

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-03/17-137
) (Substantiation)
Appeal of) Fair Hearing No. B-11/17-646
) (Expungement)

INTRODUCTION

Petitioner appeals his substantiation for sexual abuse, and a denial of expungement of his name from the Child Protection Registry for that substantiation, by the Department for Children and Families ("Department"). The parties have agreed to have these two appeals considered together rather than consecutively. The following is based upon the written submissions and arguments of the parties, with the record closing as of September 5, 2018.¹

FINDINGS OF FACT

1. Petitioner was substantiated by the Department for sexual abuse in October 2012, when he was 13 years old, based on allegations made by two younger children in March 2012.

¹This matter was initially submitted to the Board for its January 2019 meeting and then - after petitioner's counsel indicated she had not been aware of the January meeting - resubmitted for the May 2019 meeting without objection from the Department. However, in the interim, the Department acted upon the remand by the Board. See note 6, *infra*.

2. This was the second time these allegations had been reported and investigated by the Department; the two children had reported the same allegations nearly a year earlier, in May 2011. Petitioner was 11 years and 9 months old at the time those first allegations *were reported*. Nothing in the records provided by either party in this appeal establish or suggest the time period that the events allegedly *occurred*, except they must have presumably occurred prior to the initial report in May 2011.

3. Petitioner was also faced with juvenile charges filed in March 2012, based on the same allegations. While the juvenile matter was pending, and following notice by the Department of the substantiation in October 2012, petitioner requested (through his attorney) a Commissioner's review of the substantiation in January 2013. Petitioner's attorney then requested a stay of the Commissioner's review (presumably due to the pending juvenile proceedings).

4. Petitioner's juvenile charge was resolved with a plea agreement in April 2013, following which his attorney requested that the Commissioner's review process be restarted. However, for reasons that are unclear in the record - potentially due to the fact that the disposition

phase of the juvenile proceedings remained pending - the review process was not immediately restarted.

5. Petitioner's attorney ultimately withdrew the Commissioner's Review request in writing in December 2013. The Department mailed petitioner's attorney a letter dated January 13, 2014, confirming that the request for review had been withdrawn and that petitioner's name had been entered into Vermont's Child Protection Registry. This letter also indicated that petitioner had a right to request his removal from the Registry after the passage of three (3) years (i.e., an expungement request).

6. There is no evidence in the record as to why petitioner's attorney at that time withdrew the review request. Petitioner has no recollection of discussions with his attorney about withdrawal of the review request, although he alleges that his attorney believed his name would be removed from the Registry when petitioner turned 18. It is noted that petitioner's grandparents were his legal guardians at the time and they received notice of the substantiation at the time it was initially investigated.

7. In 2017, petitioner - with representation from a different attorney - requested that the Department conduct a Commissioner's review of the substantiation. After reviewing

the record of petitioner's previous request and withdrawal of that request, the Department declined to restart the review process, which led him to file this appeal with the Board.

8. In the meantime, petitioner had also requested expungement of the substantiation and his name from the Registry. By agreement of the parties, the appeal of his substantiation was stayed pending the outcome of his expungement request.

9. By decision dated October 26, 2017, the Department denied petitioner's expungement request, a decision that petitioner appealed to the Board. As noted above these appeals are considered together here by agreement of the parties.

10. The Department's expungement decision addresses the statutory factors required under 33 V.S.A. § 4916c:

a. The nature of the substantiation that resulted in the person's name being placed on the registry.

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

c. The amount of time that has lapsed since the substantiations.

d. The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur.

e. Activities that would reflect upon the person to have changed behavior or circumstances, such as therapy, employment or education.

f. References that attest to the person's good moral character.

11. The decision mentions that petitioner also argued that his expungement should be granted based solely on the requirement under 33 V.S.A. § 4916d for "automatic expungements" when a child turns 18 and the underlying incident occurred before the child was 10 years old. The Department's reference to this issue is purely descriptive; there is no discussion or apparent consideration of the issue contained in the decision.

12. Overall, there is no decision or response of any kind by the Department to petitioner's request for an automatic expungement based on his age when the incidents occurred.²

ORDER

Petitioner's substantiation appeal (Fair Hearing No. B-03/17-137) is dismissed as untimely; the expungement decision

² It is noted that the parties submitted *argument* as to their respective burdens and legal standards regarding the issue of automatic expungement. This is not a replacement for an actual decision or other response by the Department functioning as an administrative agency.

(Fair Hearing No. B-11/17-646) is remanded to the Department as outlined below.³

REASONS

The Substantiation Appeal

The burden of proof in substantiation appeals is on the Department. However, this case involves the threshold issue of whether the Board has jurisdiction over the appeal given that petitioner (through his attorney) withdrew his Commissioner's review request more than three (3) years before this appeal was filed. Petitioner argues he has "good cause" for the tardiness of his reasserted request for review, due to his attorney's (allegedly) mistaken withdrawal of the prior request and his alleged failure to receive direct notice of the substantiation.

The Board has consistently upheld the dismissal of a failure to meet the 30-day time limit for appeal of an administrative (Commissioner's) review of a substantiation. See e.g. Fair Hearing No. B-10/17-569; Fair Hearing No. M-10/13-785; Fair Hearing No. H-09/16-865; and Fair Hearing No. V-11/16-1004. Board review of the merits of a substantiation is generally predicated on the existence of a

³ Also, *see* note 6, *infra*.

Commissioner's review decision. See 33 V.S.A. § 4916b(a); 33 V.S.A. § 4916a(k); and *In re Francis Beer*, 2010 Vt. 31. The *Beer* decision is especially instructive, finding that a failure to timely request an administrative (Commissioner's) review not only deprived the Board of jurisdiction, but that the timeline for extending the filing deadline for "good cause" was specifically limited by the statute's allowance of a maximum extension of "28 days":

Because petitioner's first appeal of the December 31, 2007 Z.D. substantiation was not until November 4, 2008, we need not address whether good cause can be shown for the lateness of his appeal: even if good cause could be shown, any extension is "not to exceed 28 days after the department has mailed notice. . ."

In re Beer, *supra* at ¶8 (citing 33 V.S.A. § 4916a(c)(1)).

Thus, the *Beer* Court did not even reach the question of "good cause," agreeing with the Board that the statute did not authorize extending the deadline for appealing and/or requesting a Commissioner's review, beyond the specific timeframe for such in the statute. See *id*; see also 33 V.S.A. § 4916a(k) (failure to request a timely Commissioner's review makes the substantiation determination "final").⁴ Even

⁴ It should be noted that petitioner's argument regarding the implication or effect of a plea to a lesser or different charge in his juvenile case, as amounting to a dismissal or acquittal on the original charge (with or without a proviso that the plea cannot be construed as an admission to the original charge) has been rejected by a recent Vermont Supreme Court decision. See *In Re M.S.*, 2017 Vt. 64, ¶23.

assuming *arguendo* that the Board could extend the time frame for requesting a Commissioner's review, petitioner has not established "good cause" for an extension here, given that his request for review was withdrawn by his attorney in 2013.

What remains is what amounts to petitioner's claim that he was deprived of his rights (due process or otherwise) by neither being "directly" notified (when he was around 14 years old) of the substantiation decision, and/or that he retains a residual right to appeal until and upon turning 18. At the outset, this claim assumes that his attorney's action of filing and withdrawing a review request is not binding upon him. As a factual matter, petitioner's pleading does not establish a *prima facie* case that his attorney acted outside the scope of his authority or agency (it is otherwise presumed that his attorney was acting within that scope).

Moreover, contrary to petitioner's argument, the statute reasonably supports an understanding that notice to a minor's legal guardian(s) is an *alternative* to notice to the minor. See 33 V.S.A. § 4916e; see also DCF Family Services Policy 56 at 10-11 (eff. 7/1/09). This is in addition to notice that was indisputably given to petitioner's agent, his attorney. While petitioner asserts that a legal guardian is under no obligation to protect a minor's rights to appeal, he cites no

authority to support the position that the notice given here - to *both* a direct agent and his legal guardians - fails to comport with basic due process (as elaborated above, such notice is consistent with the statute).⁵

As such, the Board lacks jurisdiction over petitioner's substantiation appeal (Fair Hearing No. B-03/17-137), which must be dismissed as untimely. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

The Expungement Appeal

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

⁵There is no basis here to apply the principle of ineffective assistance of counsel as argued by petitioner. Putting aside the fact that the Board's process is fundamentally civil and administrative in nature - and that the "assistance of counsel" here was related to an internal Departmental administrative process, not a Board process (Board hearings are de novo) - there is no factual basis for this claim apart from the bare, unsupported assertion that petitioner's attorney withdrew his appeal for a reason that did not come to pass, or has yet to pass. As the Department points out, that decision may have been for strategic purposes that are unstated and unknowable here, but in the absence of evidence to the contrary must be presumed to be valid.

delineated in the facts above). *Id.* The Board reviews Department expungement decisions under an "abuse of discretion" standard. See 33 V.S.A. § 4916(c)(e).

Here, the Department determined, after review, that petitioner had not met that burden, and with specific reference in its decision to the six requirements in the above statute. At the same time, petitioner's expungement request raised a claim independent of those six enumerated factors, specifically that he is entitled to "automatic" expungement based upon his age when the sexual abuse *actually* occurred (not his age when he was substantiated). This is based upon a different section of the statute (relevant portion in italics):

§ 4916d. Automatic expungement of Registry records

Registry entries concerning a person who was substantiated for behavior occurring before the person reached 10 years of age shall be expunged when the person reaches the age of 18, provided that the person has had no additional substantiated Registry entries. A person substantiated for behavior occurring before the person reached 18 years of age and whose name has been listed on the Registry for at least three years may file a written request with the Commissioner seeking a review for the purpose of expunging an individual Registry record in accordance with section 4916c of this title.

33 V.S.A. § 4916d.

The above section of the statute contains two clauses. One provides for automatic expungement depending on the age

of the person at the time of the behavior at issue. The second clause provides for an automatic *right to request review* of an expungement (referring back to the process outlined by 33 V.S.A. § 4916c). The decision appealed here was considered by the Department pursuant to Section 4916c, and appeal to the Board was taken by petitioner pursuant to that section.

However, the Department's decision makes no determination or response to petitioner's claim under the first clause of Section 4916d. The Board serves as the appellate entity for Commissioner's review decisions pursuant to both 4916b (substantiations) and 4916c (expungements). The Department's failure to address *in any way* petitioner's claim to automatic expungement might normally be considered a failure to exercise discretion and effectively be an abuse of discretion. See Fair Hearing No. B-03/11-127 ("Abuse of discretion can extent to a failure to exercise authority."), *citing In re T.S.*, 144 Vt. 592, 593 (1984). More fundamentally however, the Department's failure to do so here, triggers Board review when it may, in fact, be unnecessary.

In this respect, Board review at this stage is premature. Petitioner's expungement request implicates two bases for

relief flowing from the same section of the substantiation statute. Deferral of review on one of those bases for the Department to consider the other basis for relief is consistent with the principles of judicial economy, deference to the administrative agency, and clear dictates of the Board's rules:

Agency review. Prior to the hearing, the commissioner or director of the department or office involved in the appeal, or his or her designee, shall review the appellant's stated grievance and determine whether or not the appellant is entitled to relief, and shall provide the appellant and the hearing officer with a rationale for its decision.

See Fair Hearing Rule 1000.3.G (underlined type in original).

For these reasons, the Department's decision is remanded for Departmental consideration and response as to petitioner's claim to automatic expungement under 33 V.S.A. § 4916d; any further Board review of his request for expungement (Fair Hearing No. B-11/17-646) is deferred pending that consideration.⁶

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⁶ During the Board meeting, petitioner's counsel indicated she had received a response to the remand from the Board's January 2019 meeting (neither the Board's hearing officer nor Department counsel had been aware of the Department's response). Based on counsel's representation this is accepted as meeting the Board's order of remand and therefore the matter shall now be reviewed by the hearing officer and need not be reconsidered by the Department as a new order of remand. Determination of the nature and extent of the Board's review and jurisdiction over the Department's response to petitioner's request for automatic expungement shall be part of the hearing officer's review.