

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-04/14-262
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families ("Department") to deny his request for expungement of a substantiation placed in the Child Protection Registry. The sole issue in this matter is whether the Commissioner abused his discretion in denying the request for expungement.

The following proposed Findings of Fact and discussion are based on the record of the expungement denial and the petitioner's testimony and arguments presented by telephone on October 14, 2014.¹

FINDINGS OF FACT

1. The Department substantiated a report received in October of 2005, that approximately a year earlier, when petitioner was fifteen years old, he sexually abused his twelve year old adopted sister. The sexual abuse included

¹ Petitioner, who was given several opportunities to obtain an attorney but was unable to do so, received the documents on which the Department based its decision approximately two months before the telephone hearing.

petitioner fondling his adopted sister under her clothes by touching her breasts, buttocks and genitals, and included digital penetration on at least one occasion. Petitioner self-reported these abuse incidents, and subsequently admitted that his sister had not given him permission to touch her and that she was scared during the incidents.

2. Petitioner went into therapy soon after the Department substantiated the October 2005 report and completed that therapy while he was in the Department's custody in 2005.

3. In a psychological assessment completed in November of 2005, the evaluating psychologist concluded that, at that time, petitioner was "truly struggling with aggressive and sexually deviant urges, but with highly inadequate internalized emotional resources for controlling these impulses[,] and that given his current "level of emotional disorder," it was "unlikely that [petitioner] could adequately resolve these issues and make significant progress in community based placement and therapy." In light of his conclusions, the psychologist recommended residential treatment.

4. Based on the 2005 assessment, petitioner was accepted into the Baird Center Park Street Program ("Park

Street") in January of 2006, where he participated in treatments related to mental health, past childhood trauma and abuse, and sexually offending behaviors for approximately nine months.

5. Records related to petitioner's discharge from Park Street in conjunction with his eighteenth birthday in January of 2007 document that he had taken responsibility, without minimization or excuses, for the abuse of his adopted sister in 2005, and that he was "low risk" for repeated sexual offenses based on the specifics of the abuse in 2005.

6. Park Street records document several of the following measures which were to be implemented and/or which were recommended upon discharge:

- petitioner would be placed in the Spectrum Co-op residential treatment program, which would be a step in his treatment process, and it was recommended that petitioner's treatment team begin planning for continued services after he turned eighteen;
- it was recommended that petitioner continue individual therapy, and if he continued to struggle with his mental health issues, to consider participation in group counseling;
- petitioner should begin having community experiences to improve confidence and self-esteem;
- petitioner should expect to complete, review and modify safety plans for each experience in which he is involved; and

- petitioner should not have any unsupervised time at the computer, and his use should be routinely checked for appropriateness.

7. Notwithstanding the assessment that petitioner was "low risk" for repeated sexual offenses, the Park Street treatment staff recommended that, due to petitioner's "lack of cooperation on the psychosexual evaluation prior to Park Street and his progress in treatment, . . . a psychosexual evaluation be repeated around the time that [petitioner] is discharged from Park Street. This may give a clearer picture of [petitioner]'s risk and whether his problematic personality traits . . . have persisted."

8. Department records show that petitioner did not complete recommended programs at Spectrum, and as a result, he was released from the Department's custody in August of 2007 and his case was closed.

9. Since the 2005 substantiation, petitioner has been the subject of the following unsubstantiated reports to the Department which were documented and considered when the Commissioner reviewed petitioner's request to have the 2005 substantiation expunged:

- a report in January of 2008 was accepted for investigation of risk of harm for sexual abuse based on allegations that petitioner was viewing photographs of naked pre-teen females on the

internet, but, although petitioner declined to be interviewed during the investigation, the Department concluded that he did not expose children in the home to these photographs;

- two reports of risk of harm for sexual abuse in December of 2008 and July of 2013, alleging petitioner had been in the presence of children while on the Child Protection Registry for his 2005 substantiation, were not accepted for investigation because they were primarily based on the existence of the 2005 substantiation, petitioner was a juvenile at that time, he had completed sex offender treatment,² and he had no subsequent substantiations or criminal charges related to sexual reoffending; and
- in May of 2013, a report was accepted for a Juvenile Proceeding Act/CHINS B assessment for risk of physical injury based on allegations that petitioner behaved inappropriately, including joking too much and trying to make out with his wife while they were visiting their four-month old daughter, who had meningitis, at the hospital, as well as allegations that petitioner screamed and yelled at the baby when she cried, but the Department concluded that petitioner and his wife were providing appropriate care for their children and closed the case.

10. In support of his case during the Commissioner's Review, petitioner submitted a letter from a good friend stating that, based on his observations, he does not believe petitioner to be at risk of committing sexual offenses.

² With respect to completing sex offender treatment, the Department's records include a July 3, 2006 report in which a social worker reported that petitioner had "completed Sex and Sexuality and understood what he had been taught." However, in a subsequent report dated November 1, 2006, the same social worker noted that while petitioner "was consistently able to identify his cycles of abuse . . . [and] high risk behaviors and situations," and he "was able to show and (sic) intellectual understanding of the skills, . . . he tends to fall short in implementing them into his everyday life in the moment of need."

Petitioner also submitted a copy of his Licensed Nursing Assistant ("LNA") license to the Commissioner.

11. During a telephone hearing, petitioner offered the following testimony and arguments in response to the Department's denial of his expungement request:

- he acknowledged that he made a mistake when he sexually abused his adopted sister in 2005;
- when he aged out of the treatment program in Rutland [Park Street}, he went straight into Spectrum Youth and Family Services [also referred to as the Spectrum Co-op], and lived at the Co-op "for quite some time."
- he has done everything that has been asked of him, he has been around children, and he has not reoffended;
- he was told that when he turned eighteen that his case would be expunged;
- he did not find out he was on the Child Protection Registry until he applied for a job as a LNA;
- he is now married and he and his wife have three children, including a baby;
- he believes he has made a significant amount of change in his life, and that he has rehabilitated himself through the counseling, medications, and PTSD treatment he has previously received;
- he emphasized that he is trying to improve his life, and the 2005 substantiation is the only thing holding him back, as it has prevented him from getting a job as an LNA and from enlisting in the military;
- he acknowledged that he is not currently receiving counseling or therapy;

- he asserts he is not receiving counseling or therapy because (a) the staff at the Spectrum Co-op told him that he only needed to continue counseling for PTSD, and that he confirmed this in a telephone conversation after he left Spectrum, but that he was unable to obtain any documentation of the conversation, and (b) he added that Spectrum told him that he did not need counseling, but he could continue with treatment if he wanted to do so;³ and
- he concluded that he has not continued counseling because he has been doing relatively well since then.

12. There is no evidence or credible testimony that petitioner completed the counseling and treatment recommended when he was discharged from Park Street, or that he has undergone a psychosexual evaluation since that time.

13. By letter dated March 26, 2014, the Commissioner informed petitioner of the decision to deny his request for expungement of the 2005 substantiation. The denial was based on an analysis which referred to all of the above evidence and evaluated it with reference to the statutory considerations: the nature and number of substantiations, the amount of time elapsed since the substantiations, the circumstances of the substantiations that would indicate whether a similar incident would be likely to occur, any activities that would reflect upon the person to have changed

³ As the testimony in this paragraph is clearly in conflict with information fully documented in Department records, and in any event is offered without any documentation that is reasonably required to support such assertions, it is not found credible.

behavior or circumstances (such as therapy, employment or education), and references that attest to the person's good moral character.

14. The Commissioner's decision explained that the request was denied because (1) petitioner's conduct in 2008 and 2013 indicated ongoing mental health issues, including sexually offending behaviors, and raised concerns that previously completed treatments for those issues had not been successful, and (2) he had not provided any professional documentation that he had received any on-going psychiatric or mental health care, that he had successfully completed therapy as recommended when he was discharged from Park Street, or that he had completed a psychosexual evaluation which established that he no longer poses a risk to children.

ORDER

The Department's decision denying petitioner's expungement request for the 2005 substantiation is affirmed.

REASONS

Expungements may be requested according to the following statutory timeframe:

(a) A person whose name has been placed on the registry prior to July 1, 2009 and has been listed on the registry for at least three years may file a written

request with the commissioner, seeking a review for the purpose of expunging an individual registry record. A person whose name has been placed on the registry on or after July 1, 2009 and has been listed on the registry for at least seven years may file a written request with the commissioner seeking a review for the purpose of expunging an individual registry record. The commissioner shall grant a review upon request.

. . .

(d) A person may seek review under this section no more than once every 36 months.

33 V.S.A. § 3916c.

There is no dispute that petitioner was eligible to file a request for expungement of the 2005 report of sexual abuse because the report was substantiated more than three years ago.

Timely requests for expungement are governed by the criteria set forth in the statute as follows:

(b) The person [seeking expungement] 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.

33 V.S.A. § 4916c.

Thus, the petitioner is required to demonstrate to the Commissioner that a reasonable person would believe he no longer presents a risk of harm to children. The Commissioner is required to consider the petitioner's request with regard to the above factors and to determine whether petitioner has met his burden.

In this case, the Commissioner considered the evidence before him, including records of the Department and the petitioner's own submissions and statements during the review. The Commissioner analyzed that information in light of the factors required by the above statute and concluded that petitioner's substantiation should not be expunged at this time. The Commissioner's decision was based in part on consideration of the unsubstantiated reports of risk of harm for sexual abuse⁴ and physical abuse⁵ that were filed since 2005, and in large part on the fact that petitioner did not

⁴ While the Commissioner considered the reports of risk of harm for sexual abuse in December of 2008 and July of 2013, the Review decision

provide documentation that he had completed recommended therapy and treatment after being discharged from Park Street in 2006, and that he had not undergone a psychosexual evaluation as recommended.

A person aggrieved by the Commissioner's decision to deny expungement may appeal to the Human Services Board.

33 V.S.A. § 4916(e). The Board's standard of review is specifically prescribed by statute:

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.

33 V.S.A. § 4916c(e).

dated March 26, 2014 and the reviewer's notes indicate that the Commissioner did not rely upon those two reports as reasons to deny petitioner's expungement request. However, the Commissioner did rely on the report of risk of harm of sexual abuse in January of 2008 because it involved allegations of viewing child pornography on the internet, and petitioner's treatment team had specifically recommended that petitioner not have unsupervised time at a computer when he was discharged from Park Street in November of 2006. While the Department concluded no sexual abuse occurred because petitioner had not exposed children to internet pornography, the likelihood that petitioner accessed child pornography for his own personal viewing raised questions about the success of his sex offender treatment at Park Street.

⁵ The Commissioner relied on the report of risk of harm for physical abuse in May of 2013 because, while the Department found no evidence of neglect or abuse, petitioner's behaviors while visiting his daughter at the hospital may have been due to his untreated mental health issues. The Commissioner concluded that the report raised concerns regarding petitioner's lack of continued treatment for his documented mental health issues and related sexually offending behaviors.

On appeal to the Board, the petitioner must show that the Commissioner abused his discretion in deciding that he had failed to demonstrate that petitioner no longer posed a risk to children. 33 V.S.A. § 3316c(e). The petitioner has raised a number of arguments in support of his expungement request, among them a strong argument that he has made significant changes in his life by working, getting married and starting a family.

However, petitioner acknowledged that he is not currently receiving counseling for his mental health issues that are well documented by the Department's records. More importantly, in light of the documented recommendations for ongoing treatment when he was discharged from Park Street, his testimony that staff at the Spectrum Co-op told him, alternatively, that he only needed to continue counseling for PTSD, or that he only needed counseling if he himself wanted to continue treatment, cannot be assigned any weight.

It is the lack of documentation of recommended treatment, as well as petitioner's recent suggestion, notwithstanding evidence to the contrary, that he does not need such treatment, that support the Commissioner's decision to decline to expunge petitioner's substantiation at this time. If the petitioner is willing to undergo a psychosexual

evaluation as recommended, he can do so and try to persuade the Commissioner in the future that he is no longer a risk to children.⁶ He cannot, however, persuade the Board to find that the Commissioner abused his discretion in the absence of such an evaluation or some other professional assessment establishing that an evaluation is not necessary.

The petitioner has made no persuasive argument that the Commissioner has failed to consider all the evidence, has relied on evidence that was not accurate, or did not analyze salient factors under the statute, all important considerations in a review for abuse of discretion. See, e.g., Fair Hearing No. A-01/11-12. The Commissioner's review decision in this case acknowledges and discusses all of the relevant evidence and reaches a conclusion based on that evidence that the petitioner had failed to show he no longer poses a risk of harm to children. The decision makes it clear that the Commissioner referenced and evaluated the evidence in light of the salient factors set forth in the statute at 33 V.S.A. 4916b(c). Therefore, it cannot be concluded that the Commissioner's decision to deny petitioner's request for expungement was an abuse of

⁶ As noted in the March 26, 2014 decision from the Commissioner, petitioner may re-petition for expungement on August 5, 2016.

discretion. As such, the Department's decision is consistent with applicable law, and it must be affirmed by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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