STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,014
	)	
Appeal of	)	

INTRODUCTION

The petitioner has appealed a 1997 decision by the Department of Social and Rehabilitation Services finding that he sexually abused a seven-year-old child when he was sixteen years old. The Department has moved to dismiss the appeal claiming that the Board is collaterally estopped from deciding the matter because it has already been decided by a Vermont family court in the context of a juvenile delinquency petition.

FINDINGS OF FACT

The parties agree that following facts are accurate and pertinent to the motion to dismiss:

1. After receiving a report in May of 1997 of sexual abuse of a seven-year-old boy and conducting an investigation, the Department substantiated the event and found that the abuse was perpetrated by the petitioner, who was then sixteen-years-old. The petitioner was

informed in writing of the substantiation on November 21, 1997.

2. The petitioner was subsequently the subject of a delinquency petition based on the same facts founded by the Department. The petitioner was represented by counsel during those proceedings and an evidentiary hearing was held thereon on June 8, 1998 before a Vermont family court judge. Following the hearing, the Judge declared the petitioner a delinquent child concluding "beyond a reasonable doubt" in a written finding dated July 2, 1998 that the following were the operative facts:

> 1. [The victim] is eight years old.
>
> 2. On or about the time alleged, [the victim] was alone in his father's house when [the petitioner], who was about 8 years older than [the victim] threw [the victim] on the bed forcefully. [The petitioner] said, "The barn door is open." (meaning his fly was open) and he intentionally fondled [the victim's] penis in a lewd and lascivious manner. [The victim] was wearing underpants and the touching was done outside the underwear but through the open fly of his pants.
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> Following the event, [the petitioner] warned [the victim] not to tell anyone about what he did.

3. The petitioner appealed the court's findings on July 31, 1998 alleging error regarding the admission of evidence at the evidentiary hearing. He also appealed the later disposition of the Court placing him in the custody

of SRS. Before the matter could be decided by the Supreme Court, the petitioner turned eighteen and the state moved to dismiss the matter as moot because he could no longer remain in custody as a juvenile.

4. The petitioner did not oppose the motion to dismiss. He did not inform the Supreme Court that the findings might not be moot because they could be used by SRS to support its substantiation if the petitioner should request an expungement hearing. The petitioner's counsel was aware that this could occur from his own experience and he had, in fact, made such an argument to avoid a mootness dismissal in a prior case handled by him. The prior case was dismissed as moot by the Supreme Court without comment on counsel's argument regarding SRS's potential use of the findings. He interpreted that dismissal without comment as meaning that the Court would not entertain such an argument to defeat a claim of mootness in future cases. He, therefore, did not raise it in this case.

5. The appeal was dismissed as moot by the Supreme Court on March 30, 1999. The petitioner has not moved to vacate the findings of the family court.

6. On June 17, 1999, the petitioner requested a hearing to expunge the finding against him of sexual abuse. SRS, asserting that the finding was based on the identical facts found by the family court judge on July 2, 1998, moved to dismiss the matter. The petitioner opposed the motion to dismiss arguing that it is unfair to use those findings against him since they were not subject to judicial review by the Supreme Court due to the mootness dismissal.

ORDER

The matter shall not be dismissed because the Board is required by law to grant or deny the expungement request. However, SRS shall not be required to retry the facts and the Board should adopt the findings of the family court. Based on those findings, the petitioner's request to expunge is denied.

REASONS

When SRS places a person's name in a central registry as the perpetrator of sexual abuse, that person may apply to the Human Services Board for an order expunging the record because the facts relied upon are not accurate or because a reasonable person could not conclude that the facts amounted to abuse as

that term is defined in the registry statute. 33 V.S.A. 4916(h). Because it is the function of the Board, not the family court, to interpret the meaning of abuse in the registry statute, K.G. v. Dept. of Social and Rehabilitation Services, Docket No. 99-346 (June, 2000). The Board must draw its own conclusions about whether the facts presented in any matter before it justify inclusion in the registry. A finding by a Court that a fact meets the definition of abuse in a criminal or juvenile law standard does not automatically mean that it will meet the standard set forth in a registry statute. Once an expungement request is received, the Board must carry out its duty of making this determination.

The Board is also required to find facts based upon certain evidentiary rules. However, it is a well-settled rule in this state that a tribunal is precluded from allowing the relitigation of factual issues which have already been decided in another tribunal provided certain criteria are met. The criteria established by the Vermont Supreme Court are as follows:

(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action;

(2) the issue was resolved by a final judgment on the merits;

(3) the issue is the same as the one raised in the later action;

(4) there was a full and fair opportunity to litigate the issue in the earlier action; and

(5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc.
155 Vt. 259, 265 (1990)

There is no dispute that the first three criteria for preclusion are met. The Department seeks preclusion against the petitioner who was not only a party, but indeed the subject of, the juvenile court delinquency action. The issue was resolved by a final order of the family court. And, the factual issue in the prior case is the same as in this case--namely what sexual activities took place between the petitioner and the younger boy. The petitioner's objection to preclusion relates largely to the last two criteria, whether he had a full and fair opportunity to litigate the issue in the earlier action and whether applying issue preclusion against him would be unfair.

The Supreme Court has set out several factors to consider in determining whether there has been a full and fair opportunity to litigate a matter in the prior forum, including the incentive to litigate, the foreseeability of future litigation, the legal standards and burdens used and the

procedural opportunities available in that forum. Supra at 265. Using these factors as a departure point for analysis of this question, the following must be concluded. First, the petitioner had a great deal at stake in the prior matter, namely his adjudication as a delinquent child with the concomitant Court remedies of custody and detention. He was also aware at the time this was being litigated that his name had been placed in the registry based upon the same facts making it entirely foreseeable that facts found on this issue by the family Court would be controlling in any request to expunge the record. The petitioner had plenty of incentive to aggressively litigate this matter during the prior action.

Secondly, the petitioner had procedural safeguards which are not available to him in this forum. He had the right to and received appointed counsel to represent him. He had a right to all of the rules of civil procedure, including discovery, which he would not have had in this forum. He had evidentiary rules applied in his case which are stricter than those used by the Board which has a "relaxed hearsay rule" thereby granting him greater protections against arbitrary fact-finding. Finally, the standard which the Department had to meet to fulfill its evidentiary burden was higher in the family court which required that a finding be made "beyond a

reasonable doubt" whereas the Board's civil standard only requires the proof of facts by a "preponderance" of the evidence. The petitioner certainly had a full and fair opportunity to litigate the issue in the prior forum, an opportunity which had safeguards attached to it which are superior to those found in administrative Human Services Board hearings.

The petitioner argues, however, that he did not have a full and fair opportunity to litigate this issue in the prior forum because he was not able to obtain judicial review on the merits due to the Court's finding that it was moot. The opportunity for judicial review is not one of the criteria specifically set out by the Vermont Supreme Court to employ issue preclusion. That criteria had been adopted by some courts outside of this jurisdiction as the petitioner points out. However, even if the petitioner is correct that the ability to appeal should be a factor taken into consideration, that factor does not weigh in his favor in this matter. The petitioner did have the right to file an appeal with the Supreme Court and he took full advantage of this right. The petitioner also had the right to oppose the state's request to dismiss the matter as moot and to explain to the Court why the findings should not be allowed to stand even if he was now an

adult subject to SRS custody. The petitioner, even though represented by experienced counsel, did not oppose the motion to dismiss even though his counsel was aware that the case might not have been totally moot. The fact that the Court appeared not to heed such an argument in a prior case is not sufficient reason for failing to raise it in this case. If it could be concluded that the process was ultimately "unfair" to the petitioner, it is largely because the petitioner failed to take advantage of opportunities available to him, not that those opportunities did not exist.

The final analysis in this situation must be whether applying preclusion in this matter is "fair". In addition to the fairness to the petitioner which has been discussed above, this analysis must consider the fairness to the Department and the victim as well. No doubt relitigation of this issue would require the Department to summon the same witnesses who testified over two years ago regarding events which had occurred over a year before that. The likelihood that the witnesses' memories may have faded is all too real. More importantly, the victim himself may be required to testify again and be re-subjected to the same difficulty and humiliation which most often accompanies children (and adults) who are required to testify about sexual abuse. Requiring a

child to talk again and again about the sexual abuse with the possibility of the accompanying trauma is not an acceptable procedure for an agency and appeals Board that has the obligation to protect children from further trauma and abuse, unless it cannot be avoided.

If the petitioner's argument is accepted, virtually all cases involving offenses by teenaged juveniles would have to be retried because mootness due to age is almost always an issue by the time the case comes up on appeal. The better course in this matter would seem to be to ask the Court to reconsider the mootness finding since the Court itself has set the standards for issue preclusion which would require the Board to adopt the findings of the juvenile court.

Since the Board must adopt the juvenile court findings under the Trepanier standard, the Board must consider whether these findings meet the definition of sexual abuse as set forth in 33 V.S.A. 4912. That statutes defines "sexual abuse" as follows:

> "Sexual abuse" consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct,

> sexual excitement or sadomasochistic abuse involving a child.
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> 33 V.S.A. § 4912(8)

The findings of the Court make it clear that the petitioner sexually molested a younger child and engaged in lewd and lascivious conduct with him. As such, it must be concluded as a matter of law that the petitioner was the perpetrator of "sexual abuse" as defined in the above statute. As such, his request to expunge the registry record is denied.

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