

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. H-09/20-577
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Appeal of)
)

INTRODUCTION

Petitioner appeals his substantiations for sexual abuse of two children by the Department for Children and Families (Department). The sole issue is whether petitioner's appeal should be dismissed as untimely. The Department filed a Motion to Dismiss on October 23, 2020. A telephone status conference was held on December 23, 2020. Petitioner's counsel filed a written response on January 9, 2021.

FINDINGS OF FACT

1. Based on incidents that were reported to the Department in May 2011, petitioner was substantiated by the Department (the date of the actual substantiation was not provided by the Department as part of the record) for sexual abuse of two female minors under the age of sixteen. Petitioner faced criminal charges, was convicted and placed on probation (ending in 2018), and his name was placed on the Vermont Sex Offender Registry.

2. Petitioner requested a Commissioner's Review hearing which was conducted on January 23, 2020. By letter dated February 20, 2020, the Department notified petitioner that it was upholding the substantiations.

3. The Department's Review letter contained the following information about appeals (boldface 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."** The Department's letter also provided the address and phone number for the Board.

4. The Department presented an affidavit from the staff person charged with mailing the Commissioner's Review letter; she represented that the letter that placed in the outgoing mail on the date that it was dated - February 20, 2020.

5. Petitioner filed a pro se appeal of that decision in an email to the Human Services Board Clerk dated September 16, 2020. In that email to the Board petitioner stated "[I] am appealing to family services for expungement." This

appeal was considered as an appeal of the Department's decision to uphold the substantiation.¹

6. The Department filed a Motion to Dismiss the appeal as untimely. Subsequently, after petitioner filed his appeal and after the filing of the Department's Motion, petitioner engaged counsel. Counsel subsequently filed a response to the Department's Motion on January 8th. Counsel does not contest that petitioner was late in filing the appeal but argues that the Commissioner's Review letter (dated February 20, 2020) was issued at (or near) the outset of the pandemic² which made it difficult for petitioner to respond. Counsel further argues that petitioner was ending his relationship with his wife during the period of March - September 2020 and these two factors should be considered in reviewing the lateness of the appeal.

7. To be considered timely, petitioner's appeal would have had to be filed within 30 calendar days after the date of the February 20, 2020, letter or by March 23rd. Thus,

¹At the time he filed the request for fair hearing, petitioner did not have counsel. To the extent that petitioner intended to apply to the Department for the expungement of his substantiation, counsel, who was later retained by petitioner can pursue that request with the Department, the denial of which would be separately appealable to the Board.

²The Governor's announcement of a State of Emergency was issued on Friday, March 13, 2020.

<https://governor.vermont.gov/content/declaration-state-emergency-response-covid-19-and-national-guard-call-out-eo-01-20>

petitioner's September 16th appeal was untimely filed, and petitioner has failed to show that good cause exists for the untimely filing.

ORDER

Petitioner's appeal is dismissed as untimely.

REASONS

The applicable statute sets out a specific time frame of 30 days for appealing a substantiation decision:

Within 30 days of 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.

33 V.S.A. § 4916b(a).

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. E.g., Fair Hearing No. B-10/18-703. *See also*, Fair Hearing No. R-04/18-250; Fair Hearing No. V-11/17-594; Fair Hearing No. B-10/17-569; Fair Hearing No. V-11/16-1004; Fair Hearing No. H-09/16-865.

In these previous cases on this issue, the Board has cited *In re Beer*, 2010 Vt. 31, the Vermont Supreme Court's decision upholding the Board's dismissal of an appeal for the

failure to meet the administrative review time limit, 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.

The Department's substantiation statute does contain a provision that allows the appeal filing deadline to be extended under the following limited circumstance, 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) (emphasis added).

The Vermont Supreme Court has ruled that the "good cause" review under this statute is confined to the analysis of whether a late filing is for reasons outside of a

petitioner's control. See *In re M.S.*, 2017 Vt. 64, ¶21. The Court cites as guidance a Vermont Rule of Appellate Procedure which state that "[g]ood cause refers to situations in which there is no fault on the movant's part. See also Fair Hearing No. V-11/16-1004.

The Board has also noted that "good cause" may be established when an individual is incapacitated, such as being hospitalized, or has need of an accommodation under the Americans with Disabilities Act or if there is an unforeseen event affecting the public. See Fair Hearing No. H-09/16-865 and Fair Hearing No. V-03/10-148.

While the pandemic has indeed imposed limitations and been a hardship in many ways, petitioner did not present evidence that he himself was incapacitated due to the coronavirus or otherwise unable to file an appeal with the Board, whose office has remained accessible by phone, email, and mail continuously since the State of Emergency was declared in March 2020. Petitioner did not present any evidence that good cause existed for the late filing.

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.

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