

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-04/18-228
)
Appeal of)
)

INTRODUCTION

Petitioner appeals his substantiation by the Department for Children and Families ("Department" or "DCF") for abuse of a child. The following is based upon the filings and arguments of the parties. The primary issue is the Board's jurisdiction over the appeal.¹

FINDINGS OF FACT

1. On August 5, 2016 petitioner was notified in writing by the Department that he had been substantiated for sexual abuse of a child, following an investigation based on a report made in May 2015.

2. On August 22, 2016, petitioner (through counsel) requested a Commissioner's Review of the substantiation, and requested that the review be stayed due to a pending criminal case concerning the same allegations.

¹ This appeal was the subject of a recommendation to the Board for its January 2019 meeting. At that time, the parties assented to the hearing officer's recommendation to remand the matter back to the Department, given petitioner's pending request for a Commissioner's Review under 33 V.S.A. § 4916a(k).

3. On August 29, 2016, the Department (through its Registry Review Unit) sent a letter to petitioner's counsel indicating that the request for review had been received and would be stayed as requested - and that petitioner maintained "the right to renew your request for review of this substantiation upon the resolution of the related criminal or family court case by notifying the Department in writing within thirty days after the related court case has ended (by being fully adjudicated, including any appeals)." The letter also provided that "[i]f you fail to notify the Department within thirty days, the substantiation decision shall become final and not subject to further review or appeal."

4. Pursuant to the requirements of the law, petitioner's name was placed on the Child Protection Registry while his Commissioner's Review was postponed.

5. Petitioner faced two criminal charges related to the same events as issue in his substantiation. One of those charges was dismissed by the Superior Court, Criminal Division on August 30, 2017. The second charge was dismissed by the State's Attorney "without prejudice" on November 6, 2017.

6. Petitioner's counsel wrote to the Department's Registry Review Unit on February 23, 2018 to renew

petitioner's request for a Commissioner's Review. This was 109 days after the second charge against petitioner had been dismissed.

7. The Registry Review Unit wrote a letter to petitioner's counsel on March 13, 2018 stating that "[u]nfortunately, the request [to renew the Commissioner's Review] was received after the 30-day deadline to restart the review. You are no longer eligible for review." This appeal followed.

8. Petitioner has also been involved in a Superior Court - Civil Division matter related to the same allegations as issue here. That matter was eventually resolved while the instant appeal has been pending.

9. During the pendency of this appeal, petitioner requested that the DCF Commissioner grant him relief under both 33 V.S.A. § 4916a(k) and 33 V.S.A. § 4916a(1). The former gives the Commissioner the discretion to grant a Commissioner's Review for "good cause" shown; the latter allows the Commissioner to reconsider a decision made in a Commissioner's review in "exceptional circumstances." By letter dated August 1, 2018, the Commissioner declined to "set aside" petitioner's substantiation pursuant to 33 V.S.A.

§ 4916a(1).² At the time, the Commissioner deferred any determination under 33 V.S.A. § 4916a(k).

10. As noted above, the parties assented to the hearing officer's previous recommendation that the matter be remanded to the Department, for completion of the Commissioner's consideration under 33 V.S.A. § 4916a(k) - which, if granted, would have effectively reinstated petitioner's Commissioner's Review and obviated the need for the Board to decide whether such Review should be reinstated.

11. By letter dated January 30, 2019, the Commissioner denied petitioner's request to allow for a Commissioner's Review, observing that this determination was in the exercise of his discretion and stating (in pertinent part):

I understand that the criminal matters here were ultimately dismissed because of difficulties that often arise in legal proceedings involving child witnesses who are subjected to the rigors of a public trial before strangers on sensitive, traumatic matters. Moreover, the standard of proof to sustain a criminal conviction—beyond a reasonable doubt—is the highest established by our legal system and is significantly more difficult for a prosecutor to meet than the lower burden of proof required at an administrative proceeding reviewing a child maltreatment substantiation. Finally, the DCF investigative materials show that this matter was

² As Department counsel has pointed out, this provision of the statute applies to review decisions, not initial substantiation decisions. Petitioner's substantiation was never reviewed on the merits due to the timeliness issue raised here.

thoroughly investigated by the Department and that the children gave believable statements about their experiences consistent with their age and developmental level. These considerations have led me to conclude that the dismissal of the related criminal charges does not rise to the level of "good cause."

12. Petitioner argues that his initial Commissioner's Review should be reinstated; alternatively, he argues that the Commissioner's denial of his request under 33 V.S.A. § 4916a(k) should be reversed, which would also serve to reinstate his Commissioner's Review.

ORDER

Petitioner's appeals is dismissed as beyond the Board's jurisdiction.

REASONS

The Department for Children and Families 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. Appeals are reviewed by the Board de novo and the Department has the burden of proving by a preponderance of evidence that a reasonable person would find that petitioner's conduct constitutes abuse or neglect as defined by the statute. 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.

This appeal presents the threshold issue of the Board's jurisdiction. Board review of the merits of a substantiation is generally predicated on the existence of a 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 Department has moved to dismiss petitioner's appeal here because of his failure to timely renew his request for a Commissioner's review, based on this provision of the statute:

(2) The administrative review may be stayed upon request of the person alleged to have committed abuse or neglect if there is a related case pending in the Criminal or Family Division of the Superior Court which arose out of the same incident of abuse or neglect for which the person was substantiated. During the period the review is stayed, the person's name shall be placed on the Registry. *Upon resolution of the Superior Court criminal or family case, the person may exercise his or her right to review under this section by notifying the Department in writing within 30 days after the related court case, including any appeals, has been fully adjudicated. If the person fails to notify the Department within 30 days, the Department's decision shall become final and no further review under this subsection is required.*

33 V.S.A. § 4916(a)(c)(2) (emphasis added).

The above language which indicates that the decision "shall become final" and that "no further review is required" is essentially mirrored in the language of the statute

applicable when no review is requested in the first instance. See 33 V.S.A. § 4916a(k). This section of the statute also includes the language which allows the DCF Commissioner to allow for a review with a showing of "good cause":

If no administrative review is requested, the Department's decision in the case shall be final, and the person shall have no further right of review under this section. The Commissioner may grant a waiver and permit such a review upon good cause shown. Good cause may include an acquittal or dismissal of a criminal charge arising from the incident of abuse or neglect.

33 V.S.A. § 4916a(k).

Reinstatement of Petitioner's Initial Request for a Commissioner's Review

The Department argues that petitioner failed to renew his request for review within 30 days of resolution of the criminal matter - or for that matter, any related matter in the Criminal or Family Division of Superior Court. Petitioner argues that the State's dismissal of the criminal charge "without prejudice" is not the same as the statutory language providing that the time to exercise the right to review begins to run once the criminal matter is "fully adjudicated." In this respect petitioner argues that the criminal charge could be refiled within the applicable statute of limitations, which will run for several additional years, and therefore the criminal matter should be viewed as

pending (unless, it presumably follows from petitioner's argument, it is refiled and then resolved with a dismissal on the merits, conviction, or acquittal). Petitioner argues further that the matter pending in the *Civil* Division of Superior Court should have also operated as an automatic stay of the Commissioner's Review, and since he requested that his Review process restart before the civil matter was resolved, he has preserved his right to a Commissioner's Review.

Overall, the Department's interpretation of the statute - as to whether a "dismissal without prejudice" commences the 30-day period time limit for petitioner to exercise his right to review - is reasonable. The statutory language refers to the existence of "pending" cases in the Criminal or Family Division - and the charges against petitioner were no longer pending as of November 6, 2017. By illustration of this principle, Vermont's Rules of Criminal Procedure provide that a dismissal by the State's Attorney "terminate[s]" the prosecution. See V.R.Cr.P. Rule 48(a). Conversely, petitioner's argument that the criminal matter should remain viewed as pending because the charge could be filed again within the statute of limitations period, is not persuasive. The law does not allow for postponement of the review based on *the risk* of prosecution; it is based upon the filing of an

actual case against petitioner. While a *charge* may be refiled, the *specific case* against petitioner which allowed for postponement was dismissed on November 6, 2017. See V.R.Cr.P. Rule 48(a), *supra*.

Although petitioner argues further that his involvement in a related Civil Division matter should have also operated as a stay of the Commissioner's Review process (and thus a stay of his obligation to re-assert his request for Review), the plain language of the statute restricts the automatic right to request a stay where the related matter is pending in the "Criminal or Family Division of the Superior Court." See 33 V.S.A. § 4916(a)(c)(2). The statute has no such allowance for Civil Division matters.³

Thus, petitioner's reasserted request for a Commissioner's Review did not fall within the 30-day period required by the statute. Previous Board cases on the issue of the timeliness of a request for a Commissioner's Review cite the Vermont Supreme Court's decision in *In re Beer*, 2010 Vt. 31, in which the Court upheld the dismissal of an appeal

³ Although the plain language of the statute does not require further analysis, it must be noted that this distinction is not necessarily arbitrary - matters pending in the Criminal or Family Division would be related to significant rights such as the risk of incarceration and/or loss of parental rights, and the statute gives an individual subject to substantiation the choice of not implicating those rights by being simultaneously forced to defend the substantiation, which is a civil administrative matter.

for the failure to meet the time limit for requesting review, noting that:

The timely filing of a notice of appeal is not a mere technicality. Rather, this requirement serves specific and important functions:

A notice of appeal . . . informs the parties and the tribunals concerned that the proceedings are not concluded so they may respond accordingly, and it invokes appellate jurisdiction by accomplishing the transfer of the cause to the reviewing authority while the question sought to be reviewed remains open to appeal. We require strict adherence to deadlines for filing notices of appeal primarily to serve the goal of finality.

Id. at ¶ 13, citing *Casella Constr., Inc. v. Dep't of Taxes*, 2005 VT 18, ¶ 6.

As in *Beer*, petitioner here failed to request a timely administrative review, the result being that the Board lacks jurisdiction to hear his substantiation appeal. See Fair Hearing No. A-05/11-293; M-03/10-142 (and cases cited therein).⁴

The Commissioner's Denial of a Commissioner's Review Under 33 V.S.A. § 4916a(k)

⁴ There is no provision in 33 V.S.A. § 4916(a)(c)(2) for *the Board* to make an exception for a late filing for "good cause," unlike 33 V.S.A. § 4916b(d) which contains such an exception. The issue in this case is the timeliness of petitioner's request for a Commissioner's Review in the first place, not the timeliness of his request for Board review of a Commissioner's Review decision.

The hearing officer had previously deferred a decision on petitioner's appeal pending his separate request to the Commissioner for a Commissioner's Review under 33 V.S.A. § 4916a(k) for "good cause." Also reserved was any determination regarding the nature and extent of the Board's jurisdiction to review the Commissioner's exercise of discretion under Section 4916a(k). The Board's general grant of jurisdiction does not include appeals by individuals substantiated for abuse:

An applicant for or a recipient of assistance, benefits, or social services from the Department for Children and Families, of Vermont Health Access, of Disabilities, Aging, and Independent Living, or of Mental Health, or an applicant for a license from one of those departments, or a licensee may file a request for a fair hearing with the Human Services Board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits, or services is denied, or is not acted upon with reasonable promptness; or because the individual is aggrieved by any other Agency action affecting his or her receipt of assistance, benefits, or services, or license or license application; or because the individual is aggrieved by Agency policy as it affects his or her situation.

3 V.S.A. § 3091(a) (emphasis added - petitioner is not an "applicant for or a recipient of assistance, benefits or social services").

Rather, the Board's jurisdiction over substantiations (and expungements) is based in a specific grant of jurisdiction under Chapter 49 of Title 33:

§ 4916b. Human Services Board hearing

(a) Within 30 days after the date on which *the administrative reviewer* mailed notice of placement of a report on the Registry, the person who is the subject of the substantiation may apply in writing to the Human Services Board for relief. The Board shall hold a fair hearing pursuant to 3 V.S.A. § 3091. When the Department receives notice of the appeal, it shall make note in the Registry record that the substantiation has been appealed to the Board.

* * * *

33 V.S.A. § 4916b(a) (emphasis added).

As described above, petitioner failed to request a timely administrative review pursuant to 33 V.S.A. § 4916a(c) (2). The Board clearly has jurisdiction under Title 33 over appeals *from* an administrative (Commissioner's) review that is conducted under Section 4916a and then appealed to the Board. The Board's jurisdiction is not, however, based upon its general jurisdictional statute contained in Title 3 (and established with the creation of the Board itself). Correspondingly, nothing in *Title 33* grants the Board jurisdiction over *other* decisions made by the Department or the Commissioner, save expungement

decisions made under 33 V.S.A. § 4916c (not at issue here) and a Commissioner's decision under 33 V.S.A. § 4916a(1) which "creates a Registry record." No such right of review (of any kind) is available under the preceding subsection of 33 V.S.A. § 4916a(k).

This lack of a specific allowance for a right of appeal must be construed as the intent of the Legislature. It is well-established that the Board - as a forum of limited jurisdiction - can only hear appeals that the Legislature has conferred to it the power to hear. See *Vigario v. Department of Social Welfare*, 140 Vt. 100 (1981). No such jurisdiction has been conferred to the Board with respect to Commissioner decisions made under 33 V.S.A. § 4916a(k).

For the above reasons, petitioner's appeal of his substantiation and his appeal of the Commissioner's denial of a Commissioner's Review should both be dismissed as beyond the Board's jurisdiction. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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