to Ms. Silverstein on May 17, 1983 at the day care center.

B. On May 18, 1983, Ms. Silverstein met with her supervisor, Carole Murphy and others to determine what step to take next. It was decided that Ms. Silverstein should interview the children directly. It was also decided that Ms. Murphy would consult a community expert on sexual exploitation of clients by therapists and that the Shea Clinic would be contacted.

9. On May 19, 1983, Ms. Silverstein, along with the day care teacher, attempted to interview C. and R. at the children's home. Neither child would talk about their therapy sessions. Both children stated that they did not like to go to therapy sessions but did not state why.

10. On May 20, 1983, the day care teacher tried to talk to IC about the behavior her mother had reported. At that time R. told the teacher that she did not "play that game."

11. Ms. Silverstein and Ms. Murphy met with Michael Shea on May 20, 1983 at the Clinic. They advised him of the mother's statements and told him that so far the children had not provided any information directly. They decided that they would meet with the Appellant to discuss the complaint.

12. On May 23, 1983 Ms. Silverstein interviewed R. and C. again. However, they became very active and did not want to talk about or play out anything related to therapy.2

13. On May 26, 1983, Ms. Silverstein -and Ms. Murphy went to the Shea Clinic where they met with Shea, Leslie Faricy, the Clinic's Rule 29 compliance officer, and the Appellant. The Appellant was advised of the nature of the complaint. She stated that no behavior of the type described had occurred in her therapy sessions with R. and C. Appellant stated that she was careful about touch with kids and 'wouldn't touch kids like that.' She stated that she had not dealt with sexuality issues or sex abuse in therapy with the children. (Ex. J). When asked to speculate what would move the children to make such a report, the Appellant speculated that perhaps they were attempting to get her into trouble due to their fear about having disclosed parental physical abuse to her. (Ex. J). The Appellant was told

2Although this interview is not reflected in the written exhibits, it was acknowledged by Ms. Silverstein and Ms. Murphy in their testimony.

that further investigation would need to be done. She was given a written memo by Shea which directed her to have no further communication with Clinic clients and directed her not to return to work until notified. (Ex. B) . After the Appellant left the meeting it was decided that Michael Shea would attempt to interview the children at their day care center.

14. Ms. DeVries met with the girls' mother on May 26, 1983. The mother stated the girls had previously been quite modest but lately were running around the apartment naked after their bath. She also stated that several weeks earlier she had observed C. masturbating by rubbing a stick between her legs. When mother asked C. what she was doing, C. responded, 'Nothing'; the girls then looked at each other in a "funny way", according to the mother, and both left the room giggling. The mother stated that later R. and C. were sitting next to each other and when she (the mother) asked them if they were ready to go to their "meeting", the girls' term for coming to therapy, C. turned to R. and asked if she wanted to go play that poking game. The mother said that both girls then looked embarrassed and whispered to each other as though they had a secret. When the mother inquired further as to what they meant, the girls associated playing "the poking game" with something they did with Jane Johnston during their meetings. According to the mother, one of the girls was also observed by her to be rubbing her breast area and nipple. The mother stated that when she indicated that that wasn't a good thing to do, C. responded "Oh, it's OK, Jane does it with us." The mother said she was quite taken aback by this statement and inquired further. The mother stated that she tickled C. under her arm and asked if that was what Jane was doing and C. said "No" and repeated the breast and nipple fondling. In Ms. DeVries opinion, there was nothing in the mother's manner that suggested vindictiveness against the Appellant. (Ex. A).

15. On May 31, 1983, the Appellant called Ms. Murphy and requested that

R. and C. be interviewed separately since they tended to imitate each other. Appellant was anxious to have the investigation completed as soon as possible. (Ex. J).

16. On June 9, 1983, the Appellant again called Ms. Murphy to express her concern about delay in the investigation. Ms. Murphy then called Michael Shea to encourage him to proceed with the interviews of the children. (Ex. J).

17. On June 14, 1983, Michael Shea attempted to interview the two girls at their day care center. However, he reported that their behavior was so disorganized and overactive that he was unable to interview them. (Ex. D).

18. On June 16, 1983, Ms. Murphy asked Ms. DeVries to interview the children because the mother had confidence in her and because Ms. Murphy believed she was skillful in interviewing children and had good clinical skills and judgment in matters relating to sexual abuse. (Ex. J).

19. Susan DeVries interviewed the two girls together on June 23, 1983 at the Clinic. She asked them who played the poking game with them. C. immediately responded that Mom played the poking game and said the game was fun and giggled. R., however, was quite solemn in her facial expression and said that the game was not fun and looked away from Ms. DeVries. C. was giggling and silly in her affect throughout the rest of our conversation. Ms. DeVries presented the girls with the anatomically correct dolls and asked them

to tell her about who played the poking game and where they were poked. C. poked at the nipples and said that Dad poked her there and that also Jane poked her there. Pis. DeVries then asked C. whether various other people played 'the game with her including her brother and Ms. DeVries, and she said yes to everyone Ms. DeVries asked her about. C. was very restless throughout this conversation and quite distracted by the toys. At this point Ms. DeVries allowed C. to return to the dollhouse and engage in free play activities. (Ex. A; Ex. J).

20. Ms. DeVries then asked R. to talk about the poking game before she played any further. Throughout the conversation R. was serious in her demeanor with no smiling or laughing. Ms. DeVries asked R. if various people played the game with her including Laurie, Jason, Mom, Raina, Gina, and Jane. (Raina and Gina are neighborhood children whom Laurie reports play an undressing game called "playing house"). R. said no to each person that Ms. DeVries named except Jane. She indicated that Jane did play the poking game. Ms. DeVries then asked if she played the poking game here, and she looked at Ms. DeVries with great surprise on her face. She responded, "No, not in your room, we played it in Jane's room." Ms. DeVries showed her the doll representing the female and asked where she played the poking game. She pointed to the belly button and the genitals, and rubbed the nipple back and forth in a manner similar 'to what her mother had demonstrated seeing one of the girls do on herself. R. then looked at the doll for a few moments quietly and said in a very serious voice, 'I didn't want to play that game.' (Ex. A; Ex. H).

21. R. then went to play with 'the toys, and Ms. DeVries returned to C. and asked her again about the poking game. This time C. indicated that Linda -a teacher at the day care center, played that game with her and demonstrated Linda poking her in the belly button, the nipple, and the eyes. She also indicated in response to a question that her mother played the game with her

and pointed to the belly button, nipple and leg. C. was once again giggling and silly. (Ex. A; Ex. J).

22. On June 27, 1983, Susan DeVries conducted a videotaped interview with each child separately. She asked each of the girls questions about various people they interacted with including what things they did with people they enjoyed and what things they did with people that they did not like or that scared them. On this occasion R. indicated at various times during the session that Jane, Linda, Jason, and Laurie had all played the poking game with her and had poked her in the genital area. When asked to point out on a doll all of the places that Jane had poked her, R. pointed to the nose, the hand, the toes, the eyes, the hair, the neck, the nipple, the bellybutton, and the genitals. (Ex. N). She looked very sad and unhappy about this game and also in discussing the entire topic. She also said during this conversation that Jane and Laurie had played the poking game with C. When Ms. DeVries presented C. with similar questions and discussed the poking game with her, C. indicated, as she had on the previous occasion, that virtually everyone Ms. DeVries named had played the poking game with her. She specifically denied the information that R. had given Ms. DeVries, namely that Jane had played the poking game with her. C. also focused on her Dad and said that her Dad was sometimes mean to her, slapped her and made her kneel down when she was naughty. As on the 23rd, Ms. DeVries felt it was very difficult to elicit reliable material from C. (Ex. A; Ex. N; Ex. J).

23. In her July 8, 1983 written report to Ms. Murphy concerning her investigation (Ex. A), Ms. DeVries stated the following:

In evaluating this material in terms of the allegations of sexual abuse, the girls did not consistently identify a perpetrator. However, mother did outline behavior changes such as are commonly seen in sexually abused children. Similarly, R. 's statement regarding where she played 'the poking game' was the type of spontaneous, unguarded remark often found significant in the diagnosis of sexual abuse. I believe serious concerns remain concerning R. and C. and strongly recommend continued diagnostic and therapeutic work with a therapist experienced in the treatment of sexual abuse.

When Ms. Murphy picked up the written report from Ms. DeVries on July 13 1983, Ms. DeVries told her that she believed that sexual touching had occurred. (Ex. J, p. 3).

24. On June 28, 1983, Hennepin County Child Protection Services filed a report with the Minneapolis Police Department's Family Violence Division concerning this matter. Subsequently, on June 30, 1983, Officer Robertson of that Division called Carol Murphy and told her there did not appear to be sufficient probable cause for a criminal charge. (Ex. H).

25. on or about July 5, 1983, a memo was circulated to the staff of the Hennepin County Child Protection and Child Welfare Divisions. It requested that social workers report if they had any clients that were seeing Jane E. Johnston as a therapist. On July 14, 1983, a meeting was held with those social workers who had responded. At the meeting those present were advised that a complaint against Jane E. Johnston had been made. Nine families were identified and interviewed to see if any problems had occurred in therapy. None of the children indicated any problems with the Appellant. (Ex. J).

26. On August 1, 1983, a Motion for a Temporary Injunction requiring Hennepin County Community Services Department 'to complete its investigation into the allegations was heard by Judge Charles Porter of Hennepin County District Court. Judge Porter, by an Order dated August 4, 1983, ordered the investigation to be completed and a report filed with the Court by August 17, 1983. (Ex. 1).

27. On August 17, 1983, Carol Murphy submitted the Report now in question in compliance with the court (&de" The Report reached the conclusion that there had been a substantiated report of child sexual abuse and that Jane E. Johnston was the perpetrator. (Ex. D). The conclusion was based upon guidelines issued by 'the Department of Public Welfare. (See Conclusion No. 9).

28. After May of 1983, C. and R. continued in therapy at the Shea Clinic. C. was seen individually by Susan Isaacs, M.S.W., approximately 33 times through August of 1984. R. was seen individually by Anita Doyle, M.S.W., approximately 28 times through July of 1984. (Ex. 2).

29. On October 3 1983, Ms. Doyle talked to R. about people who had touched her in ways that weren't comfortable, but R. wasn't able to give any

examples. On November 7, 1983, Ms. Isaacs asked C. to talk about the touching game she used to play with Jane. C. immediately changed the subject and began coloring on a piece of paper. On November 7, 1983, Ms. Doyle brought up the "poking game" but R. refused to discuss it. On November 14, 1983, Ms. Doyle asked if R. and Jane had ever played in the sand room. R. said yes. Ms. Doyle then asked if R. had played the 'poking game' in the sand room. R. said no. Ms. Doyle asked, "Where did you play that game?" and R. replied, "In Jane's room." Ms. Doyle commented that R. probably felt bad talking about that game and R. said no, that she didn't. (Ex. 2).

30. In May of 1984, an allegation was made that R. and C.'s older brother had had sexual contact with his sisters and his cousins. Neither R. nor C. would talk about this in therapy, however. (Ex. 2).

31. William D. Erickson, M.D., testified -as an expert witness for the Appellant. He is currently Medical Director of the Minnesota Security Hospital at St. Peter. Dr. Erickson has been a psychiatrist for 14 years and is board certified in child psychiatry and pediatrics. (Ex. M). He has frequently testified as an expert witness in criminal sexual abuse cases, most commonly for the prosecution. He has also been called upon to testify in family court and to investigate alleged abuse. In his opinion the allegations should be found to be unsubstantiated because there is no logical basis for deeming the accusations made in this case to be valid. He believes that sexual abuse of two preschool children being seen together by a female therapist is improbable, that the ambiguous statements of very young children in response to leading questions cannot be given great weight, and that hearsay was relied on too heavily in the investigation, at least initially.

32. By a letter dated September 25, 1984, Jane E. Johnston requested that Kevin Kenney, Associate County Administrator, either remove the Report to the Court from the records or replace it with an accurate and complete report.

(Ex. F). By a letter dated October 25, 1984, Mr. Kenney denied Jane E. Johnston's request and stated Hennepin County's determination that the Report was accurate and complete. (Ex. G). By a letter dated December 6, 1984, the Appellant appealed that determination to the Commissioner of Administration under Minn., Stat. sec. 13.04, subd. 4. (Ex. H). On June 13, 1986, the Commissioner of Administration issued a Notice of and Order for Hearing in this matter setting a hearing date of July 17, 1986.

33. This matter was also the subject of a court action initiated in 1983, which was based on theories of defamation, negligence, intentional infliction of emotional distress, intentional interference with contractual relations and violation of 42 U.S.C. § 1983. One Defendant, Hennepin County, prevailed on a Motion for Summary Judgment in August of 1987. The Summary Judgment was appealed and affirmed. *Johnston v. Michael Shea and Associates*, 425 N.W.2d 263 (Minn.App. 1988). The Minnesota Supreme Court denied review on July 27, 1988. This contested case proceeding was stayed pending resolution of the appeal.

34. Since the complaint was made in 1983, the Appellant has been unable to find employment as a therapist. She feels that she must advise prospective employers of the Report in question. It is unlikely that the Appellant will be hired as a therapist since an employer will feel that it is responsible to take no such risks in order to protect its clients. It is likely that the Department of Human Services would require an employer to ensure that the

therapist was herself in therapy, to limit clients so that those most vulnerable would not see the person in question, and to, provide increased supervision to the therapist. (Ex. C, p. 2).

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Administrative Law Judge and the Commissioner of Administration have jurisdiction in this matter pursuant to Minn. Stat. SS 13.04, subd. 4 and 14.50 and Minn. Rule 1205.1600.
2. That the Department of Administration has complied with all relevant substantive and procedural requirements of law or rule.
3. That the Department of Administration has given proper notice of the hearing in this matter and has authority to take the action proposed.
4. That pursuant to Minn. Stat. S 13.04, subd. 4, an individual may contest the accuracy or completeness (of public or private data concerning himself or herself and may appeal the determination of the responsible authority in this regard pursuant to the provisions of the Administrative Procedure Act.
5. Pursuant to Minn. Rule 1400.7300, subp. 5, the burden of proof in this proceeding is upon the Appellant to prove by a preponderance of the evidence that the data is not accurate and/or complete. See also, Thompson v. Department of Transportation, U.S. Coast Guard, 547 F.Supp. 274, 282 (S.D. Fla. 1982); Local 2047, American Federation of Government Employees v. Defense General Supply Center, 423 F.Supp. 481 (D.Va. 1976), affirmed 573 F.2d 184.
6. That pursuant to Minn. Rule 1205.1500, subp. 2.A. "Accurate" means that the data in question is reasonably correct and free from error.
7. That pursuant to Minn. Rule 1205.1500, subp. 2.B. "Complete" means that the data in question reasonably reflects the history of an individuals

transactions with the particular entity. Omissions in an individual's history that place the individual in a false light shall not be permitted.

8. That the Appellant has demonstrated by a preponderance of the evidence that the Report to the Court omits data which is needed to reasonably reflect the Appellant's transactions with Hennepin County and is therefore, incomplete.

9. The Department of Public Welfare Social Services Manual (XIV-4734) relied upon by Hennepin County provided the following definitions related to child protection maltreatment reports:

Determination of Case Status

1. Substantiated:

- a. An admission of the fact of Abuse or neglect by persons responsible.

- b. An adjudication of abuse or neglect; or
- C. Any other form of confirmation (deemed valid by the local agency).

NOTE: Substantiated does not mean adjudicated. For the local agency to determine that abuse or neglect has occurred does not require the type of evidence needed to file an assault petition against a perpetrator. However, an adjudicated case would also constitute a substantiated case.

- 2. Unsubstantiated: The complaint is found to have no substance; no reason to suspect that abuse or neglect has occurred.
- 3. Unable -to _Substantiate: Not enough criteria for a substantiated report are present, but there is reason to suspect abuse or neglect; e.g., the child shows signs of physical or emotional abuse or neglect but the social worker cannot logically refute the suspected perpetrator's denial of involvement.
- 4. Not Yet Determined: The assessment is not yet completed. When a determination is made, the status of the report must be submitted to the State Agency, either in writing or by phone.

NOTE: When amending or completing an already submitted report refer to report number or agency case number.

(Ex. 1).

10. That a person named as -a perpetrator in a substantiated report of child sexual abuse may appeal that conclusion under the provisions of the Data Practices Act.

11. That the record as a whole does not contain substantial evidence that the Appellant was involved in sexual abuse.

12. That the Appellant has proved by a preponderance of the evidence that the Report to the Court is inaccurate in concluding that this matter constitutes a substantiated report of abuse by the Appellant.

13. That these Conclusions are arrived at for the reasons set out in the Memorandum which follows and which is incorporated into these Conclusions by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes

the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED to the Commissioner of Administration that she issue an Order requiring:

1. That the Report to the Court (Ex. D) be amended as indicated in the attached Exhibit Z.

2. That the following notice be added to the Report:

This document has been altered to change, explain, or delete data found to be inaccurate or incomplete by the Commissioner of Administration.

3. That the Report as Amended be forwarded by Hennepin County to any persons specified by the Appellant.

Dated: January 20th 1989.

GEORGE A. BECK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. S 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Nos. 6962, 6963, 6964, 6961, 6930, 6931, 6932, 6906.
No Transcript Prepared.

MEMORANDUM

In this proceeding the Appellant, Jane E. Johnston, challenges the accuracy and completeness of a report submitted by Hennepin County Community Services Department to Judge Charles Porter on August 17, 1983. That report summarizes an investigation of a child abuse complaint made against the Appellant. The report was submitted pursuant to a court order which resulted

from a lawsuit initiated by 'the Appellant due, in part, to her concern that the investigation was not being promptly concluded. Most of the changes sought by the Appellant in the Report are additions of facts. (Ex. E). Under the applicable rule, omissions which place an individual in a false light shall not be permitted. Appellant believes the additional facts are required to make the Report complete. The Appellant Aso challenges the ultimate conclusion in the Report, however, as inaccurate. The Report concluded that under the relevant DPW definitions, the facts gathered constituted a substantiated report of abuse. Ile Appellant seeks to have this conclusion

changed to indicate that "While sexual abuse may have occurred it cannot reasonably be found to have been substantiated 'that Jane Johnston was the person who did it.'

Completeness of the Report

The parties agree that inaccurate facts, that is facts which are not reasonably correct and free from error may be ordered changed or deleted by the Commissioner of Administration. Additionally, the data must reasonably reflect the history of Appellant's transactions with Hennepin County and if Hennepin County has omitted certain facts from the Report in question, which as a consequence places the Appellant in a false light, the Commissioner can order those facts to be added to the Report.

The Appellant offered into evidence a report as she proposes to have it amended. (Ex. E). A number of the suggestions are argumentative in nature -- they appear to be suggested additions which merely -argue the Appellant's position and are not, therefore, appropriate for inclusion. For example, the Appellant seeks to have the parents' reports described as "N claims". A number of suggested additions purport to describe the thoughts or mental processes of Ms. Silverstein or, Ms. Murphy. These suggested additions were described as inaccurate by Ms. Silverstein and Ms. Murphy and seem out of place in a report of this nature. Other suggestions were repetitious; and/or were not chronological and are not included for that reason. Additionally, some suggestions are simply stylistic preferences, e.g., using "Five year old" instead of "R.". This proceeding is not a vehicle to permit an appellant to rewrite government documents according to the appellant's preferences. see, R.R. v. Department of Army, infra.

However, there are a number of suggested factual additions which, based upon an examination of the full record, must be added in order to accurately reflect the history of this matter and in order to make the Report a complete

document. Those additions are set out in the attached Exhibit "Z". The reference to the reason for therapy is added to the first paragraph because it is important to know that sexual abuse had occurred in the family home. This statement is removed from the sixth paragraph of the original report because its presence there unfairly implies that 'the Appellant's denial of dealing with sex abuse issues was surprising or incredible. It is replaced by a statement indicating what the record reflects, namely, that Ms. Johnston had not been told about sexual abuse in the family home. Just prior to the original sixth paragraph, a sentence is inserted %Mich was agreed to by the County witnesses. It is added because it is necessary to indicate all interview dates to make this report complete. The words "After Jane left" were added at the start of a paragraph to make it clear, as was stated by all witnesses, that the Appellant did not participate in an agreement that Michael Shea would interview the children. Finally, portions of Ms. DeVries' July 8, 1983 letter (Ex. A) are incorporated into the report in place of shorter summaries of that letter. The County did not object to adding Ex. A as an attachment to the report. The Appellant justifiably felt that an attachment would be too easily overlooked. Accordingly, the relevant portions are proposed to be inserted into the report. The greater detail contained in Exhibit A is necessary to fully understand the history of this matter. A paragraph is added after the insertions which restates deleted material but also conforms it to oral testimony which indicated that this information was

relayed orally from Ms. DeVries to Ms. Silverstein. The Appellant has proved by a preponderance that these additions are necessary to reasonably reflect the history of this matter and to avoid placing her in a false light.

Challenge to a Conclusion

Beyond the matter of completeness, a determination must be made as to whether opinions or conclusions of a government employee charged with making an investigation of alleged child abuse are subject to review under the Minnesota Data Practices Act. There is no Minnesota appellate case law interpreting the Data Practices Act in this respect. The Federal Privacy Act (5 U.S.C. S 552a) provides a remedy similar to the Minnesota Data Practices Act and, accordingly, the federal case law is instructive. Particularly in the areas of personnel matters and medical decisions, the courts have declined to substitute their judgment for the opinion of a federal official. In *Turner v. Department of Army*, 447 F.Supp. 1207, 1212 (D.D.C. 1978), affirmed mem. 593 F.2d 1372 (D.C. Cir. 1979), the court declined to change a soldier's officer efficiency rating which was based upon a subjective judgment as to the quality of his military service. See also, *Blevins v. Plummer*, 613 F.2d 767 (9th. Cir. 1980). In *Rogers v. U.S. Department of Labor*, 607 F.Supp. 697 (D.C. Cal. 1985), the Plaintiff sought to compel DOL to amend certain records it compiled in course of processing her disability claim. The material included a physician's diagnosis with which the Plaintiff disagreed. The court noted that the Privacy Act is not "a vehicle for amending the judgments of federal officials or of other parties as those judgments are reflected in records maintained by federal agencies. . . . Moreover, it may not be employed as a skeleton key for reopening consideration of unfavorable agency decisions." 607 F.Supp. at 699.

in other factual situations however, other federal courts have adopted a

somewhat broader view. Judge Gesell's decision in R.R. v. Department of Army, 482 F.Supp. 770 (D.D.C. 1980) has been widely quoted. In that case a serviceman had been denied disability benefits based upon an admittedly inaccurate patient history. The government contended that the correction of errors in a medical judgment was not appropriate under the Privacy Act. The court stated the following:

Under the Privacy Act, each government agency compiling records on individuals is obligated to ensure that the information it retains is accurate, relevant, timely and complete. 5 U.S.C. 552a(e)(5) (1976). Accuracy of government-recorded personnel information is particularly important in our complex and bureaucratically-interrelated society, where an individual's rights and benefits may well be influenced or determined by what some government agency has to say about him. The prejudice resulting from inaccuracies may affect determinations reached by third parties, public or private, as well as those made by the recordkeeping agency. Of course, no individual is entitled to shape or color such information according to his own whims or preferences. On occasion accuracy is achieved only by allowing a disputed question of fact or judgment previously recorded to remain in the record, qualified by subsequent data. On the other hand, it may be necessary to

eliminate clear mistakes of fact or irresponsible judgment from an individual's file so as to not prejudice prospects for a fair determination of his rights or benefits.

The language of the Act establishes that an individual may bring a civil action to compel the correction of inaccurate records. See, 5 U.S.C. 552a(g)(1) (1976). Although Defendant would confine the scope of this cause of action to amending purely factual misrepresentations, 'the court does not so narrowly interpret the statute. Remedial legislation should be liberally construed in order to effect its obvious purpose. In this instance, the statute vests broad discretion in a district court to ". . . order the agency to amend the individual's record in accordance with his request or in such other ways the court may direct." 5 U.S.C. sec. 552a(g)(2)(A) (1976). It would

defy

common sense to suggest that only factually erroneous assertions should be deleted or revised, while opinions based solely on these assertions must remain unaltered in the individual's official file. An agency may not refuse a request to revise or expunge prior professional judgments once all the facts underlying such judgments have been thoroughly discredited. This position is reinforced in the Act's legislative history, where there are clear indications that insidious rumors and unreliable subjective opinions as well as simple factual misrepresentations fall within the gambit of the Act's strictures. (Cites deleted). 482 F.Supp. at 773-74.

Although Judge Gesell struck the inaccurate factual material from the plaintiff's records, he declined to change the medical opinion that the plaintiff's condition resulted from a gradual lifelong pattern unrelated to his military service, observing that "Where matters of professional judgment such as this are concerned, and the factual predicates for such opinions are diverse, it is next to impossible 'to reconstruct the process by which the opinion was formulated and determine what the opinion would have been.'" 482 F.Supp. at 775.

In prior data practices cases the Commissioner of Administration has recognized R..R. v. Department of Army as persuasive precedent. See, In the Matter of the Appeal of the Determination of the Responsible Authority for the Minnesota Department of Corrections 'that Certain Data Concerning James H. Johnson is Accurate and Complete, Order dated July 10, 1984 (OAH File

ADM-84-001-JL; Administrative Law Judge Report dated November 3, 1983); In the Matter of the Appeal of the Determination of the Responsible Authority for the Social Services Division of the Community Services Department of Hennepin County That Certain Data Concerning Mr. and Mrs. Richard Zemen is Accurate and Complete, Order dated September 27, 1985 (OAH file ADM-84-003-GB; Administrative Law Judge Report dated August 1, 1984).

The court in Ertell v. Department of Army, 626 F.Supp. 903, 911 (C.D. Ill. 1986) quoted Judge Gesell with approval and stated that the Privacy Act "dictates that opinions maintained in and freely disseminated through a system of records, apparently (perhaps admittedly) causing concrete, adverse determinations, and allegedly grounded on demonstrably, (although not proven)

erroneous factual bases, are amenable to review with respect to Privacy Act issues . " In *Hewitt v. Grabicki*, 794 F.2d 1373, 1378-79 (9th.Cir. 1986), a physician employee of the Veterans Administration sought to have critical remarks expunged from his annual proficiency reports which evaluated his performance. The court observed that:

A court should be very hesitant to second guess subjective evaluations and observations by an employee's superiors where such matters as are within the competence and experience of those superiors. The trial court should, however, carefully review the record to eliminate clear mistakes of fact, inaccurate opinions based solely upon such erroneous facts, and plainly irresponsible judgments of performance or character. See, *R.R. v. Department of Army*, 482 F.Supp. 770, 773-74 (D.D.C. 1980). The

simplest

test to ask whether the allegation is that the record is inaccurate or instead that the authorized preparer of the record, although basing his judgment on accurate facts, reached the wrong conclusion -- whether amendment of the record is sought as to a matter of fact as opposed to expression of a judgment based on reliable facts. *Russell, The Effect of the Privacy Act on Correction of Military Records*, 79 Mil. L. Rev., 135, 142-45 (1978).

Hennepin County argues that none of the cases go so far as to hold that a court may substitute its opinion for that of an agency where no facts are challenged and that the Commissioner should not do so in this case. The Appellant argues that there are numerous omitted facts in the Report and that once those facts are supplied, the County's finding of substantiated abuse becomes inaccurate. The Appellant asserts that the intent of the Minnesota Legislature was to provide for accurate and complete governmental records and that this intent would be subverted if deference is given to an agency's conclusion.

The consequences of this determination are very serious for the Appellant. She is no longer employable in her profession. (Finding of Fact No. 34). The County has argued that the consequences to the Appellant are not relevant. However, one federal court suggests 'that the "likelihood of an unfair, adverse effect on the individual' was one consideration in determining

whether to amend a governmental record under the federal Privacy Act
Thompson v. Department of Transp., U.S. Coast Guard, 547 F.Supp. 274, 282 (S.D.Fla. 1982). This appeal may be the only means open to Ms. Johnston to challenge the County's conclusion³ In Bohn v. County of Dakota, 772 F.2d 1433 (8th.Cir. 1985), the Court indicated 'that the appropriate means for challenging a determination by Dakota County that the parents had abused their

³Had the Appellant faced this allegation in the context of a license revocation, the conclusion could be squarely challenged and the licensing authority would have to prove its conclusion by a preponderance of the evidence.

child, was by a data practices administrative appeal rather than a U.S.C. S 1983 action. 772 F.2d at 1442.

The case law demonstrates that the federal courts are reluctant to second guess purely evaluative decisions of government officers, such as personnel evaluations or medical opinions. This case does not involve a purely subjective determination, however. It is a quasi-legal determination based upon evidence gathered in an investigation which is then measured against a definition. It is not, therefore, purely judgmental. This conclusion should be reviewable without the County's authority being deemed to be usurped. The facts in the record should support the determination made. This is not a case where unarticulated expert medical judgment or subjective personnel evaluation is crucial to a decision.

it must be candidly acknowledged that the addition of facts as suggested in the attached Exhibit does not so radically alter the factual content of the report so as to compel a different conclusion. This added material was known to Ms. Silverstein and Ms. Murphy but was not included in the report to the court. Accordingly, this is not a case where the correction of inaccurate facts requires the correction of an opinion based upon those facts. Nonetheless, the federal case law also indicates that apart from the correction or addition of facts, "irresponsible judgments" are subject to review. R.R., supra; Ertell, supra. The conclusion in this case was not irresponsible. It was made in good faith by the officials charged with making that very difficult determination. The County is of course obligated to investigate reports such as that made in this case. Minn. Stat. S 626.556. The federal case law does indicate, however, that in some cases judgments may be reviewed even in the absence of inaccurate facts. Hennepin County's determination is appropriately subject to review under the Minnesota Data Practices Act. As Judge Gesell observed, an individual's rights may be

seriously affected by what a government agency says about him or her and statutes such as the Privacy Act should be liberally construed to accomplish the goal of the legislation. The legislative intent of the Minnesota law is to permit a person to contest the accuracy of data about him or her kept by a governmental authority. Neither the statute nor the rules limit a challenge to purely factual matters. An allegedly inaccurate determination of child abuse by an individual is a very serious matter with serious consequences and must be within the legislative intent, even where it is not based upon inaccurate facts.

The D.P.W. Definitions

The Appellant has argued that the D.P.W. definitions (Conclusion No. 9) applied by Hennepin County are unconstitutionally vague. Although that question cannot be resolved in this forum, the application of the definition must be examined to help determine if the conclusion is accurate. The Appellant argues that the County's interpretation of the rule was not rational and amounts to no more than -a declaration by the County that Owe are right because we say we are." The County states that such a standard must necessarily be general to apply to a large number of factual situations. The definition is not a "le that has a binding effect on Hennepin County or the Commissioner of Administration in this case. It is merely a guideline intended to help the County determine when abuse is substantiated.

The definition lists three types of substantiated cases -- admissions adjudications, and "any other forum of confirmation deemed valid by the local agency." A note indicates that an agency may determine that abuse has occurred in the absence of the type of evidence necessary for a criminal complaint. The context of the definition indicates that while the evidence gathered need not be that necessary to file an assault petition, it must nonetheless be substantial. It cannot be reasonably assumed that the guideline contemplates that a person can be labeled as a child abuser based on a mere "scintilla" of evidence. The evidence must reasonably and fairly support the conclusion that the alleged perpetrator was responsible for the abuse. In this proceeding the Appellant is obligated to prove by a preponderance of the evidence that the conclusion of substantiated child abuse is inaccurate. This means that it must be shown that there is not substantial evidence (A child abuse by the alleged perpetrator.⁴ The definition cannot be so construed as to provide so easy a standard that the County's conclusion is effectively shielded from any review.

Possible Motives

The Appellant has argued that certain factors in the investigation may have improperly influenced the outcome. The focus of this proceeding is properly on the accuracy of the conclusion rather than the quality of the investigation. It is nonetheless necessary to look at the investigation to judge the reliability of the facts gathered to support a conclusion. The Appellant has suggested that the participation by the Shea Clinic in the investigation may have been inappropriate. Michael Shea would have had an economic interest in the Appellant not taking any clients with her when she left the Clinic. Dr. Shea did not successfully interview the children, however. Susan DeVries did, at the request of Carole Murphy. Presumably, Ms. DeVries' economic interest would be less direct. At any rate, the record does

not support a conclusion that Ms. DeVries slanted her Findings to benefit her employer. Additionally, the Appellant also pointed out that Carole Murphy is a social friend of Leslie Faricy and became acquainted with Michael Shea through her. No evidence was developed which demonstrated that this social relationship influenced the investigation.

4An alternative conceptualization of the burden of proof would be that the Appellant must simply prove that it is more likely than not that the conclusion is inaccurate. However, this would not seem to acknowledge the intent of the guidelines, which appears to be that evidence less than that necessary to support an adjudication or the filing of an assault petition is sufficient for a substantiated report of abuse. It would not seem to comport, either, with the legislative intent contained in Minn. Stat. S 626.556, to encourage the reporting and investigation of abuse in order to protect children.

The Appellant also argued that the girls' mother may have fabricated what she stated the girls told her about the Appellant. It was suggested that her motive was to retaliate against Ms. Johnston because she had reported to Ms. DeVries that she suspected the mother to be involved in physical abuse. There is no evidence, however, that the Appellant's communication to Ms. DeVries was ever repeated to the mother. Additionally, Ms. DeVries concluded that the mother did not appear to be vindictive towards the Appellant. Ms. Murphy did entertain the hypothesis that perhaps the parents were trying to extricate themselves from therapy. However, when she offered the parents an opportunity to change clinics, the parents indicated they preferred to stay at the Shea Clinic. It is also the case that the allegations do not stem only from the mother, but were also stated by the older child to Ms. DeVries. One would have to hypothesize -a conspiracy between the mother and her daughters to support this allegation. Given the age of the girls, this does not seem likely. Accordingly, it seems unlikely that the mother simply fabricated this matter.

Accuracy of the Conclusion

Based upon the record as a whole, it is concluded that the Appellant has demonstrated that there is not substantial evidence of child abuse on her part. There is some evidence, namely, the report of the mother and the report of R. to Ms. DeVries on June 3rd. However, it cannot be reasonably found to be sufficient to be called "substantiated" either under the D.P.W. definitions or within the usual judicial definition of substantial evidence, i.e., "1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; 2) more than a scintilla of evidence; 3) more than 'some evidence'; 4) more than 'any evidence'; and 5) evidence considered in its entirety." Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 825 (Minn. 1977).

The record supports the conclusion -that the girls were the subject of

sexual abuse. There is a good deal of reason to doubt that the Appellant was the abuser, however. A number of the reasons were described by Dr. Erickson who has extensive experience in the area of child abuse. He has participated in some 1000 such investigations. He has testified often in criminal cases, the great majority of the time for the prosecution. After reviewing the exhibits in this case, including the videotape, he testified that there is no reasonable basis for finding the allegations to be valid. Neither he nor Hennepin County were aware of any other reported case in which a female therapist abused 2 young girls in therapy. Even though such an act is possible, he judged it to be improbable. He also pointed out that the victims were very young and that they did not produce a consistent story as to what had happened to them. Each child identified a large number of perpetrators at different times. Even allowing for the concept of diffusion, the conflicting statements are troubling. Dr. Erickson also pointed to a potential distortion of the data caused by the nature of the investigation. In the videotape interview, Ms. DeVries employed leading questions in gathering information from R. He also felt the County relied heavily on hearsay (the report of the mother and the report of Ms. DeVries) in arriving at its conclusion.

Other factors also point towards a lack of substantial evidence. No other instances of improprieties with other therapy clients were found which might corroborate the conclusion. Additionally, it seems clear that abuse had

occurred in the family. A sibling was sexually abused and the father had physically abused the girls. Ms. Johnston suspected the mother of physical abuse. In 1984 it was alleged that an older brother had sexual contact with his sisters. There were a number of candidates besides the Appellant who were possible perpetrators. Each was mentioned by the girls at some point as an abuser. The investigation did not focus on anyone besides the Appellant, however.

The nature of the investigation may also have contributed adversely to the quality of the evidence gathered. The abuse apparently occurred prior to mid-May of 1983. R.'s statements to Ms. DeVries did not occur until June 23rd. In between were four attempts to interview the girls in which they were asked questions about their therapy sessions and presumably about "the poking game" and declined to talk about it. Finally, on June 23, one of the girls stated that the Appellant had played the poking game and, according to Ms. DeVries, indicated that she was poked in the bellybutton, the nipple, and the genitals. The nature of the questioning in the videotape on June 27th raises some doubt about the June 23 information, however. Poking in itself may not be abuse. In the videotape Ms. DeVries asked the girls, who were shown an anatomically correct doll, "Where else did you get poked?" rather than "Were you poked anywhere else?". As a result, R. indicated that she was poked in nine spots, including her nose, eye, hand, toes, hair, and neck, as well as her chest, bellybutton and genitals. When the interviewer asked for another location, she provided one. This raises a question as to the reliability of the information collected concerning where the girls were poked.

It is also notable that there was very little detail provided by the girls as to the exact nature of the alleged abuse. This may be due in part to the fact the girls were not highly verbal and were very reluctant to discuss anything having to do with abuse. Nonetheless, even if "poking" occurred in

the Appellant's therapy sessions %with the girls, the record contains very little description of what that might have included. Additionally, R.'s attitude towards the game was not consistent. While on June 23rd she didn't want to play that game, on the 27th she described the game as fun and later in 1983, she stated that she did not feel bad talking about it. The younger girl described the game as fun repeatedly.

The state of the evidence in this record compels the conclusion that the finding of a substantiated report of child abuse is not supported by substantial evidence and is therefore, inaccurate. The conclusion which accurately fits the evidence is that the case should be classified 'unable to substantiate' which is defined as a situation in which there is reason to suspect abuse occurred but that based upon the information ;lathered, the suspected perpetrator's denial of involvement cannot be logically refuted. If this change is made, the report still contains a recitation of the pertinent facts should that information ever need to be referred to in the future. However, the conclusion should be changed since it cannot be found to be accurate, that is, reasonably correct and free from error, as it now stands.

G.A.B.