

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-01/11-60
)
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 expungement statute is found at 33 V.S.A. § 4916c. The statute does not allow the Human Services Board to do a de novo hearing. The statute only allows the Human Services Board to determine whether the Department abused its discretion when it denied petitioner's expungement request.

The petitioner filed for fair hearing on or about January 31, 2011. The parties held a telephone status conference on March 8, 2011 and set a briefing schedule. Based on the Department's request, the briefing schedule was extended. The petitioner did not submit written argument.¹ The decision is based on the record below and the Department's written argument.

FINDINGS OF FACT

¹ Prior to the Board meeting, the petitioner submitted several letters regarding his character.

1. The expungement case arises from the Department's substantiation of physical abuse by petitioner of his son, J.M. stemming from an incident on or about December 19, 1999.

2. On or about December 19, 1999, petitioner and his son J.M., who was then seventeen years old, argued. The argument escalated and became physical. The local police were called because of a report of a family fight with a knife. There was no knife. But during the argument, the son used the threat of a screwdriver to get the petitioner to physically back off from him. The argument continued, and the petitioner took out a loaded weapon (gun). According to the records in the case, petitioner hit J.M. on the side of the head with the gun. The police report indicated that J.M. had visible marks on his neck, head and a chipped tooth.

During the expungement process, petitioner indicated he had no recollection of hitting J.M. with his gun.

3. According to the information petitioner gave the Department, he was convicted of misdemeanor domestic assault, placed on probation, and ordered to undergo anger management counseling. The Department ran a record check but could find no records of a criminal conviction.

4. Petitioner wrote the Department on August 28, 2010 that he wanted his name removed from the child protection

registry so that he could continue to work with children. Petitioner stated that he worked as a counselor with Job Corps for about eighteen months; the records do not indicate when petitioner held this job.

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

6. Petitioner submitted letters from his daughter, T.M., and two friends in support of his request for expungement. T.M. was present during the December 19, 1999 incident. The material in these letters include:

a. T.M. wrote that ten years have passed since the incident and that petitioner's actions are different now. She pointed to petitioner's work as a mentor when he worked for the Job Corps. She wrote that her daughter visits her grandfather regularly and that they have a good relationship.

b. W.O.B. has been petitioner's friend for forty years. He wrote that petitioner was and is an attentive parent, that petitioner has used "tough love", and based on his knowledge, petitioner has not been a threat to his children.

c. R.V. H. wrote a general letter in support of petitioner's character concluding that petitioner is not a child abuser.

7. C.C. met with petitioner on October 18, 2010. C.C. gave petitioner the opportunity to provide materials from the Job Corps about his work as a counselor and mentor for the youth in that program. According to the Commissioner's

Review, petitioner declined to get supporting information from Job Corps believing that with the turnover of staff, no one would be available who worked with him.

C.C. reviewed the materials in the Department's file as well as the documents provided by petitioner. Materials included notes from petitioner's counseling at the Veteran's Administration from 2000 to the beginning of 2002 and investigative materials from the Department's files documenting a report from 1988 substantiating petitioner for physical abuse of J.M.

The 1988 substantiation is not part of petitioner's registry record.

8. The Commissioner's Review of December 13, 2010 denied the petitioner's request for expungement. Petitioner timely appealed to the Human Services Board.

9. The Commissioner's Review documented the six factors as follows:

- a. Nature of Substantiation. Reference to the December 19, 1999 incident.
- b. Number of Substantiations. One substantiation. Then, the review references the 1988 incident in which petitioner chased J.M., grabbed J.M., and struck J.M. with a belt leaving bruises on J.M.'s back, grab marks on his arms, and bruising on left cheek and right ear.
- c. Time elapsed since the substantiation. Eleven years.

d. Circumstances that would indicate a similar incident is unlikely. Reference to petitioner's explanation that he received counseling and would handle the situation differently. Reference that no allegations made against petitioner over the past eleven years. Reference good relationship with five year old granddaughter and that he cared for her for fifteen months while his daughter was in basic training.

e. Activities supporting claim that petitioner changed behavior or circumstances. Reference to VA counseling. Reference to counseling job with Job Corps. The Reviewer added notes about counseling after the 1988 incident and notes from the 2000-2002 VA counseling. Reviewer noted that the 2000-2002 VA counseling was to address anger management issues, that the counselor noted attendance problems and lack of motivation, and that the sessions ended due to lack of participation.

f. References regarding good moral character. The three letters petitioner supplied the reviewer.

10. 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. The Review points to a lack of adequate objective documentation to support petitioner's assertion that he is not a risk to children. The Reviewer points to the treatment records from the 1988 and 1999 incidents as indicative that the underlying anger issues were not fully addressed. The Reviewer's conclusion is as follows:

I have reviewed this matter as indicated above and discussed it with the Commissioner's office. This incident in 1999 was irrefutably violent and could have resulted in significantly more serious injuries to this child. The incident in 1988 involved use of a belt, causing injury to a child. Such conduct cannot be

lightly dismissed. Documentation related to both incidents notes your need to work on anger management. Given considerable additional weight is that information available to the Department suggests you did not appropriately address such issues during the period between 1988 and 2002. You provided little to support your assertions that your circumstances and behavior have changed so that a similar incident is unlikely to occur.

T.Z., the Registry Review Unit Director, approved the decision by C.C.

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 remove employment barriers. He points to the passage of time, in part, as support for seeking expungement.

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. (emphasis added).

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 their 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.

During the registry review process, petitioner pointed to his eleven year history of no complaints or substantiations. He pointed to his work with Job Corps.

Petitioner supplied letters of support from his daughter and two friends. However, before the hearing officer, the petitioner did not respond to the Department's argument and did not explain why he believed that the Department abused their discretion by denying his expungement request.

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 Department looked at all the factors and found that petitioner had not met his burden of proof. 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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