

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FROM THE DEPARTMENT OF ADMINISTRATION

In the Matter of the Appeal of
the Determination of the Responsible
FACT

Authority for Hennepin County Community
Services Department That Certain Data
RECOMMENDATION
Concerning Mr. and Mrs. Richard Zeman
is Accurate and/or Complete.

FINDINGS OF

CONCLUSIONS AND

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck commencing at 9:00 A.M. on Thursday, July 26, 1984 in Courtroom No. 12, Third Floor, Summit Bank Building, in the city of Minneapolis, Minnesota.

Arthur W. Katzman, Assistant Hennepin County Attorney, 2000 Government Center, Minneapolis, Minnesota 55487, appeared on behalf of the Hennepin County Community Services Department. Stephen J. Beseres, Attorney at Law, 7801 Bass Lake Road, Suite 211, New Hope, Minnesota 55428, appeared on behalf of Mr. and Mrs. Richard Zeman. The record closed on July 26, 1984 at the conclusion of the hearing.

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 of Administration. Parties should contact Sandra J. Hale, Commissioner 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 July 29, 1983 assessment prepared by Jan Darcy (Ex. 1) is accurate and 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. On July 28, 1983, the Hennepin Child Protection Department received a complaint concerning the treatment of two and one-half year old Joshua Zeman, the son of Richard and Kathleen (Kathy) Zeman who reside in Maple Grove,

Minnesota. Richard Zeman is a high school graduate who has been employed for ten years as a cabinet maker. Mr. Zeman is five foot eight and one-half inches tall and weighs between 175 and 180 pounds. At age two and one-half, Joshua weighed between 20 and 22 pounds.

2. On Sunday, July 25, 1983, the Zemans had a barbeque at their house and invited four or five couples together with their children. The barbeque began in early afternoon and lasted through the early evening. The guests played croquet, horseshoes and volleyball. Over the course of the afternoon Mr. Zeman consumed approximately five beers. Joshua played with the other children during the afternoon. It was a hot day.

3. After the guests had left the Zemans proceeded to clean up the house. Joshua had had no nap that day and was excited and wound up by the day's activities. Mr. Zeman gave Joshua a bath and a popsicle to help cool him down. He then put Joshua to bed and kissed him goodnight at approximately 9:00 P.M. After Mr. Zeman left, Joshua then proceeded to return to the living room. Mr. Zeman put him back in bed. This was repeated approximately four or five times. Mr. Zeman then became somewhat irritated and told Joshua that he would spank him if he came out again. Joshua did come out into the living room again and Mr. Zeman returned him to his room. Joshua then proceeded to come out one more time. Mr. Zeman then proceeded to spank Joshua on his exposed buttocks with a plastic Tupperware vegetable spoon. He hit Joshua twice with the spoon on his buttocks. Joshua cried when this occurred. Mr. Zeman then kissed Joshua and put him back to bed and he fell asleep at approximately 10:00 P.M.

4. the following morning Mrs. Zeman noticed two red marks on Joshua's buttocks when she was changing his diaper. Each mark was an oval which corresponded to the size of the holes in the Tupperware spoon. Mrs. Zeman called the red marks to her husband's attention that morning. She was angry that Mr. Zeman had used a spoon to spank Joshua instead of his hand. Mr. Zeman then left for work. When Mr. Zeman gave Joshua a bath at 7:00 P.M. that evening, he observed that the marks were no longer present.

5. On July 28, 1983, Janice Darcy, a principal social worker with the child Protection Department in Hennepin County made a field call to the Zeman home in response to the complaint made that morning. Mrs. Zeman was at home with Joshua and one other child for whom she was babysitting. Ms. Darcy advised Mrs. Zeman of the complaint concerning Joshua and they discussed the importance of parents being aware of their strength and size in relation to small children. Mrs. Zeman admitted that her husband had spanked Joshua with

a spoon and stated that she had observed red marks on Joshua's buttocks the following morning. She admitted that she was upset about the marks and stated that her husband had told her that he had not intended to spank Joshua that hard and that he would be careful in the future. Mrs. Zeman stated that Joshua had been an easygoing, obedient child but had been somewhat more of a management problem in recent weeks. She stated that Joshua had occasionally had a problem getting to sleep at night and they had consulted with their physician who suggested spending some quiet time with the child before bedtime such as reading or talking softly. Mrs. Zeman stated she had found this an appropriate technique. Ms. Darcy observed that Mrs. Zeman and Joshua interacted appropriately and affectionately during her visit with Joshua, seeking out her attention and exhibiting no fear whatsoever of her.

6. on July 29, 1983, Mr. Zeman called Ms. Darcy because he was upset about the investigation. He asked to have a copy of the Hennepin County records released to him. Mr. Zeman advised Ms. Darcy that he had not meant to spank Joshua so as to leave red marks.

7. Ms. Darcy dictated a written Report concerning her investigation on July 29, 1983 and the case was closed on that date. (Ex. 1) She concluded that the incident was a substantiated incident of child abuse because Mr. Zeman had intentionally struck Joshua with a spoon leaving bruises on his buttocks. Although the file is closed, the case record is retained for seven years. The case record is classified as private. It is not available to the general public.

8. The Zemans' normal method of disciplining Joshua is to speak to him, to make him stand in a corner or to send him to his room. Occasionally one of the parents will slap Joshua on the butt over his diaper if Joshua is misbehaving. This happens a couple of times a week and causes Joshua to whine a bit but not cry. Mr. Zeman had not spanked Joshua on his bare buttocks prior to the incident in question and has not since that time. Joshua is not scared of his father; they have a loving relationship. Several of Mr. and Mrs. Zemans friends and relatives have observed a loving relationship and no mistreatment of Joshua by his parents. (Ex. 5)

9. In February, 1984, Mr. Zeman wrote a letter to Hennepin County objecting to the accuracy of Jan Darcy's Report including the use of the word bruises and Jan Darcy's closing entry. (Ex. 4) By a letter dated February 13, 1984, Hennepin County advised Mr. and Mrs. Zeman that they had reviewed the file for accuracy and determined that the data was accurate. They advised Mr. Zeman that they would keep Mr. Zeman's letter of disagreement on file. On April 3, 1984, the commissioner of Administration received an Appeal of that determination from Mr. and Mrs. Zeman. (Ex. 3) On May 18, 1984, the Commissioner of administration issued a Notice of an Order for Hearing in this matter.

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. 13.04, subd. 4 and 14.50.
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. sec. 13.04, subd. 4 an individual may contest the accuracy or completeness of public or private data concerning himself and my 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 Mr. and Mrs. Zeman to prove by a preponderance of the evidence that the data is not accurate and/or complete. See also Thompson vs. Department of Transportation, U.S. Coast Guard, 547 F. Supp.. 274, 282 (S.D. Fla. 1982); Local 2047, American Federation of Government employees vs. 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. 2A. '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 individual's 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 any attribution to Mr. or Mrs. Zeman of the use of the word 'bruises' in describing the marks on their son's buttocks contained in Jan Darcy's Report of July 29, 1983 is inaccurate.

9. That any statement or inference in the Report that Mr.. and Mrs. Zeman regularly spanked Joshua at bedtime in order to induce sleep is inaccurate.

10. That --he failure of the Report to mention the size or color or duration of the marks on Joshua's buttocks renders it incomplete.

11. That -he conclusion contained in the closing entry of the Report which finds this case to be a 'substantiated incident of child abuse" is reasonably correct and therefore accurate.

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 that:

1. The Report of July 29, 1983 be amended to indicate that Mr. and Mrs. Zeman used the phrase "red marks" instead of the word "bruises" in describing the marks on their son's buttocks.
2. That the Report be amended to indicate that Mr. and Mrs. Zeman did not regularly spank Joshua at bedtime in an effort to induce sleep.
3. That the Report be amended to include a statement of the size of the red marks in question as indicated in Exhibit 4, a description of their color, namely red, and a statement of their duration.
4. Mat the Report be otherwise found to be accurate and complete.

Dated: August 1st 1984.

GEORGE A. BECK
State Administrative Law Judge

Reported: Taped, Tapes Nos. 3061, 3062.
No Transcript Prepared

MEMORANDUM

At the hearing of this matter, Mr. and Mrs. Zeman contested the accuracy and completeness of the Report prepared by the Child Protection Department of Hennepin County in three respects. First, they stated that they did not use the word 'bruises' in describing the marks on Joshua's buttocks but described them as 'red marks'. Secondly, Mrs. Zeman stated that she did not tell Jan Darcy that she and her husband had found it necessary to regularly spank Joshua at bedtime in order to induce sleep. Thirdly, they challenged the accuracy of Ms. Darcy's conclusion that this occurrence constitutes a substantiated incident of child abuse.

In regard to the first issue, both Mr. and Mrs. Zeman testified that they did not use the word 'bruises' in describing the marks on Joshua's buttocks. They believe the word bruise connotes black and blue marks which remain present for two or three days. In her testimony, Ms. Darcy stated that she doesn't recall if Kathy Zeman said "bruises" or "red marks". Ms. Darcy stated that she regarded the two phrases as being synonymous and therefore would have used them interchangeably in her Report. Ms. Darcy pointed out that the initial complaint used the word "bruise" and that term carried through into the investigation and Report. As to Ms. Darcy's use of the term 'bruises' apart from her quotations of the Zemans, its use appears to be accurate. A bruise is defined as 'an injury involving rupture of small blood vessels and discoloration without a break in the overlying skin'. Discolor is defined as "to alter or change the hue or color of". Webster's New Collegiate Dictionary, 1975 Ed. According to these definitions a bruise could be red or black and blue. However, since the Report inaccurately attributes the use of the word bruises to Mr. and Mrs. Zeman, the Report should be corrected in that regard. However, the word 'bruise' may in fact connote black and blue marks of substantial duration to many readers. Such a conclusion would place the Zemans in a false light within the meaning of Minn. Rule 1205.1500, subp.

2B and therefore the data is not in fact complete without a description of the size of the red marks as shown in Exhibit 4 and a statement that they were red rather than some other color. It should also be stated that the marks disappeared within 24 hours.

The Zemans were also concerned that the Report stated or at least implied that they had found it necessary to spank Joshua regularly at bedtime in an effort to induce sleep. The Zemans testified that this was not in fact the case. the Report at page 2 does not explicitly state that Joshua was spanked each time that he had trouble sleeping at night. this might easily be inferred however. Ms. Darcy's testimony at the hearing was that Mrs. Zeman had said that Joshua was having trouble getting to sleep, that they had given him a spanking to make him sleep and that they had talked to a doctor about alternatives. Again Ms. Darcy pointed out that the complaint had suggested that Mrs. Zeman had told the Complainant that Joshua always needed a spanking so that he would go to sleep and that the investigation and report was responding to this allegation. Mrs. Zeman convincingly testified that she had

never said it was necessary to spank Joshua to induce sleep and that this was not in fact true. She stated and Mr. Zeman also testified that Joshua has not been routinely spanked at bedtime when he will not go to sleep. It is concluded that the Report is inaccurate in that regard and should be amended to indicate that Mrs. Zeman stated to Ms. Darcy that Joshua had been spanked on one occasion at bedtime.

Finally, the Zemans have challenged Ms. Darcy's conclusion that the occurrence which was a subject of the Complaint constituted a substantiated incident of child abuse. An initial question is whether or not the conclusions of a professional contained in government records, can be challenged under the Data Practices Act. Case law under the Federal Privacy Act has held that that Act does apply to judgmental or evaluative matters since it would not make sense to revise erroneous factual assertions while allowing opinions based upon those assertions to remain unaltered. R.R. vs. Department of Army 482 F. Supp. 770, 774 (D. C. 1980) The same rationale should apply to the Data Practices Act. In that case, however, the court refused to alter a physician's medical diagnosis because the factual predicates for the opinion were too diverse to attempt to determine what that opinion might have been under different facts.

Minn. Stat. 626.556 mandates the reporting and investigation of suspected abuse of children. This statute at subd. 2(c) defines "physical abuse" as "any physical injury inflicted by a person responsible for the child's care on a child other than by accidental means;" Ms. Darcy testified that she concluded that any mark or bruise which lasted from the evening to 8 or 9 hours later in the morning was an injury. She felt it was clear that the injury was not accidental since Mr. Zeman intended to spank Joshua with a spoon. She determined that it was a substantiated incident since it was admitted.

The statutory definition is obviously very broad. This is in line with the Legislature's declared policy of protecting children whose health or welfare may be jeopardized through physical abuse. Minn. Stat. sec. 626.556, subd. 1. An injury is commonly defined as an act that damages or hurts.

Webster's New Collegiate Dictionary, 1975 Ed. Blacks Law Dictionary, (Rev. 4th Ed.) defines physical injury as "bodily harm or hurt". Mr. and Mrs. Zeman have argued in this case that the red marks do not constitute an injury. It seems clear however, that the spanking with the spoon did hurt Joshua since he cried and that the presence of red marks on his buttocks for in excess of nine hours can reasonably be said to be harm or damage. Given these broad definitions, it must necessarily be concluded that the red marks inflicted upon Joshua fall within the statutory definition of physical -abuse and that therefore Ms. Darcy's conclusion is accurate within the meaning of Minn. Rule 1205.1500, subp. 2.A. in that it is reasonably correct. There is no reason to believe that the changes suggested in the factual content of 'the Report would alter Ms. Darcy's opinion since she was accurately informed of the correct facts at the time she made her conclusion.

The result of Ms. Darcy's conclusion is that, as required by Minn. Stat. sec. 626.556, subd. 11(b), this record will be kept for seven years after which it will be destroyed. The facts on this record indicate that this incident

was not serious and Ms. Darcy classified it as low risk. that statute provides that --he records are private data except insofar as copies of the Report are required to be sent to the local police department. and county sheriff or the investigating or prosecuting authority.

G. A. B.

