

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-04/13-324
)
Appeal of)

INTRODUCTION

Petitioners appeal the Department for Children and Families' ("Department") denial of their application for a foster care home license. The Department moved for summary judgment based on a statement of uncontested facts. Petitioners oppose summary judgment, disputing certain facts. The primary issue is application of the "abuse of discretion" standard governing Department denials of foster care licenses, given that the factual basis for the denial is partially in dispute. The following facts are adduced from the parties' filings.

FINDINGS OF FACT

1. Petitioners applied for a foster care license in November of 2012. The Department denied their application on April 11, 2013.¹

2. According to the April 11 letter to petitioners, the application was denied on the following grounds, with the facts alleged by the Department in bold:

- a. Regulation 103.1: "Applicants and licensees shall provide complete and truthful information on the licensing application and in the licensing process." **The specific licensing violation is as follows: You did not disclose your full criminal history on the licensing application or in conversation with RLSI. Fingerprint checks revealed twenty-two convictions in [petitioner D.S.'s] history. [Petitioner M.S.] has two convictions of shoplifting (one felony and one misdemeanor), and [another household member] has a (1997) substantiation for physical abuse. On the narrative section of the application form the family only acknowledges "driving without a license and Simple Assault." It should be noted that [petitioner D.S.] did verbally acknowledge to St. Albans district staff three simple assaults and [the] substantiation. St. Albans district staff discussed the incidents and developed a subsequent plan of care.**
- b. Regulation 038.1 and 038.3: "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; and (038.3) Has abused or neglected a child."

¹ Although it is not material to the outcome here, it appears undisputed that petitioners seek a foster care home license to provide care to their grandchild who was involved in a CHINS proceeding.

- c. Regulation 200: "Household members in a foster home must be . . . emotionally mature people of good character as exemplified by past performance and general reputation."
- d. Regulation 201.1: "Applicants shall exhibit healthy patterns of social and interpersonal relationships."
- e. Regulation 202: "Each child-caring adult in the home shall exhibit the ability to be an appropriate role model for children."

The specific licensing violations are as follows: [D.S.'s] numerous criminal convictions include violent crimes such as numerous Simple Assaults, one of them perpetrated on a teenager less than two years ago. Police affidavits related to [D.S.'s] convictions indicate a repeating, ongoing pattern of an inability to control his temper and subsequent violent behavior. This was especially evident in one affidavit describing a situation in which D.S. was shouting "I'll knock your teeth down your throat" to a female with whom Daniel was having an altercation. The police affidavit indicates that D.S. continued to repeat this threat even when the police officer directed him to stop and return to his home.

M.S.'s mother . . . a household member who has been in a caretaking role for R.S., was substantiated by DCF in 1997 for physical abuse of a child.

- f. Regulation 303: "Foster parents shall have a plan or providing appropriate substitute care in their absence for employment or other purposes." **The specific licensing violation is as follows: You have allowed your daughter . . . to have unsupervised time with R.S., the child placed with you. Due to R.S.'s pre-verbal age and high level of vulnerability, coupled with [your daughter's] history of inappropriate care for R.S., you had committed to not allowing unsupervised time between [your daughter] and R.S. as instructed by the St. Albans district social worker. An intake from a**

concerned community member also indicates that you have allowed M.S.'s mother to provide care for R.S. Both RLSI and the district worker had forbidden this due to [her] prior DCF substantiation for physical abuse.

g. Regulation 322: "Foster parents shall cooperate with the child-placing agency in case planning and carrying out the case plan." **The specific licensing violation is as follows: In ongoing case planning, the district determined, as a result of concerns outlined in the recent intake, that R.S. must be moved to another home. You initially refused to cooperate with the DCF case plan by refusing to transport R.S. to the new provider's home as instructed by the district social worker. The district found [D.S.'s] unwillingness to cooperate concerning enough to involve police support in their move of R.S. As mentioned above, you also failed to cooperate with DCF when you allowed your daughter . . . and [mother] to care for R.S. unsupervised, which is not in compliance with the DCF case plan.**

3. The Department's statement of undisputed facts essentially asserts the factual basis for the denial of the license as described above.

4. Petitioners' response to the Department's statement of undisputed facts contests the allegations of their lack of compliance with the transfer of R.S. as well as the lack of supervision of R.S. Petitioners also dispute, with

supporting documentation, that D.S.'s criminal record includes an assault on a teenager.²

5. Petitioners do not otherwise dispute the record of convictions cited by the Department.³ This includes numerous convictions for assault and disorderly conduct, as well as operation of a vehicle with a suspended license, and petit larceny, over a seventeen-year period.

6. Petitioners do not dispute, nor can they, that their application for a license did not include a full disclosure of their criminal record.

7. Rather, petitioners assert, based on "belief," that the Department denied their license because R.S. had already been placed with another adoptive family and that licensure would have impeded this placement. Petitioners do not include any affidavits, records, or other information which would prove or tend to prove this assertion, other than their belief it is the case, tendered through counsel.

8. Petitioner had limited party status in a CHINS proceeding which also concerned R.S. The Superior Court,

² Petitioners attach a court record showing that count one of two counts of simple assault was dismissed by the State on October 17, 2011, while D.S. pleaded guilty to the second count of simple assault.

³ The Department included with its filing a listing of D.S.'s convictions from the Vermont Criminal Information Center.

Family Division, made findings and an order from a July 3, 2013 Disposition hearing. The findings included that "[T]he court does not find that a transfer of legal custody to the grandparents [petitioners] is in the best interests of the child." The court approved the Disposition plan, which recommended adoption of R.S., and denied transfer of legal custody to petitioners.

9. Petitioners appealed the court order. The court has denied their right to appeal based on their limited party status. Petitioners assert that the matter remains on appeal and the Superior Court (Family Division) had no right to deny their appeal.

ORDER

The Department's denial is affirmed.

REASONS

The Board has jurisdiction over appeals of foster care license denials. 3 V.S.A. § 3091(a). 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. Petitioner

must therefore establish that the Department abused its discretion in denying the license. Id.

Here, some of the facts relied upon by the Department in denying the license are in dispute. There is no dispute about the petitioners' criminal convictions nor is there any dispute that petitioners' did not fully disclose their criminal record on their application. There is no dispute that one member of the household was substantiated for physical abuse in 1997.

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. The Department's decision rests on the following regulations, among others:

- Regulation 103.1: "Applicants and licensees shall provide complete and truthful information on the licensing application and in the licensing process."
- Regulation 038.1 and 038.3: "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; and (038.3) Has abused or neglected a child."
- Regulation 200: "Household members in a foster home must be . . . emotionally mature people of good character as exemplified by past performance and general reputation."

- Regulation 201.1: "Applicants shall exhibit healthy patterns of social and interpersonal relationships."

- Regulation 202: "Each child-caring adult in the home shall exhibit the ability to be an appropriate role model for children."

Notably, any of these requirements in and of themselves could form the basis for a license denial. See VT Foster Care License Regulations §§ 010 and 037. Based on petitioners' criminal record alone of assault, disorderly conduct, and petit larceny, it was not unreasonable or arbitrary for the Department to deny their license application under all of the above regulations. Based on petitioners' failure to fully disclose this record alone, it was not unreasonable or arbitrary for the Department to deny their license application under regulation 103.1.

Petitioners have offered in response the sole allegation that the Department's decision was not based on these facts, but rather the intent to see through to completion R.S.'s placement in a different adoptive home. This allegation is wholly unsupported and cannot in and of itself bar summary judgment. See V.R.C.P. 56(c)(1)(A) (Assertions of disputed facts must be supported by a concise statement of facts with ". . . specific citations to particular parts of materials

in the record, including depositions, documents, electronically stored information, affidavits, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials.”).⁴

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). While some facts in the record below may be disputed, under an abuse of discretion standard the undisputed record is sufficient to find in the Department’s favor on summary judgment - there is a “reasonable basis” for the license denial here.

Under these circumstances, the Department’s denial of a foster care license to petitioner 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.

#

⁴ While it cannot be the basis of a claim that petitioners’ appeal is barred under the doctrine of collateral estoppel, at a minimum the findings and order undercut petitioners’ claim that the Department had unstated motives or reasons in denying their license. Even though the order was apparently appealed in some fashion, it was not stayed, nor can it be stayed, on appeal. See V.R.F.P 2(a)(2).