

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. T-11/19-722
)
Appeal of)
)

INTRODUCTION

Petitioner appeals her substantiation by the Department for Children and Families ("Department" or "DCF") for risk of harm (physical) towards her two children. The following is based upon the filings and arguments of the parties. The primary issue is the Board's jurisdiction over the appeal.

FINDINGS OF FACT

1. On August 10, 2018 the Department sent a notice to petitioner of a recommendation to substantiate her and place her name on the Child Protection Registry. Petitioner timely requested a Commissioner's Review of this determination.

2. At the same time, petitioner was the subject of criminal proceedings in New York State - she was charged with two counts of Aggravated Driving While Intoxicated (With Child) and one count of Child Endangerment - which involved the same underlying factual allegations as her

substantiation. Petitioner's Commissioner's Review meeting was postponed while her criminal proceeding was ongoing.

3. On May 22, 2019 petitioner was convicted (by plea agreement) of one count of Aggravated Driving While Intoxicated (With Child) and remanded into the custody of the New York state correctional department, with a recommendation that she enter a special program for non-violent offenders.

4. Petitioner entered this program voluntarily on May 22, 2019. Petitioner describes this program as "strict" and "rigid," with limits on communication with "the outside world." Petitioner acknowledges that she continued to receive mail at her home address (where her spouse and mother lived) and maintained contact with her spouse and mother (although primarily used her limited phone time to speak with her young children). Petitioner makes no claim that she was unable to receive mail - even if limited - during her time in the program, nor is there any evidence that petitioner notified the Department of her circumstances or of a new mailing address. Petitioner acknowledges that she never informed her spouse or mother about her pending request for a Commissioner's Review and any corresponding need to monitor her mail for communications about the Review.

5. Petitioner successfully completed the program on October 24, 2019. In the meantime, presumably due to the resolution of petitioner's criminal proceeding in March 2019, the Department moved forward with the Commissioner's Review process. The Department initially sent a letter to petitioner on June 27, 2019 that the Registry Review Unit had not been able to reach her, and without further contact (by July 11, 2019), the Review would move forward in her absence based on all available information.

6. Hearing nothing from petitioner, the Commissioner's Review process moved forward and - by letter dated September 17, 2019 - the Registry Review Unit issued a decision upholding her substantiation. The decision was mailed to petitioner's home mailing address and included the following information about appealing (bold type in original):

If you disagree with this decision, and you wish to appeal further, you should advise the Human Services Board, by writing to it within thirty (30) days of when this letter was date stamped by the Post Office. (also including contact information for the Board)

7. The Department established that the routine practice of the Registry Review Unit is to mail Commissioner's Review decisions on the same date that the

decision is dated. Petitioner thus filed this appeal with the Board on November 15, 2019, 58 days after the Commissioner's Review letter was mailed.

8. The Department has moved to dismiss petitioner's appeal as untimely; in the alternative, the Department argues that petitioner's appeal is effectively barred under the principle of collateral estoppel, due to her criminal conviction for Aggravated DWI (With Child).

ORDER

Petitioner's appeal 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. The Board's jurisdiction over substantiations is based in a specific section of Chapter 49 of Title 33:

(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).

Petitioner's appeal was received by the Board nearly 60 days after mailing by the Department. 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.

The Vermont Supreme Court has also generally found that the language in the Department's letter sufficiently notifies the recipient of the right to file an appeal and the statutory requirements for filing a timely appeal. See *In re J.G.*, 2009 WL 4573787.

Of note, the substantiation statute allows for the filing deadline to be waived as follows:

If no review by the Board is requested, the Department's decision in the case shall be final, and the person shall have no further right for review under this section. The Board may grant a waiver and permit such a review upon good cause shown.

33 V.S.A. § 4916b(d).

The Vermont Supreme Court has confirmed that "good cause" under this section is confined to an analysis of whether a late filing is for reasons "within [the petitioner's] control." See *In re M.S.*, 2017 Vt. 64, ¶21. The Court cites as guidance Vermont court rules on appellate procedure, which give examples of "good cause" such as "'failure of the Postal Service to deliver the notice of appeal.'" *Id.* at ¶20 (internal citation omitted).

Petitioner argues that the circumstances of her placement in an alternative correctional program establishes "good cause" for her failure to file a timely appeal. While petitioner's argument is genuine and her focus on rehabilitation and completing her incarceration is commendable, she has not established how filing a timely appeal was "out of her control" under these circumstances, given that the Commissioner's Review letter was sent to her

last-known mailing address and she was not restricted from contact with her family living at that address; thus, her untimely filing could have reasonably been avoided. See *In re M.S., supra*; *In re J.G., supra*.

As such, the Board lacks jurisdiction over petitioner's appeal, which must be dismissed as untimely. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.¹

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¹ The Department's argument that petitioner's appeal should otherwise be barred by collateral estoppel - although a valid and likely successful argument - need not be reached.