

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-05/18-348
)
Appeal of)
)

INTRODUCTION

Petitioner appeals a denial of expungement from the Child Protection Registry by the Department for Children and Families ("Department"). Petitioner was substantiated for physical abuse (death resulting) and placing a child at risk of harm for physical injury in November 2009. The following is based upon the filings of the parties and the issue is whether the Department abused its discretion in denying expungement.

FINDINGS OF FACT

1. Petitioner was arrested on October 16, 2009 in connection with the death of minor (her niece) living in her household. The minor, who was 16 years old at the time, died from a knife wound inflicted by petitioner, following a verbal and physical argument with her. At least one other minor child was present during the altercation.

2. After a jury trial, petitioner was convicted of 2nd degree murder for the minor's death and sentenced to 20 years

to life in prison. Petitioner appealed this verdict to the Vermont Supreme Court; the primary issue raised being the trial court's jury instructions. However, the Vermont Supreme Court - which affirmed petitioner's conviction - recited the pertinent facts of the case, which were that petitioner and the minor had an intense verbal and physical argument, followed by the knife wound to the minor. While petitioner has apparently acknowledged that she may have thrown a kitchen knife at the minor, the Vermont Supreme Court decision includes a summary of the State's expert testimony that the wound suffered by the minor was consistent with a direct stab wound and not a thrown knife.

3. The Vermont Supreme Court decision also recites evidence of petitioner's history as a victim of domestic abuse, her potential mental health issues (such as PTSD), and her subaverage intellectual functioning.

4. Due to petitioner's jury conviction for 2nd degree murder and affirmance by the Court, it cannot reasonably be disputed that petitioner inflicted a knife wound on the minor, resulting in her death. For that matter, petitioner did not appeal her substantiations for physical abuse and risk of physical harm (the latter as to the other minor present during the event).

5. After her conviction was affirmed, petitioner's sentence was amended based on a Motion to Reconsider and Reduce Sentence filed by her defense attorney. Petitioner ultimately received a 10-year sentence with the remaining part of the sentence suspended, along with probation following her incarceration. The amended sentence was entered on March 13, 2015 and the criminal matter was closed.

6. Petitioner's request for expungement was reviewed with her during a Commissioner's Review meeting on February 20, 2018, held at the correctional facility where she is incarcerated. Petitioner's exact release date is unspecified in the record submitted to the Board, although based on the date she was placed in custody and the length of her sentence, it is anticipated that she will be released sometime in 2019.

7. The Commissioner's Review decision following the February 20, 2018 meeting was issued on May 8, 2018 and denied petitioner's request for expungement. The denial letter included consideration of the factors required pursuant to 33 V.S.A. § 4916c (the reviewer's summary related to each factor and a summary of petitioner's response - according to the decision - in italics, is also included below):

a. The nature of the substantiation that resulted in the person's name being placed on the registry. On November 4, 2009 you were substantiated for physical abuse-death resulting to SA (age 16) and for placing NA (age 14) at risk of harm for physical injury. A joint investigation by DCF and [the police] disclosed that on October 15, 2009 SA died as a result of a stab wound to the chest. The investigators determined that you got into an argument and altercation with SA. You grabbed a knife from the kitchen and stabbed her in the chest. The investigation further disclosed that during the altercation NA was in close proximity. DCF determined that in addition to physically abusing SA your actions also placed NA at significant risk of harm for physical injury. *You advised that you did not plead guilty to the charges but were convicted by a jury trial for 2nd degree murder. You denied that you stabbed SA. You said, "I did not stab her. I threw a knife. I don't remember when I threw the knife or where it came from. I do not remember throwing a knife at her. I remember seeing her on the floor laying there in a lot of blood. Then I remember saying I was sorry to her. I cannot recall why we were arguing. I had been running errands because [another child] was going to a concert at the school, he was mentally challenged, and I had 100 things to do running errands. When I got back home she was sitting instead of folding clothes. I was not angry, and she did not argue back. She hit me and I hit her back. I assume all of the kids were upstairs when this happened. I never saw them again because so much was going on.*

b. The number of substantiations, if more than one. Two (2). Physical Abuse and Risk of Harm-Physical.

c. The amount of time that has lapsed since the substantiations. Eight(8) years, Five(5) months.

d. The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur. *You advised that the stress of raising your three children, four(4) nieces and nephews, and caring for their mother eventually made you lose control. You explained that you had to become the primary caretaker of seven (7) children and your sister, who had MS. You now believe that emotional stress coupled with the day*

to day responsibilities of caring for so many children caused you "to lose it." You denied having been a victim of domestic abuse. You were married in 2006 however, your husband continued to live in New York while you and the children lived in Vermont. You denied using alcohol or drugs.

e. Activities that would reflect upon the person to have changed behavior or circumstances, such as therapy, employment or education. You have been in the custody of the Department of Corrections since you were arrested on October 15, 2009. In 2010, you were subsequently convicted of 2nd degree Murder and received a sentence of 20 years to life to serve. You claimed that while incarcerated you successfully completed all Department of Corrections programs relating to Domestic Violence Education. You participated in individual counseling, family counseling, anger management and parenting classes. You denied any mental health issues. You claimed to have a strong network of supports, which you developed by participating in Church and Bible studies. You do not consider yourself to be a risk to the safety or well-being of children. You claimed that this was an isolated incident, because you did not have any prior criminal convictions. However, DCF records disclosed the Department received reports of concern about you and the well-being of children before [the] fatal incident in 2009.

You married [] in 2006 and have three (3) children from that marriage. In addition, you petitioned family court and were granted guardianship of your four (4) nieces and nephews. In 2014, you divorced your husband.

f. References that attest to the person's good moral character. During the review meeting you provided four (4) letters of support. Your opportunity to provide additional documents in support of your petitioner was discussed. You signed a Document Submission Form agreeing to submit additional letters and documentation for consideration by March 14, 2018. On February 21, 2018 you submitted an additional letter of support. To date you have not submitted documentation of treatment programs you participated in.

8. The review decision summarized the letters of support provided by petitioner. Two of the letters were from family members; one letter was from a corrections-based church pastor; and one letter was from a retired probate judge who had presided over petitioner's assumption of guardianship over her nieces and nephews approximately 15 years prior and had recently become a mentor for petitioner through a non-profit agency. It is noted that two of these letters (as excerpted in the decision) offered as support for expungement that petitioner's placement on the registry was based on "unsubstantiated" reports and that the deceased minor was "no longer in danger" due to being deceased.

9. The Commissioner's Review also listed several other documents that were considered as part of the decision, some of which were court or Department documents related to the substantiations at issue here, and some of which were reports of previous incidents involving petitioner and her children which were either not accepted for investigation or not substantiated.

10. The review decision goes on to draw several conclusions based on the information in the record and information provided by petitioner, including:

It is noted and considered significant that even though you were convicted of 2nd degree murder, you have not taken full responsibility for your conduct which resulted in your substantiation for physical abuse . . . and risk of harm for physical injury. . . Despite the nature of your substantiated conduct and criminal conviction for murder you make the implausible claim that you were not angry during the incident that resulted in your niece's death . . . You claimed that during the nine years of your incarceration you participated in various treatment programs . . . You signed a document extension agreement which provided that you would submit documents that you attended treatment programs. The Commissioner's Registry Review Unit has not received any documentation from you as of this date. . . You submitted letters of support for your petition from people, who spoke positively about you, and now believe your name should be removed from the Child Protection Registry. However, they lack substantive insight into the allegations leading to the substantiation and the inherent questions about the inherent risk you might pose to children. . . You have not lived in the community since 2009. You have been in custody, under constant and continuous supervision, and have been unable to demonstrate that your circumstances have significantly changed or whether similar incidents are likely to occur. You took minimal responsibility for hitting and fighting with SA . . . you blamed her for failing to follow your rules, being lazy, and not folding clothes as the main reasons for arguing with her. You did not show any remorse or demonstrate any insight about yourself. You were unable to explain why you "lost it" and how you would be able to prevent that from happening again.

11. The review decision ultimately concluded that:

In the end, a reasonable person would not find your petition is supported. Given the nature of your conduct, and the lack of insight into your actions, questions persist about your current circumstances and whether a similar incident is likely to occur. While you have complied with behavioral expectations while incarcerated and participated in classes while there, you failed to participate in mental health counseling to gain insight

into and take full responsibility for your actions. Thus, it raises significant questions about your ability to recognize potentially dangerous situations and to act in a way to keep children safe. It is determined that you have not met your burden of proving that a reasonable person would believe you are no longer a risk to the safety or well-being of children.

It should be noted that the purpose of the Child Protection Registry is to protect children, concerns regarding your history, the lack of information regarding treatment addressing the issues central to your substantiations, and that you have not been living unsupervised in the community prevents you from meeting your burden of proving that a reasonable person would believe that you no longer a risk to the safety or well-being of children.

12. On appeal, petitioner argues for reversal of the denial of expungement based on several alleged factors: (1) the Department's failure to "accurately" summarize and consider her criminal case, including her diminished capacity and the fact of her reduced sentence; (2) the Department's failure to give weight to her rehabilitative efforts; and (3) the Department's failure to consider her character references.

13. With respect to the above factors, petitioner takes specific issue with (1) the decision's description of her criminal conviction ending in a sentence for "20 years to life" without mentioning her appeal and eventual reduced sentence; (2) that she was not given an adequate opportunity by the reviewer to produce evidence of her participation in

treatment programs and classes; and (3) that her letters of reference were not considered by the reviewer.

14. At the request of the hearing officer, the Department produced a copy of the "document extension agreement" signed by petitioner on February 20, 2018, which shows that she was given additional time to submit documentation of her counselling or other treatment and certification of her completion of classes while incarcerated.¹

ORDER

The Department's denial of expungement is affirmed.

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.

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

¹ While it is recognized that petitioner raises a material issue in theory regarding her opportunity to submit this information (even though the record establishes that she was given that opportunity), it is noted that on appeal she neither submits such documentation nor makes any proffer that this documentation (or the opinion of any treatment provider) would provide support for her expungement request.

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). The Vermont Supreme Court "will not interfere with the performance of a discretionary duty in the absence of a showing of an abuse of discretion resulting in prejudice to one of the parties." *Hall v. DSW*, 153 Vt. 479 (1990). 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.

In this case, two of the issues raised by petitioner must be rejected. First, the record does not support petitioner's assertion that she was not given an opportunity to submit documentation of her counseling, treatment or other records related to her rehabilitative efforts. Second, the Department clearly gave consideration to petitioner's letters of support but did not find those letters persuasive due to the background and knowledge of those references (as described in the decision). The Department's determination to accord less weight to these letters of reference cannot be said to be unreasonable or untenable, particularly given the complete lack of professional support for petitioner's expungement in the record.

The remaining issue raised by petitioner - that the Department failed to consider the full procedural history of her criminal case, including her eventual reduced sentence and her appeal decision which, while citing her potential history of trauma and subaverage intellectual functioning, affirmed her conviction for 2nd degree murder - must also fall in light of the entire record considered by the Department.

In the first place, the Department's basic understanding of the resolution of her criminal matter as resulting in a murder conviction, and the result of an intentional or gravely reckless act, is neither untrue nor unreasonable. Petitioner otherwise makes no specific assertion or offer as to why the factors of her conviction, which she believes should have been given weight, support her expungement. In this respect there is nothing in the record that makes the Department's conclusion that she lacks sufficient insight into the circumstances of her substantiation unreasonable. Moreover, when taken into consideration with the entire record - the lack of professional support for petitioner's expungement, the serious nature of the underlying events, and petitioner's lack of a track record outside correctional confinement and supervision - the Department's decision as a whole cannot be found to be arbitrary, unreasonable or based on untenable reasons.

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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