

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. A-08/17-373  
 )  
Appeal of )  
 )

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families Registry Review Unit (Department) substantiating a report that he placed his son at risk of physical harm. Following multiple telephone status conferences and several continuances, a hearing in the matter was held on August 13, 2018. The following findings of fact are based on the evidence presented at that hearing.

FINDINGS OF FACT

1. The petitioner is a thirty-five-year-old father of two young boys, now ages five and six. Based on a reported incident relating to his driving with his older son in the car on November 1, 2016, the Department determined that petitioner placed his son "at risk of physical harm" and placed his name on the Child Protection Registry. Petitioner requested a Commissioner's Review of the substantiation. By letter dated July 5, 2017, he was notified that the

substantiation was upheld. He filed a timely appeal with the Board on August 2, 2017.

2. A review of petitioner's prior contact with the Department is relevant to the facts of the case. Before the November 1, 2016 incident, the Department had entered into a 'safety plan' with petitioner that included participation by petitioner's mother. The safety plan was created due to a 'pattern of concerns' that had been reported to the Department in September or October 2016 related to an incident when petitioner left his children in the car while he went into a store and was reported by the store personnel to be abrasive and appearing to be under the influence of alcohol or drugs. Petitioner and his mother agreed to the terms of the safety plan which included his completion of a drug and alcohol assessment, a prohibition on his driving with either of the children in the car and required that his mother serve as the primary caretaker of the children in the home and that the children be placed in full-time daycare. To implement this safety plan, petitioner's mother moved in with him to care for the children. Petitioner's mother also assumed responsibility for providing petitioner with his prescribed medication(s), to include oxycodone. At hearing, the caseworker assigned to this case indicated that the

Department had continuing concerns about possible misuse of prescribed medications.

3. At hearing, the Department offered the testimony of the caseworker and the child's daycare provider. The caseworker testified that on November 1, 2016 the Department received a report from the daycare provider for petitioner's children. Under Vermont law, the daycare provider is a 'mandated reporter' and is required to report incidents of potential child abuse. The daycare provider is also petitioner's sister-in-law.

4. The daycare provider testified at hearing that she has a master's degree in school counseling and that she had taken courses, both at the undergraduate and graduate level, in which the signs and symptoms of alcohol and drug abuse were addressed. After the incident in question but prior to the hearing in this case, the daycare provider became a Substance Abuse Prevention counselor responsible for screening students for drug and alcohol problems.

5. The provider testified at hearing that on November 1, 2016, she contacted the Department to report that the petitioner had driven his older child (then age 4) to the daycare around 11:00 a.m. that morning and that he had appeared unfit to drive a vehicle. She stated that she has

known petitioner since 2009 and is familiar with his normal appearance and behavior. She testified that after petitioner brought the child into the house she immediately realized that something was wrong. She stated that petitioner was incoherent, his balance was wobbly, his eyes were partially closed or closed, and he was "not really responding to me." She asked the petitioner if he wanted to sit down and got him a chair; he sat down but then fell out of the chair onto the floor. The provider stated that she then called petitioner's mother to say she was worried about him driving away from the daycare and asked that his mother or father come drive him home. The provider stated that at the time of the incident, petitioner was living about 10-15 minutes away from the daycare and that the road to the daycare is a highway where the posted speed limit is 50 miles per hour. The provider testified that petitioner remained at the daycare for approximately a half-hour to 45 minutes and that she was able to observe him during this entire period. His behavior and demeanor remained as described above. At some point, petitioner left the daycare and went outside to sit in the truck (a Chevy S-10 pickup belonging to his father) that he had driven to the daycare and smoked a cigarette. She stated that petitioner was outside when his father arrived in a

second vehicle to pick him up. She stated that petitioner's father took the keys to the truck and left it in the driveway; the petitioner's parents later returned together to pick up the child and to get the truck that had been left at the daycare.

6. The provider's testimony was highly credible. She was emotional during the hearing given the obvious distress this incident has caused within the family, but her testimony remained entirely consistent with the account she provided to the Department on the date of the event, November 1, 2016. There was no evidence of any bias or self-interest in her account of what occurred; indeed, it was apparent that having to provide this testimony due to her status as a mandated reporter was a responsibility that she took very seriously given her understanding of the consequences it would have for this family.

7. Petitioner also testified at hearing. His story is markedly different than the provider's account. He testified that on November 1<sup>st</sup>, his father, with petitioner as a passenger in the car, drove the child to the daycare in the truck between 7:00 - 7:30 a.m. and brought the child inside while he remained in the truck. He stated that he then took his father to work and took the truck to an appointment in

another location that morning. Petitioner stated that on his return from his appointment later that morning, he went to the daycare by himself because he wanted to see his son. He denied that he was under the influence of alcohol or drugs when he appeared at the daycare.<sup>1</sup> He testified, and the provider agreed on cross-examination, that the chair that he fell from was a child-sized chair; petitioner credits the size of the chair as the reason he fell. Petitioner stated that he suffers from insomnia and that the reason for his demeanor and behavior described above is that he was over-tired. He acknowledged that he had agreed to the terms of the safety plan, including the prohibition on him driving with either of his children in the car. He also acknowledged that he did not currently have a car and could not legally drive as he did not have a valid driver's license on the date of the incident.

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<sup>1</sup> During the pre-hearing conferences, the production of petitioner's medical records relating to his drug tests during the time in question was discussed at length. The Department requested, and the hearing officer ordered, that petitioner provide a release to his medical provider so that a complete copy of his relevant urinalyses, or other drug tests, could be reviewed. Despite the continuances, the Department was never provided with the records. Petitioner offered a report of one drug test near to the time of the incident. The petitioner did not provide a foundation for the admission of the record, the Department objected to the admission of the document, and the document was not admitted into evidence.

8. Petitioner's testimony is in direct opposition to the daycare provider's testimony and her account is found to be more credible for several reasons. First, she contacted the Department on the date of the incident when the incident had just occurred. Second, she is charged with the responsibility to care for the petitioner's child and has the legal obligation to report any incident of potential abuse or neglect. The risk of harm in this case was the petitioner driving with the child in the car while he was in a dangerous, altered physical state; if petitioner had not driven the child to the daycare and brought him inside, there would have been no reason to make the report. Third, the daycare provider had no reason to make a false report. She testified that petitioner brought the child into the daycare at around 11:00 a.m., that the child had not been at the daycare that morning until petitioner brought him in, that when petitioner brought the child in there was no one else outside in the truck and that it was not until after she called petitioner's mother that petitioner's father drove to the daycare to get him in another car. Finally, petitioner's account of the incident is self-serving. He did not have a credible explanation for appearing alone at the daycare around 11:00 a.m.

9. The caseworker testified that she interviewed petitioner's mother on November 1<sup>st</sup> but was unable to reach petitioner until November 2<sup>nd</sup>. Petitioner and his mother both described an incident on the evening of October 31<sup>st</sup> when petitioner had become upset about something relating to his drug prescription(s) and that petitioner knocked all the prescription(s) into the sink at their home. During their conversation on November 2<sup>nd</sup>, petitioner told the caseworker that although he had agreed to the safety plan "it was bullshit that he couldn't drive his own kids" and that the current allegation was also "bullshit." The social worker also interviewed petitioner's father who provided an oral statement about the incident that is referenced below.

10. Petitioner called his father as a witness at hearing. On direct examination by petitioner, when asked whether he had driven the child to the daycare on November 1, 2016 at 7:00 a.m., the father replied, "I believe I did, yes." He said his recollection is that he left his home, drove to petitioner's home to pick up both petitioner and his grandson, drove them to the daycare, then drove petitioner back home, and then went to work. He also testified that later that day his wife called him and said that petitioner was at the daycare acting strange and she asked me to go get



him. Petitioner was sitting in the truck (the truck belonging to the father) on his arrival. When the father asked him what was going on, petitioner said he was very tired. The father took the keys to the truck and drove the petitioner home. The father testified that he was unaware that there was a safety plan in place or that petitioner was not supposed to be driving with either child in the car. As noted above, at the time of the incident, petitioner's mother had moved to petitioner's residence to act as the primary caregiver to the children. On cross examination, petitioner's father was asked whether he recalled telling the caseworker in 2016 that the petitioner had taken the child to daycare on the date in question; he said he did not recall making that statement. Petitioner's father was also asked whether he recalled telling the case worker in 2016 that when he took the petitioner home after picking him up at the daycare, petitioner was "nodding on and off" in the car. Petitioner's father did not recall making that statement either. There was no explanation provided by the father about how petitioner would have obtained his truck, which it is undisputed petitioner was driving later that morning. There was no explanation provided as to why petitioner's father did not know about the safety plan and he was not

asked whether he knew that his son did not have driver's license.

11. Petitioner's father's testimony was uncertain and in conflict with statements that he provided to the Department in 2016. His account of the sequence of events that morning was also different than petitioner's, which makes it more likely that petitioner's father may be remembering a different day as it was the norm that one of petitioner's parents drove the children to the daycare. Petitioner's father testified that he did not currently have an absolute recollection of the incident. Therefore, his account of the events on November 1<sup>st</sup> is not persuasive.

12. Petitioner's mother also testified at hearing but said that she had a bad memory because of medical problems and does not have a clear recollection of that morning.

13. As of the date of hearing, petitioner is living in his parents' home with the children.

ORDER

The decision of the Department substantiating the petitioner for risk of physical harm to his son is affirmed.

REASONS

The Department is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916. The statute provides an administrative review process for individuals challenging their placement on the registry. 33 V.S.A. § 4916. At an administrative review, a report is considered substantiated if it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912 (16). If the substantiation is upheld at the administrative review level, the individual can request a fair hearing pursuant to 33 V.S.A. § 4916b(a) and 3 V.S.A. §3091(a). Appeals from a substantiation determination are heard de novo and the Department bears the burden of establishing the substantiation by a preponderance of the evidence. See *In re R.H.* 189 Vt. 15, 14 A.3d 267, 2010 VT 95, at ¶16; *In re Selivonik*, 164 Vt. 383, 670 A.2d 831 (1995); Fair Hearing No. B-01/12-69.

Pertinent sections of Vermont's Child Protection Statute that defines mandated reports of child abuse and neglect are as follows:

(1) "Abused or neglected child" means a child whose physical health, psychological growth and development, or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . . .

(6) "Harm" can occur by:  
...

(14) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse, including as a result of:

(A) a single egregious act that has caused the child to be at significant risk of serious physical injury;  
...

33 V.S.A. § 4912.

The daycare provider provided highly credible, consistent testimony about the incident on November 1, 2016.

Petitioner admitted to driving to the daycare on the day in question, and to being very tired. But his account of the central fact of that morning - did he bring the child into the daycare with him at approximately 11:00 a.m. - differs from the provider's testimony. The undisputed evidence regarding petitioner's physical state that morning may account for petitioner's failure to clearly remember what happened that day. At hearing, petitioner expressed a concern about being unable to volunteer for school events

given the substantiation, which is a legitimate concern but also a reason why petitioner may have offered self-serving testimony. At hearing, petitioner also expressed frustration with the terms of the safety plan that he had agreed to prior to the incident.

Petitioner's parents both appeared to be very caring people who want the best for their son and his children. However, as noted above, their testimony did not provide persuasive information on what happened on the date in question.

While the underlying reasons for petitioner's altered physical state on the day in question remain unclear, credible evidence establishes that he drove with his son in a car in violation of the safety plan, that immediately after driving the child to the daycare he was 'wobbly' while sitting as well as walking, that he was incoherent and unable to communicate, and was unable to keep his eyes fully open while sitting and walking. Based on the above findings it must be concluded that the Department has met its burden of establishing that the petitioner's actions that day constituted a single egregious act that recklessly exposed his son to a risk of serious physical harm, as defined in the above-cited statutory provisions.

Thus, the Department's decision to substantiate the petitioner for abuse of his son must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule 1000.4(D).

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