

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. M-09/21-579
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Appeal of)
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INTRODUCTION

Petitioners appeal the decision of the Department for Children and Families (Department or DCF) denying their application for a foster care license. A video hearing was held on November 22, 2021. The findings below are based on the arguments presented at hearing and the evidence submitted by the parties.

FINDINGS OF FACT

1. In April 2021, petitioners applied to the Department to serve as respite care providers for the Vermont Foster Care program. By letter dated August 26, 2021, the Department denied their application based on its determination that petitioners did not meet the requirements for foster care providers as provided by the Licensing Regulations for Foster Homes in Vermont (Regulations). The basis for the denial was the existence of the male petitioner's criminal record.

2. The denial letter cited Regulation 038 which states as follows:

A license may be denied or revoked if the applicant, licensee or other member of the household:

038.1 Has been charged with or convicted of a criminal offense;

In the section of the form titled "[B]asis for Decision, the Department stated:

The Adoption and Safe Families Act of 1998, Section 431, includes the following language: "criminal records checks for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child on whose behalf foster care maintenance payments of adoption assistance payments are to be made under the State plan under this part, including procedures requiring that . . . in any case in which a record check reveals a felony conviction for . . . a crime including violence such final approval shall not be granted. . ." "(emphasis added)"

In 1995, [name of male petitioner] pled guilty to felony charges of arson and extortion for bombing a research office/lab at Michigan State University.

The Department's decision went on to describe the incident for which male petitioner was convicted. That text is summarized as follows:

On February 28, 1992, male petitioner gained access to a research building on the campus of Michigan State University. He forcibly entered the office of an MSU researcher, where he built a pyre using wooden desk drawers, research papers and a makeshift firebomb. He set the timer of his makeshift bomb before walking out. The incendiary device detonated, and the resultant fire overtook the office in which it was planted and spread to three nearby offices. There were two students in the

building when the incendiary device detonated. . . . On September 28, 1994, male petitioner was arrested and charged with federal crimes. On August 11, 1995, he pled guilty to the Arson and Extortion charges and was sentenced to 57 months incarceration.

3. At hearing, the parties stipulated to the introduction of all proffered exhibits, to include the Department's letter denying the application, a media account of the incident, and documents proving the male petitioner's criminal conviction. Petitioners submitted written statements about the incident in question and the male petitioner's change in philosophy since the event occurred, noting the fact that he has raised two of his own children since that time, and multiple letters of recommendation regarding male petitioner's attributes. They further submitted documents in support of their legal argument that the Department is not required by the Regulations to deny the application and has latitude in this instance.

4. Consistent with its denial letter (which cites the federal law), the Department stated that its Regulation 038 is based on and must be consistent with the Adoption and Safe Families Act. The Regulation itself is very broadly worded and provides discretion to the Department; it states that a conviction may serve as a basis for denial. However, the federal law contains a prohibition against granting a foster

care license if someone in the household has committed a crime involving violence. Therefore, the first legal question posed by the parties is whether the federal law acts as an absolute bar to the Department's grant of a license. The Department argues that it is because Arson is a "crime of violence" that falls within the prohibition. Petitioners argue that male petitioner's conviction does not fall within the prohibition and that the Department has latitude under its Regulation to consider mitigating factors, particularly the passage of time since the date of conviction and male petitioner's documented efforts to lead a positive life since the event.

5. The federal law lists certain offenses that it deems violent offenses but based on the plain language of the text the law's prohibition is not limited to those offenses. Based on the analysis below, petitioner's conviction for Arson as defined in 18 USC § 844 is found to be a crime of violence. Therefore, federal law does bar male petitioner from obtaining a foster care license.

6. However, it must be noted that even if the federal law did not serve as a bar to petitioners' application, the Department was still within its discretion, under its Regulation, to deny the license based on the 1995 conviction.

While the conviction is many years old, its severity, particularly in light of the fact that there were two people in the building when the explosive device was detonated, supports the Department's position. While reasonable minds might disagree about this conclusion, it cannot be said that it is an abuse of discretion for the Department, under its own Regulation, to deny the application based on the 1995 Arson conviction.

ORDER

The Department's decision denying the foster care license is affirmed.

REASONS

The Board has jurisdiction over appeals of foster care license denials. See 3 V.S.A. § 3091(a). The standard of review before the Board is whether the Department has abused its discretion in denying the application and the burden is on the petitioner to demonstrate abuse of discretion.

The Department has adopted regulations governing foster care licenses pursuant to 33 V.S.A. § 306. Prospective licensees must meet the requirements of the regulations. See VT Foster Care License Regulations §§ 010 and 037. Non-compliance with any one of the Regulations can form the basis

for a license denial. See VT Foster Care License Regulations §§ 010 and 037.

The Board has consistently held that the Department, standing *in loco parentis* of the children in its custody, is entitled to a high degree of deference and discretion in matters of foster care. See, e.g., Fair Hearing No. T-01/08-13. Abuse of discretion arises when the decision is made for untenable reasons, or the record has no reasonable basis for the decision. See Fair Hearing No. M-04/10-223, citing State v. Putnam, 164 Vt. 558, 561 (1996); USGen New England, Inc. v. Town of Rockingham, 177 Vt. 193 (2004).

The facts in this case are not in dispute. The male petitioner pled guilty to federal charges in 1995, including Arson. Since the 1992 event, media accounts have documented, and male petitioner's written submission outlines, his change in philosophy since that time. He has submitted multiple letters that speak to his character. However, the outcome of the appeal hinges on the interpretation of the language of the Regulation and the federal law. It is undisputed that the Department's Regulation must be read to comport with the federal law. See Fair Hearing No. H-04/12-221 (Department follows federal requirements in its licensing decisions).

The federal law that serves as the basis for the Regulation at issue provides that the States must enact a provision relating to criminal record checks for applicants as follows:

For criminal records checks for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child on whose behalf foster care maintenance payments or adoption assistance payments are to be made under the State plan under this part, including procedures requiring that –

(i) in any case in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), **or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery**, if a State finds that a court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and

(ii) in any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted;

Adoption and Safe Families Act of 1997, 24 USC 1305, Sec 106.

(emphasis added) amending the Social Security Act, Section 471.

By its plain language, the statute does not limit the list of offenses of “violent” crimes to the examples listed in the statute.

Reference to the description of "violent" crimes as that term is used in other provisions of federal statutes is instructive. In 18 USC § 924, Congress defined a "violent felony" in a sentencing enhancement statute, in relevant part as follows:

the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that

(i) has an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involved conduct that presents a serious potential risk of physical injury to another...

18 USC § 924(e) (2) (B).

And, the Department points out that the comments to the amendment to 42 USC § 471 support the finding that the definition of "violent" crimes in the amendment was left intentionally broad so that the States could consider all types of felony crimes which may appear on their face to be non-violent but that could involve violent actions. See 65 Federal Register 4020, 4067-68 (Jan. 25, 2000).

Therefore, despite all the positive aspects of male petitioner's life, given the nature of his conviction and the prohibition contained in the statute, the Department properly denied the application based on federal law.

Further, even if the federal law was not considered a bar to the approval of the application, it was not unreasonable or arbitrary for the Department to deny the license application under its Regulation.

Under these circumstances, the Department's denial of the petitioners' foster care application is consistent with the applicable regulations and must be affirmed by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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