

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-09/17-460
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Appeal of)
)

INTRODUCTION

Petitioner appeals a denial of expungement of his substantiation (and name) from the Child Protection Registry by the Department for Children and Families ("Department"). In March of 2007, petitioner was substantiated for sexual abuse of his 11-year-old niece, leading to his placement on the Registry. The following is based on several telephone status conferences and the filings of the parties, with the record closing January 4, 2018.

FINDINGS OF FACT

1. Petitioner's substantiation for sexual abuse stems from a report made in December of 2006 that he had fondled his 11-year-old niece approximately two years prior to the report, while on a camping trip with her and her father. His substantiation was upheld in a Commissioner's Review decision dated July 13, 2007. The substantiation included a

determination that petitioner had been drinking alcohol at the time of the reported events.

2. Approximately three years later, petitioner applied for expungement of his substantiation and was ultimately denied such by a Commissioner's Review decision dated December 10, 2010. Petitioner appealed this decision to the Board, which upheld the Department's denial.

3. The current appeal is based on petitioner's most recent request for expungement, which was denied by a Commissioner's Review decision dated August 28, 2017. The Commissioner's Review of petitioner's request for expungement included consideration of the factors required pursuant to 33 V.S.A. § 4916c (and the reviewer's summary related to each factor, including a summary of petitioner's response in italics):

a. The nature of the substantiation that resulted in the person's name being placed on the registry. You fondled your prepubescent niece. You were over forty years old at the time.

b. The number of substantiations, if more than one. There is one.

c. The amount of time that has lapsed since the substantiations. The incident was reported over ten years ago and had occurred around two years earlier.

d. The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur. *The incident never occurred. You do*

not know why [petitioner's niece] would lie, but she did. In response to a question about the concerns that were raised in the prior decision not to expunge your name [in 2010], including your alcohol use and lack of treatment for sex offenders, and what has changed since then, you said that you "don't drink anymore." This means that you "might consume one or two beers on a weekend, but that's about it." You used to drink every night. You stopped drinking for reasons related to your physical health. You did not engage in sexual offender treatment because you were never asked to, but you would be willing to have a psychosexual assessment or evaluation.

The last seven years have been "quiet." You are still married. Your son [] lives with you and your wife. He had open heart surgery two years ago to replace a valve and it got infected. This led to a stroke and a second surgery. [He] walks with a cane and a brace and does not have full use of his left hand. Your granddaughter [], who was the subject of unsubstantiated allegations of sexual abuse by you (detailed in the 2007 denial letter) is now seven. She went to live with your sister and you still spend time with her. There is no safety plan with the Department for when she visits your home, but you do not spend time with her unsupervised and she does not spend the night.

e. Activities that would reflect upon the person to have changed behavior or circumstances, such as therapy, employment or education. You continue to be employed at [] in Williston in the machine shop. You have worked there since 1997. As for therapy, you completed CRASH after a DUI in 2006 and saw a counselor for three months. You completed an alcohol assessment at the Howard Center in 2010.

During the 2010 substance abuse assessment, you reported that you had no problem with substances, you did not see a need for treatment, and you would drink two to three beers on Friday or Saturday nights, and the occasional six beers during camping trips. Based upon these statements and your negative urine screen, it was determined that you did not meet criteria for substance abuse counselling. Despite considering engaging in a

psychosexual evaluation following the review meeting, you apparently chose not to do so learning of the costs associated with the evaluation.

f. References that attest to the person's good moral character. (summarized below)

4. Petitioner submitted three letters from co-workers, two of whom have known him for more than twenty years, describing him in positive terms as a parent, spouse, friend and worker.

5. In addition, the Department reviewed numerous other reports and documents, including the original report (leading to the substantiation), intake and investigation; documents related to the Level One Review and Commissioner's Review from 2007; the 2010 denial of expungement and December 13, 2011 Board decision affirming that denial; several other reports in 2009 and 2010 of alleged sexual abuse by petitioner towards children, which were either not accepted for investigation or unsubstantiated; and Department case notes from 2010 from when petitioner's granddaughter was removed from his home, including recommendations that petitioner engage in substance abuse and psychosexual evaluations.

6. The Commissioner's Review decision goes on to discuss, among other things, petitioner's risk associated

with alcohol use, his failure or refusal to participate in a psychosexual evaluation, and his continued denial that the underlying incident never occurred, ultimately concluding that his request for expungement should be denied:

While acknowledging the positive aspects of your life, the fact remains that you continue to deny engaging in inappropriate sexual behavior with [your niece]. Although this was the only substantiated incident, the Department was advised of multiple reports of your sexualized conduct towards juveniles. Despite being offered the opportunity to do so in 2010 and in 2017, you have not engaged in a psychosexual evaluation or treatment to address your sexual offending, and therefore, have not gained any insight into the reasons behind your offending or how you might decrease the risk that future incidents may occur. Furthermore, while you have characterized your alcohol use as a couple of beers on the weekend, it is noted that you have minimized your use in the past when it has benefited you. To that end, the only available substance abuse assessment was in 2010 and appears to rely on your misrepresentation of your alcohol use.

Given these concerns and in light of the factors for expungement, it is determined that your petition is not supported at this time. You have not addressed your offending behavior or offered information assessing your current risk to children. You also have not demonstrated insight as to how your alcohol use impacts your risk to engage in inappropriate sexual behavior around children. Thus, you have not met your burden that you are no longer a risk to the safety or wellbeing of children.

7. In his appeal to the Board petitioner, among other things, continues to maintain that the incident of sexual abuse never occurred. He also submits the substance abuse evaluation referenced above, dated December 14, 2010, and

negative urine screen for numerous substances from September 24, 2010. This same information was submitted to the Board and referenced in its 2011 decision affirming the Department's denial of expungement, in Fair Hearing No. A-01/11-12. Of note, the Board decision indicates that he received a diagnosis of "Alcohol-Related Disorder NOS" but this information was not included in the materials submitted by petitioner in this appeal.

ORDER

The Department's denial of petitioner's expungement request is affirmed.

REASONS

The overarching purpose of the statutes governing the reporting of abuse is to protect children. See 33 V.S.A. § 4911(1). The Child Protection Registry is a tool that is used to further this purpose by providing certain employers and volunteer groups a means to check the suitability of individuals seeking employment or volunteer work with children.

A person on the Registry may periodically request expungement of their substantiation(s) and removal from the Registry. See 33 V.S.A. § 4916c. During an expungement

review, the individual requesting expungement "shall have the burden of proving that a reasonable person would believe that he or she no longer presents a risk to the safety or well-being of children." *Id.* The Commissioner's Review process must consider six (6) enumerated factors (which are delineated in the facts above). *Id.* Here, the Department determined, after review, that petitioner had not met that burden (for the reasons set forth above), and with specific reference in its decision to the six requirements in the above statute.

A person may appeal to the Human Services Board if the commissioner denies his/her request for expungement. The Board's standard of review is set out in 33 V.S.A. § 4916c(e):

The person shall be prohibited from challenging his or her substantiation at hearing, and the sole issue before the board shall be whether the commissioner abused his or her discretion in denial of the petition for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by the commissioner shall be given deference by the board.

Thus, the sole issue before the Board is whether the Department abused its discretion in denying petitioner's request for expungement. The burden is on the petitioner to show that the Department abused its discretion.

Abuse of discretion arises when the decision is made for untenable reasons or the record has no reasonable basis for the decision. *State v. Putnam*, 164 Vt. 558, 561 (1996); *USGen New England, Inc. v. Town of Rockingham*, 177 Vt. 193 (2004). Abuse of discretion can extend to a failure to exercise authority. *In Re: T.S.*, 144 Vt. 592, 593 (1984). If the Department has a reasonable basis for its decision, the Board must affirm the Department's decision, even in those situations in which the Board or another trier of fact may have reached a different conclusion based on the information at hand.

The Department's decision here more than meets this standard. Petitioner's continued denials of the underlying incident, failure to engage in a psychosexual evaluation (after that was recommended in 2010 and again raised in 2017), and minimization of his alcohol use and the role that played in the underlying incident are all rational bases for the denial of expungement.¹

For these reasons, it cannot be concluded that the Department's denial of expungement is unreasonable, arbitrary

¹ Of note, it is not *unreasonable* for the Department to give less or little weight to the 2010 substance abuse evaluation based primarily on petitioner's self-report. The Commissioner's Review decision makes clear that the issue of concern is petitioner's alcohol use (which he does not deny) and the role it played in the incident leading to his substantiation.

or otherwise an abuse of discretion. The Department's decision thus meets the standard applicable in expungement appeals and must be affirmed by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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