

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-05/11-293
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, substantiating a report of risk of harm to three of his children (D.B., C.B. and N.B.).

The Department moves the Human Services Board to remand petitioner's case for an expungement review and to dismiss the petitioner's challenge of the underlying substantiation as untimely. The petitioner opposes the Motion. The issue is whether the Human Services Board has jurisdiction to hear the case.

DISCUSSION

Factual History

The Department sent the petitioner a notice dated October 29, 2007 entitled "Notice of Substantiation and Intent to Place Name on Registry". The Department informed petitioner that the Department substantiated risk of harm of three of his children (C.B., D.B., and N.B.) based on an

incident occurring during September 2007. The Department informed petitioner of his appeal rights as follows:

If you disagree with this determination and wish to appeal it, you have the right to do so. You must indicate your wish to appeal by November 12, 2007. If you do not indicate your wish to appeal by this date, your name will be entered into the Child Protection Registry.

The Department further informed petitioner that he could appeal in writing, by e-mail or by telephone, and the Department provided petitioner with the contact information he would need to make the appeal. The Department referenced that a pamphlet further explaining petitioner's appeal rights was enclosed.

The petitioner did not appeal by November 12, 2007.

On January 7, 2011, the petitioner's attorney requested an administrative review of the substantiation for risk of harm stemming from an incident on September 10, 2007.

On January 27, 2011, the Registry Review Unit wrote petitioner acknowledging receipt of petitioner's request for expungement.

On February 23, 2011, the Registry Review Unit wrote petitioner that a meeting was scheduled for March 25, 2011 to address the expungement request.

On March 25, 2011, the registry review meeting was held with petitioner's attorney and with the petitioner participating by telephone.

The Registry reviewer sent a Review of Substantiation on April 20, 2011 upholding the substantiation of risk of harm from September 10, 2007. The Review of Substantiation did not address expungement.

Fair Hearing Procedural History

The petitioner filed for fair hearing on May 19, 2011. A telephone status conference was held on July 5, 2011 in which the parties identified the issue as whether the petitioner placed his children (D.B., C.B., and N.B.) at risk of harm on September 10, 2007. Discovery was addressed.

A telephone status conference was held on August 1, 2011 at which the case was scheduled for hearing on September 1, 2011.

On August 23, 2011, the Board received a Motion to Remand (by fax) from the Department noting that the issue of the untimely request for review of the above substantiation was discovered August 22, 2011 during hearing preparation.

A telephone status conference was held on September 1, 2011. Petitioner's attorney indicated that his opposition to

the Department's Motion would be sent out September 2, 2011. Petitioner sent out his opposition on September 2, 2011. The Department did file further pleadings.

Analysis

The Department argues that the petitioner's appeal of the underlying substantiation is untimely, and as a result, the Human Services Board does not have jurisdiction to hear the matter. They ask that the case be remanded to review whether petitioner's name should be removed from the child protection registry through the expungement process.

Challenges to subject matter jurisdiction can be raised at any time including the eve of hearing. Poston v. Poston, 161 Vt. 591 (mem. 1993).

The statutes governing the placement of a person on the child abuse and neglect registry set out specific timelines and procedures for appeal by an aggrieved individual. The initial appeal is directed to the Department through 33

V.S.A. § 4916a(c) (1) stating:

A person alleged to have abused or neglected a child may seek an administrative review of the department's intention to place the person's name on the registry by notifying the department within 14 days of the date the department mailed notice of right to review in accordance with subsections (a) and (b) of this section. The commissioner may grant an extension past the 14-day period for good cause, not to exceed 28 days after the department has mailed notice of the right to review.

If the individual does not request an administrative review, the decision to substantiate is a final decision and the individual does not have further appeal rights. 33 V.S.A. § 4916a(k).

The Board has dismissed fair hearing requests as untimely when the individual has not made a timely request for an administrative review before the Department. Fair Hearing Nos. J-11/08-501 and A-07/09-410.

The Vermont Supreme Court reviewed this issue in the case of In Re Francis Beer, 2010 VT 31 (E.O. April 5, 2010) and affirmed the Board's reasoning that the Board does not have jurisdiction when a petitioner has not made a timely request for administrative review.

Petitioner's request for review of the underlying substantiation was requested more than three years after he was notified of the substantiation and his appeal deadlines. The plain language of the statute creates a cut-off and is controlling.

The essential issue is one of the finality of administrative decisions. As the Court stated in paragraph thiteen of the Beer case:

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 that they may respond accordingly, . . . We require strict adherence to deadlines for filing notices of appeal primarily to serve the goal of finality.

Casella Constr., Inc. v. Dep't of Taxes, 2005 VT 18, ¶6, 178 Vt. 61, 869 A.2d 157 (quotations omitted). To allow petitioner's untimely appeal to go forward here would upset the important principle of finality.

The same principles apply here. The statutes delineate timelines by which an individual must ask for an administrative review of a decision to substantiate child abuse. If an individual does not file a timely appeal, the decision to substantiate is final and no further appeal can be taken. Thus, the Board is without jurisdiction to hear a case in which the individual has not sought timely review below.

Petitioner argues that equitable estoppel applies and that his case should be heard. Petitioner does not argue that he was misled by the Department prior to November 12, 2007, the operative date for requesting review, but that the Department's actions three years later dealing with his January 7, 2011 request is tantamount to equitable estoppel.

There is no need to dwell on why petitioner has not shown the elements of equitable estoppel. Even if equitable estoppel applies, there is still no jurisdiction. In re Francis Beer, supra at ¶ 14.

Petitioner also argues that his request should be treated in the same manner as those individuals who were placed on the registry after January 1, 1992 but prior to September 1, 2007 because the Department considered pattern evidence predating September 1, 2007 in its decision to substantiate petitioner for risk of harm. Petitioner's name was not placed on the child protection registry until after his appeal date of November 12, 2007.

The statutory language is clear. The operative date is the date an individual is placed on the registry. In petitioner's case, his placement on the registry occurred after September 1, 2007. Thus, he was bound by the appeal deadline of November 12, 2007 found in the October 29, 2007 Notice of Substantiation and Intent to Place Name on Registry.

Petitioner's remedy is through an expungement proceeding. The Department is making this option available to petitioner.

ORDER

The Department's Motion to Dismiss is granted.

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