

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-01/11-12
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, denying his request to expunge his name from the child protection registry. The issue is whether the Department abused its discretion when it denied petitioner's expungement request.

The petitioner filed for fair hearing on January 6, 2011. Due to the attorneys' scheduling problems, telephone status conferences were held on April 5 and May 31, 2011. The parties were given a briefing deadline. The record below was filed with the Human Services Board on August 24, 2011. The decision is based upon the argument of the parties and the record.

FINDINGS OF FACT

1. The expungement case stems from the Department's substantiation of sexual abuse by petitioner of a niece, C.L., who was eleven years old at the time of the incident.

2. The incident was reported to the Department approximately 1.5 years after the event. C.L. sought out her guidance counselor during December 2006 because dealing with a boyfriend triggered memories of the incident with petitioner. When the guidance counselor checked her records, she learned that C.L. had disclosed in 2004 to a person taking the guidance counselor's place while she was on parenting leave but the substitute had not reported the allegation to the Department. The guidance counselor reported the incident to the Department.

3. During a summer 2004 holiday, petitioner and his immediate family joined other relations at his mother's property to celebrate. C.L. was there with her parents; they were staying in their camper. During the day, C.L., her father, and petitioner drove to C.L.'s home to gather wood for a fire. C.L. was sitting in the middle of the back of the car wearing a bathing suit with a long tee-shirt over her bathing suit. When they arrived at C.L.'s home, her father left the car to pick up the wood. Petitioner was in the front passenger seat of the car. According to C.L., the petitioner turned around and placed his fingers on her clothing over her vagina for about two seconds when she said "hey" and petitioner lifted his fingers to his mouth and said

"shh". Later, during the night, C.L. disclosed to her mother that petitioner touched her. C.L.'s mother confronted petitioner and a family argument ensued. According to C.L. and her father, the petitioner had been drinking before the incident. Petitioner acknowledged that he was drinking that day.

Petitioner denied the grounds for the substantiation and continues to deny that he improperly touched C.L.

4. The Department substantiated petitioner for sexual abuse on January 25, 2007. Petitioner appealed the substantiation through a Level One review and a Commissioner's Review. The Commissioner's Review was issued August 8, 2007. Petitioner did not appeal the substantiation to the Human Services Board.

5. Petitioner requested an expungement during December 2010. Petitioner's motivation included his desire that his granddaughter H be placed in his and his wife's care. His granddaughter H was in the Department's custody due to the behaviors of her parents. The Department informed petitioner that he needed to have the substantiation expunged and to obtain an alcohol evaluation in order to be considered as a placement.

6. Petitioner's case was assigned to C.C. for the expungement registry review process.

7. Petitioner submitted several reference letters in support of his request for expungement, including:

a. October 13, 2010 letter from his employer E.P. E.P. noted that he has known petitioner for twenty years and that he is a valued employee. He wrote that their families spent time together and that petitioner was never inappropriate with E.P.'s children.

b. September 14, 2010 letter from J.H., a co-worker, who has known petitioner for fifteen years. H.H. wrote that petitioner is helpful and cooperative at work and that he cares about his family.

c. Letter from R.R., a co-worker, who has known petitioner for fifteen years. He noted that petitioner was a good co-worker and leader.

d. September 22, 2010 letter from C.M., HR administrator at petitioner's employment who has known petitioner for over fifteen years. She noted petitioner was an asset to the company and in a group leader position.

e. Petitioner's sister M wrote that he is a responsible and loving family man.

f. Petitioner's wife wrote that they raised three children together and that petitioner is a loving father who would never hurt a child.

g. Petitioner's son D.F.III wrote that petitioner would do anything to protect and care for his family.

Petitioner also submitted a drug screening report from Burlington Labs dated September 24, 2010 that indicated petitioner tested negative for a series of drugs.

8. C.C. met with petitioner and his wife on September 23, 2010. The record was kept open for additional documentation; petitioner submitted additional letters.

9. The Commissioner's Review of December 14, 2010 denied the petitioner's request for expungement. Petitioner timely appealed to the Human Services Board.

10. The Commissioner's Review documented the six factors considered in expungement requests as follows:

a. Nature of Substantiation. Petitioner was substantiated for fondling his eleven year old niece.

b. Number of Substantiations. One.

c. Time elapsed since the substantiation. Incident occurred six and half years ago and was reported four years ago.

d. Circumstances that would indicate a similar incident is unlikely. Petitioner denied incident occurred and noted no criminal charges were filed. Petitioner noted raised three children and that granddaughter H lived with them for the majority of her life. Petitioner said no other allegations of improper conduct towards children except for a report about H that was baseless.

e. Activities supporting claim that petitioner changed behavior or circumstances. Petitioner stated he made sure that he did not have unsupervised contact with children including a safety plan with his wife regarding H. Petitioner noted DUI from 2006 and that he completed CRASH program and does not drink as much. Commissioner's Review response included reference to case note that petitioner appeared intoxicated during July 2010 when Department workers came to take H and place her in Department custody and resulting concern because petitioner drinking at time of incident with niece.

f. References regarding good moral character.

Summarized the letters of reference submitted by family and from petitioner's place of employment.

11. The Commissioner's Review sets out the reasons why the Commissioner does not believe the petitioner met his burden of proof that he no longer presents a safety risk to children. In the analysis, the Registry Reviewer wrote:

Your [Petitioner's] documented issues with alcohol use present significant concerns, especially in light of your own admissions and others' observations that you were under the influence of alcohol at the time of the substantiated sexual abuse incident. Although you report having undergone substance abuse treatment related to your DUI conviction in 2006 in the form of completing CRASH, you claim that only required your meeting with a counselor on two occasions. In addition, you have demonstrated a lack of follow-through with treatment recommendations by the Department over the last several months, including an unwillingness to participate in an alcohol assessment. The combination of your having been drinking heavily around the time of the incident, the unresolved concerns over your continued substance use, your not answering the questions about the risk you pose sexually to a child, along with your demeanor and behavior in front of social workers earlier this year, indicates a lack of changed behavior.

ORDER

The Department's decision is affirmed.

REASONS

The overarching purpose of the statutes governing the reporting of abuse is to protect children. 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 children.

Petitioner's decision to seek expungement is based on his desire to care for his granddaughter. Petitioner continues to deny the underlying substantiation and points to the passage of time, in part, as support for seeking expungement. He notes there have been no further substantiations or other incidents that support a continuing concern by the Department.

The expungement process is governed by 33 V.S.A § 4916c. The applicable provisions are found in 33 V.S.A. § 4916c(b), which state:

The person shall have the burden of proving that a reasonable person would believe that he or she no longer presents a risk to the safety or well-being of children. Factors to be considered by the commissioner shall include:

- (1) The nature of the substantiation that resulted in the person's name being placed on the registry.
- (2) The number of substantiations, if more than one.
- (3) The amount of time that has elapsed since the substantiation.

(4) The circumstances of the substantiation that would indicate whether a similar incident would be likely to occur.

(5) Any activities that would reflect upon the person's changed behavior or circumstances, such as therapy, employment or education.

(6) References that attest to the person's good moral character.

A person may appeal to the Human Service Board if the commissioner denies his/her request for expungement.

The Board's review is set out in 33 V.S.A. § 4916c(e), which states:

The person shall be prohibited from challenging his or her substantiation at hearing, and the sole issue before the board shall be whether the commissioner abused his or her discretion in denial of the petition for expungement. The hearing shall be on the record below, and determinations of credibility of witnesses made by the commissioner shall be given deference by the board.

The sole issue before the Board is whether the Department abused its discretion when they denied petitioner's request for expungement. The burden is on the petitioner to show that the Department abused its discretion.

Abuse of discretion arises when the decision is made for untenable reasons or the record has no reasonable basis for the decision. State v. Putnam, 164 Vt. 558, 561 (1996); USGen New England, Inc. v. Town of Rockingham, 177 Vt. 193 (2004). Abuse of discretion can extend to a failure to

exercise authority. In Re: T.S., 144 Vt. 592, 593 (1984).

If the Department has a reasonable basis for its decision, the Board must affirm the Department's decision, even in those situations, in which the Board or another trier of fact may have reached a different conclusion based on the information at hand.

The Department based their decision on a number of factors including the petitioner's failure to take responsibility for the underlying substantiation, the petitioner's failure to adequately address concerns about his alcohol use, and the petitioner's interactions with the Department around his granddaughter H.

The petitioner argues that the Commissioner abused his discretion because a reasonable person could look at the criteria in the statute and reach an opposite conclusion based on the information provided by petitioner.¹ The petitioner objects to the Commissioner considering his interactions with the Department regarding H as a denial of

¹ Petitioner attached a Substance Abuse Evaluation dated December 14, 2010 with his written argument submitted on June 30, 2011. There is no indication that this material was submitted to the Department in reference to the expungement request. The report stated "[b]ased upon petitioner's negative urine screen, self report and at this time he does not meet criteria for substance abuse counseling." The diagnosis was Alcohol-Related Disorder NOS.

due process because he does not believe he had the opportunity to be heard regarding this information.

In expungement cases, the Board does not do a de novo review of the evidence but looks at whether there is an abuse of discretion. The Board is limited to looking at the record below and is bound by deference to the Commissioner's credibility determinations of witnesses.

The issue is whether the Department has any reasonable basis for its decision. The Department found that petitioner had not met his burden of proof that he no longer posed a danger to children after considering the information petitioner provided and the statutory criteria.

The Department had a reasonable basis based upon concerns over petitioner's alcohol use and the Department's history with the petitioner. The Department did not abuse its discretion in this case. The Department's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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