

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. M-01/19-04
)
Appeal of)
)

INTRODUCTION

Petitioner appeals his substantiation by the Department for Children and Families ("Department") for alleged sexual abuse of a minor child I. H. A hearing on this matter was scheduled to take place on December 13, 2019. Immediately prior to the hearing, counsel for the Department informed the Board and counsel for the petitioner that the Department would be unable to carry their burden of proof at hearing. Consequently, the hearing was cancelled. The central question in this appeal then is whether the substantiation should be reversed due the Department's failure to present evidence of the allegations.

PROCEDURAL HISTORY

1. The Department for Children and Families substantiated the petitioner for sexual abuse of a minor based on a report filed with the Department on March 6, 2018. A review of this determination was held by the Commissioner's Registry Review Unit on December 6, 2018 and

the Commissioner upheld DCF's decision in a letter issued on December 21, 2018. On December 27, 2018 petitioner filed this appeal.

2. Discovery was exchanged by the parties, numerous telephone status conferences were held, and the matter was eventually scheduled for hearing to take place on December 13, 2019.

3. Prior to the hearing the Department informed the Board and petitioner that it would be unable to proceed as it could not present the evidence necessary to carry its burden of proof at hearing. Consequently, the hearing was cancelled.

4. However, as the Department thereafter took no affirmative action to reverse the substantiation, the petitioner filed a Motion for Judgment as a Matter of Law, seeking an order from this Board to fully and finally resolve the appeal.¹

ORDER

The Department's decision is reversed.

¹ To the extent that the Department was aware in advance of the unavailability of a necessary witness and their concomitant inability to carry their burden of proof at hearing, the Department's standard practice of filing a letter with the Board reversing the substantiation, enabling the subsequent withdrawal of the appeal by petitioner would have been a far more expedient mechanism to resolve this matter. It is unclear why this course of action, frequently implemented by the Department in such cases, was not pursued here.

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. See 33 V.S.A. §§ 4914, 4915, and 4916.

The pertinent sections of 33 V.S.A. § 4912 define abuse and harm as follows:

(1) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person...

(15) "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child, including:

- (A) incest;
- (B) prostitution;
- (C) rape;
- (D) sodomy;
- (E) lewd and lascivious conduct involving a child;

Appeals are reviewed by the Board de novo and the Department has the burden of proving by a preponderance of evidence that petitioner's conduct constitutes sexual abuse

as defined by the statute. See *In re R.H.* 189 Vt. 15, 14 A.3d 267, 2010 VT 95, at ¶15.

Based on their failure to present evidence Department has not established that petitioner sexually abused I.H. under the above-cited statute.

For these reasons, the Department's substantiation of petitioner for sexual abuse was not proven and is thus inconsistent with the applicable rules and must be reversed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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