

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. R-06/18-422
)
Appeal of)
)

INTRODUCTION

Petitioner appeals her substantiations by the Department for Children and Families ("Department") for risk of harm towards her (three) minor children as well as, for a separate alleged incident, physical abuse of her 10-year old son. The substantiation for risk of harm was made in or around August 1993 and the substantiation for physical abuse made in or around December 1994. Petitioner requested a Commissioner's Review of these substantiations in 2018, leading to a June 8, 2018 decision upholding both substantiations - the Commissioner's Review decision is the subject of the instant appeal.¹

The following is based upon a merits hearing held February 26, 2019.

¹ Petitioner indicates that she was not aware of the substantiations until recently applying for a foster home license to provide a placement for her grandchild. In any event, petitioner had an indeterminate period to request a Commissioner's Review of the substantiations as allowed under 33 V.S.A. § 4916a(j). The Board appeal was then made pursuant to 33 V.S.A. § 4916b, following the Commissioner's Review decision.

FINDINGS OF FACT

1. Petitioner's substantiations stem from separate reports made, respectively, in July 1993 and December 1994. According to the Commissioner's Review decision, the July 1993 report alleged that petitioner had hit her 10-year-old son with a belt, threw him to the floor, and was "flying into rages" at all three of her children, posing a risk of physical harm to them. The December 1994 report alleged that petitioner had physically abused her 10-year-old son by attempting to clean a temporary tattoo off his face so roughly and out of control that it hurt him and left bruising, swelling and scabs on his face.

2. It is noted that these alleged events occurred approximately 25 years ago. The only witness at hearing was petitioner; there was no testimony from any current or former Department employee, and no one else who may have been involved or aware of these events at the time testified. The Department offered some documents as evidence which are further discussed below.

3. As noted above petitioner indicates she was not aware that she had been substantiated until recently.² In her testimony she denied hitting her son with a belt as well

²The Department produced a letter dated December 6, 1994 to petitioner notifying her of the substantiation decision based on the December 1994 report; there was no documentary evidence that petitioner had been notified of the July 1993 substantiation.

as "flying into rages" at her children. She did acknowledge becoming frustrated and angry at times, but primarily with her husband at the time, who she felt did not participate in parenting the children and often exacerbated situations because he imposed no structure or direction to the children. Petitioner described her ex-husband as often inebriated and frequently at home due to lack of employment, while she was employed and often coming home to chaotic situations involving her children. When questioned about whether she "flew into rages," petitioner acknowledged that she had an anger issue but "did not take it out" on her children.

4. Petitioner acknowledged and recalled an interaction with her son in 1993 or 1994, when she came home from work to find her son had marked his face with temporary tattoos. She further acknowledged attempting to clean his face with a wet cloth mixed with some kind of cleansing agent, which she recalls was likely rubbing alcohol. Petitioner does recall that when he woke up the next day that her son's face was somewhat red in the area she had cleaned, and she realized then that she may have been rougher than she intended. While it is not alleged that the rubbing alcohol was itself harmful to her son, petitioner believes that may have caused his face to become red and marked, along with her use of a slightly abrasive cloth. She recalls sending him to school that day.

5. Petitioner acknowledged being frustrated with her then-husband for allowing her son to have and apply the facial tattoos, but denied that she deliberately harmed him or used excessive force in cleaning his face, or that he was significantly harmed because of this event. She agrees that her son became upset during this event, but primarily because he wanted to keep the tattoos on his face. While petitioner does not recall being substantiated for this incident, she agreed that this may have been the incident that led to the August 1993 substantiation.

6. Petitioner's testimony was genuine, consistent and generally credible. However, the threshold issue presented by the record here is the admissibility, nature and weight of the documentary evidence submitted by the Department.³

7. One of the documents submitted is titled "INITIAL INVESTIGATION SERIES" and appears to relate to the allegation of "risk of harm" by petitioner towards her children from July 1993. The form (identified and marked as State's Exhibit 2) is filled out in handwriting and is largely, although not completely, legible. The form also lists a

³ The hearing officer accepted the documentary evidence under the "business records" exception to the general rule excluding hearsay. The findings and discussion *infra* assume *arguendo* that these records meet this exception. All of the records at issue are Department forms used to proceed through a Family Services case and/or investigation. While they are facially reliable as official records and forms, this still leaves the question of whether the content of the records is admissible and support the substantiations.

"worker" name at the top of the first page but is unsigned. It does not contain a specific date - the blank line for a date contains the notations "7/93, 8/93." The Department relies upon a section of the form titled "PARENT/CARETAKER STATEMENT" which - in this case - notes at the beginning "See intake" and goes on to provide what appears to be a summary of petitioner's own report regarding the allegations at issue. The summary is not, nor is any portion of it, in quotation marks so there is no way to tell whether it describes the verbatim words of petitioner. Because this section refers at the beginning to another "intake," this also suggests the reasonable possibility that the summary was taken from or based upon another document. Finally, the lack of a specific date or a signature undermines value of this document as memorializing any kind of *contemporaneous* statement, even if it was an actual, direct statement by petitioner.

8. For all of these reasons, the information contained in this form is excluded from evidence as an admission by petitioner, and thus as having any relevance in this appeal. A second form (identified and marked as State's Exhibit 5) is titled "SUMMARY FORM" and is signed and dated on August 5, 1993. However, this form appears to be information that was relayed in part or whole from another reporter who had

contacted the Department about information reported to them by petitioner. This makes such information hearsay and it must therefore be excluded. For that matter, the information contained in the form only partially matches the allegations of risk of harm against petitioner.⁴

9. As petitioner otherwise denies the allegations that are the basis of the Department's substantiation for risk of harm, there is no evidence in the record supporting those allegations. More specifically, there is no evidence that petitioner "hit her child with a belt" or "flew into rages" (as described in the Department's allegations, to the point of posing a risk of harm) with respect her children, nor is there evidence of any other allegations from July or August of 1993 which would support a risk of harm determination.

10. With respect to the allegation of physical abuse, petitioner acknowledges that she rubbed a tattoo off her son's face and may have done so "a little roughly" resulting in some redness and visible irritations on his face the next day. There is no other admissible evidence in the record

⁴ Despite that these are clearly official Department documents, the passage of time since the allegations make it difficult to provide essential information about the creation and reliability of the documents for *the purpose* (as admissions by petitioner) that the Department seeks.

regarding this incident.⁵ Of note, the Commissioner's Review which upheld the substantiation describes the alleged incident as far more serious than admitted by petitioner: that petitioner allegedly "lost it" when scrubbing off the tattoo; that one of her children "hollered" at her to stop scrubbing because it appeared to be hurting the child; and that the son was "observed" with swollen cheeks and several scabs on his face. There was no evidence admitted at hearing which establishes any of these allegations.

11. Accordingly, there is no evidence that the alleged physical abuse was non-accidental, intentional or reckless, or even if so, no evidence establishing the nature and extent of any injury or physical harm suffered by petitioner's son as alleged in the substantiation.⁶

ORDER

Petitioner's substantiations (for risk of harm and physical abuse) is reversed.

⁵ A document (marked as State's Exhibit 6) submitted by the Department does contain what appears to be a summary of a direct statement made by petitioner at the time; however, that statement is consistent with petitioner's testimony at hearing. The remaining information in the document is constituted of second-hand reports that are excluded as hearsay.

⁶ With respect to the allegation that her son had "scabs" on his face, petitioner acknowledged that his face had a "mark" which she did not consider significant. As such the evidence against petitioner suffers from a lack of specificity and completeness as to the nature of her attempts to scrub off the tattoo as well as the extent of any harm or injury to her son.

REASONS

The burden of proof in substantiation appeals is on the Department. In addition, hearings before the Board are de novo, and must be based upon evidence admitted at the hearing.

The applicable legal standard at the time of petitioner's substantiation was as follows:

(2) An "abused or neglected child" means a child whose physical or mental health or welfare is harmed or threatened with harm by the acts or omissions of his parent or other person responsible for his welfare or a child who is sexually abused by any person.

(3) "Harm" to a child's health or welfare can occur when the parent or other person responsible for his welfare:

- (A) Inflicts, or allows to be inflicted, upon the child, physical or mental injury; or
- (B) Commits, or allows to be committed, against the child, sexual abuse; or
- (C) Fails to supply the child with adequate food, clothing, shelter or health care. For the purposes of this subchapter, "adequate health care" includes any medical or nonmedical remedial health care permitted or authorized under state law. Notwithstanding that a child might be found to be without proper parental care under chapter 55 of Title 33, a parent or other person responsible for a child's care legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child shall not be considered neglectful for that reason alone; or
- (D) Abandons the child.

(4) "Threatened harm" means a substantial risk of physical or mental injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or mental

health or protracted loss or impairment of the function of any bodily organ.

* * * *

33 V.S.A. § 4912, from 1992 Vermont Laws P.A. 141 (H.B. 216).⁷

The evidence in the record fails to support either of petitioner's substantiations. First, as determined above, there is no evidence supporting the "risk of harm" allegations from July 1993 - that petitioner beat her son with a belt, threw him on the ground, and was "flying into rages" at her children. As the second allegation, of physical abuse from December 1994, the only admissible evidence was petitioner's own testimony, which fails to establish that petitioner acted deliberately, recklessly or non-accidentally to cause her son physical harm or injury as provided by the law. See DCF Family Policy 56, at pp. 4-5. In particular, key allegations from this substantiation - such as that petitioner "lost it," or that her son's face was swollen with several scabs - which may have gone to show that the incident was non-accidental, or petitioner acted deliberately or recklessly, had no support in evidence.⁸

⁷ Changes to the statutory definitions applicable now would not change the outcome in this case.

⁸ To the extent applicable, even under more relaxed evidentiary rules regarding the admission of hearsay, see FH Rules 100.3.0, the documentary evidence submitted by the Department would be excluded. Although the Department is at a disadvantage due to the passage of time, it remains highly prejudicial to petitioner to substantiate her *solely* on

As such, petitioner's substantiations are not consistent with the rules and must be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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documentary evidence that lacks sufficient reliability in the first place.