

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. J-03/21-221
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Appeal of)
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INTRODUCTION

Petitioner ostensibly appeals a denial of expungement, by decision of the Department for Children and Families ("Department"). The denial of petitioner's expungement request - which was, in effect, a denial of the opportunity to request expungement - was included in a "Commissioner's Review Decision" which primarily concerned petitioner's appeal of three (3) separate substantiation determinations. The Department has moved to dismiss petitioner's expungement appeal for lack of jurisdiction, also requesting that his substantiation appeals remain pending while the Board determines whether there is jurisdiction over petitioner's expungement appeal. The following is based upon status conferences held July 9, 2021, November 1, 2021, and January 3, 2022, as well as the arguments of the parties.¹

¹ This matter was transferred to a new hearing officer when the prior hearing officer retired.

FINDINGS OF FACT

1. Petitioner was substantiated in 2002 for sexual abuse. In 2020, he was substantiated for two (2) separate instances of "risk of harm - sexual" by the Department. The 2020 substantiations involved allegations that petitioner is registered sex offender who had unsupervised contact with minor children.

2. Petitioner requested a Commissioner's Review of all three (3) determinations.² Simultaneously, petitioner also requested the expungement of his name from the Child Protection Registry.

3. In a decision dated March 22, 2021, the Department - through its Registry Review Unit which conducts the Commissioner's Review hearings - upheld petitioner's substantiations. The Review decision furthermore denied petitioner the opportunity to request expungement, because he is listed on Vermont's Sex Offender Registry and therefore is precluded from requesting expungement from the Child Protection Registry. This appeal followed.

4. The Department has moved to dismiss petitioner's appeal of the denial of the opportunity for expungement, relying upon the same basis as the Commissioner's Review

² Petitioner was allowed to request a review of the 2002 substantiation because it predated the 2007 change in the law which placed a time limit on such requests. See 33 V.S.A. § 4916a(j).

decision - arguing that petitioner is legally precluded from requesting expungement, thus depriving the Board of jurisdiction over the appeal.³

5. Petitioner does not dispute that he is required to register as a sex offender (for "life") and is listed on Vermont's Sex Offender Registry.

ORDER

Petitioner's expungement appeal is dismissed for lack of Board jurisdiction; to the extent the Department's decision denying petitioner an opportunity for expungement may be construed as an appealable decision, that decision is affirmed.

REASONS

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 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

³ It is noted that the Board would typically consider a substantiation appeal before hearing a related expungement appeal. However, in this instance, the Department's request for an initial determination of jurisdiction over petitioner's expungement appeal is appropriate given that any potential for expungement here could affect resolution of petitioner's substantiation appeals. Thus, it is appropriate to settle the jurisdictional question raised by the Department first.

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. In an expungement appeal, the primary issue is whether the Department has "abused its discretion" in denying expungement. See Fair Hearing No. B-03/19-221.

This case presents a preliminary question of whether the Board has jurisdiction over petitioner's appeal of the denial of his expungement request. The statutory provision relied upon by the Department provides as follows:

A person who is required to register as a sex offender on the State's Sex Offender Registry shall not be eligible to petition for expungement of his or her Registry record until the person is no longer subject to Sex Offender Registry requirements.

33 V.S.A. § 4916c(a)(2).

Petitioner, therefore, is not "eligible" to request expungement. It is axiomatic that, to appeal a denial of a request for expungement, the requestor must have the legal right to request expungement in the first place. As petitioner does not have such a legal right, there is no substantive expungement decision for him to appeal and no relief that may be granted by the Board. Even if the Board has jurisdiction over petitioner's appeal of the Department's decision to deny him *the opportunity* for expungement, that

decision is consistent with the above-referenced statutory provision rendering petitioner ineligible to request expungement.

As such, the Board lacks jurisdiction over petitioner's appeal, which accordingly must be dismissed. To the extent the Department's decision denying petitioner the opportunity for expungement may be construed as an appealable decision, that decision is consistent with the applicable law and must be affirmed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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