

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-06/14-503
)
Appeal of)

INTRODUCTION AND PROCEDURAL BACKGROUND

Petitioner appeals the decision by the Department for Children and Families ("Department" or "DCF") in 2014 substantiating a report that he placed his child, C., at risk of harm for physical abuse during an altercation with his wife, A. The issue is whether the Department's decision is supported by a preponderance of the evidence.

By letter dated June 2, 2014, the Department informed petitioner that it had upheld the substantiation of him for placing his child at risk of harm, and petitioner timely appealed the Department's decision.

Following a series of telephone status conferences, petitioner filed a pre-hearing motion on October 9, 2014, in which he argued that the Department's substantiation should be overturned without a hearing because the substantiation was not based on "accurate and reliable" information. The Department filed a response on October 31, 2014, and argued that it would be premature to overturn the substantiation

prior to introducing its evidence at hearing. As appeals of substantiations are *de novo* for the purpose of hearing the Department's information and weighing whether it is sufficient, petitioner's motion was denied by a preliminary ruling dated November 19, 2014.

An evidentiary hearing was held on November 24, 2014, during which testimony was heard from petitioner and a Department Investigator ("DCF Investigator"). The Department introduced eight exhibits, which were stipulated to or admitted without objection, and petitioner introduced two exhibits which were admitted without objection.

Following the hearing, the Hearing Officer determined that the Department's exhibits, and in particular a transcript of the deposition of petitioner's wife about the incident, should not have been admitted into the record on the stipulation of petitioner. Petitioner was not represented by counsel at that time and did not know that he could have objected to the Department's exhibits as hearsay. During a status conference on February 10, 2015, the Hearing Officer advised the parties of his determination and his preliminary decision not to admit the deposition transcript or other exhibits into the record. At that time, the Department requested that another hearing be scheduled so the

Department could subpoena petitioner's wife to testify. The Department's request was granted over petitioner's objection.

The matter was subsequently continued several times at the request of petitioner, in part because he had retained counsel who requested additional time to review the case.

Another evidentiary hearing was held on April 30, 2015 during which testimony was heard from petitioner's wife. At the conclusion of the hearing, counsel for the Department and petitioner stated that they had no objection to the admission into the record of the eight exhibits previously introduced by the Department and the two exhibits previously introduced by petitioner.

Petitioner submitted his "Post-Hearing Memorandum and Motion to Dismiss Substantiation" ("Petitioner's Post-Hearing Memorandum") to the Board on May 15, 2015. The Department submitted "DCF's Memorandum Regarding Substantiation" ("DCF's Post-Hearing Memorandum") on June 10, 2015.

This decision is based on evidence adduced from the testimony of petitioner, petitioner's wife and the DCF

Investigator during the hearings and the exhibits admitted into the record.¹

FINDINGS OF FACT

1. Petitioner and his wife, A., are the parents of two children currently ages six and four.

2. At the time of the incident in November of 2013, petitioner's younger daughter, C., had recently reached the age of two in September. Petitioner's older daughter, whose name also starts with "C," was not involved in the incident. Accordingly, all references to "C." herein refer to petitioner's younger daughter.

3. At hearing on November 24, 2014, petitioner testified as follows:

a. On November 7, 2013, petitioner and A. engaged in an argument about petitioner's addiction issues and whether he was still using opiates;

b. Petitioner and A. were in their home during the argument and C. was present;

¹ The Department's exhibits are: (1) December 19, 2013 Deposition of [A.], State of Vermont v. [Petitioner], Docket No. 1270-11-13 Frcr; (2) DCF Intake Report dated November 15, 2013; (3) DCF Summary of Investigation Activities completed November 29, 2013; (4) January 14, 2014 DCF Case Determination Report; (5) DCF Review of Substantiation dated June 2, 2014; (6) Docket Page, Vermont Superior Court, Franklin Criminal Division, Docket No. 1270-11-13; (7) Offense Summary, Docket No. 1352-11-13 Frcr; and (8) Affidavit of Trooper Riggan of the Vermont State Police. Petitioner's exhibits are: (1) DCF, Family Services Division Assessment of Danger and Safety dated November 18, 2013; and (2) DCF, Family Services Division Risk Assessment dated December 18, 2013.

c. petitioner acknowledged that he was upset with A. because she had confronted him with drug test results she told him were positive but were in fact negative;

d. petitioner acknowledged that he swung his baseball cap in her direction and stated "if she says it hit her on the back of the head, I'm not going to dispute that . . ."; and

e. petitioner admitted that he grabbed A.'s arm while she was leaving the house with C. in her arms.

4. During a demonstration of the incident by petitioner and his father at the November 24, 2014 hearing, during which petitioner was playing the role of A., petitioner testified, "she used her arm, swing at me, let me leave, let me leave . . . let me leave. She tries to hit me, I grab her arm. . ." It is found that petitioner's spontaneous statements of "let me leave" while he was playing the role of A. are evidence that he was physically restraining A. during the incident.

5. Although petitioner asserted that he had no actual contact with A. when she fell to the deck, he did not dispute that she fell while holding C. after he let go of A.'s arm.

6. Petitioner testified to his belief that there was no risk of serious bodily injury to C. because there were no stairs or sharp or hard objects where A. and C. fell on the deck. Given the evidence of the nature of A.'s fall, petitioner's testimony is assigned no weight.

7. In response to a question regarding whether C. had the ability to mitigate the risk of injury to herself when her mother fell, petitioner testified: "she could put her arms up or her hands out and maybe she would end up with a jammed wrist or possibly a broken arm, but as I understand it, [the Department's] definition of serious bodily harm means multiple fractures, head trauma, internal organ injury, and I understand this risk to be very, very low."

8. Petitioner also testified that he did not interfere with A.'s ability to leave their house during the argument, that he only asked her to stay, and then grabbed A.'s arm in response to her slapping him. Petitioner's testimony is not found to be credible because it conflicts with the credible testimony of A. at hearing and her testimony at the deposition on December 19, 2013.

9. A. testified at hearing on April 30, 2015 and her testimony is found to be credible.² Based on A.'s testimony at hearing and her testimony in her deposition on December 19, 2013, it is found as follows:

² A.'s testimony was based primarily on her recollection of the incident, but with respect to some details her memory was refreshed by the transcript of her deposition testimony on December 19, 2013 describing events on November 7, 2013.

a. On November 7, 2013, A. and petitioner engaged in an argument about petitioner's addiction issues and whether he was still using opiates;

b. Petitioner and A. were in their home during the argument and their younger daughter, C., was present (earlier in the morning A. had dropped off their older daughter at school);

c. A. confronted petitioner with drug test results she told him were positive but were in fact negative;

d. A. also read a quote from a book about addiction, after which petitioner grabbed the book out of her hands, ripped it and threw it;

e. A. then decided to leave the residence and began putting C.'s shoes and coat on;

f. while A. was kneeling down to help C. put on her shoes and coat, petitioner hit A. over the back of her head with his baseball cap;

g. when petitioner ripped and threw A.'s book and then hit A. with his baseball cap as described in subparagraphs d and f, above, he was acting with rapidly increasing anger and physical aggression;

h. as A. was leaving the house through the back door and onto the wet deck with C. in her left arm, petitioner grabbed A. by the sleeve and tried to pull her back into the house;

i. while A. was standing on the wet deck and petitioner was standing in the doorway, they engaged in a "tug-of-war" for a few seconds during which petitioner was "pulling and wanting [A.] to go one way and [A.] was

pulling away and wanting to go the other way..."³ and which ended when petitioner suddenly let go;

j. when petitioner grabbed A., physically restrained her from leaving, and then abruptly let go of her, he was acting in anger and with reckless disregard of the risk of injury to C.;

k. A. slipped and fell on the wet deck with C. in her arm because petitioner physically restrained A. and then abruptly let go of her;

l. A. was holding C. in her left arm when she fell on the deck and landed on her left side, and after she and C. fell they were lying next to each other on the deck;

m. A. did not have any control over how she and C. fell to the deck;⁴

n. when A. got up and picked up C. off the deck there was wetness and dirt on the side of C.'s face, demonstrating that C.'s face hit the deck;

o. C. faced a significant danger that she would suffer a serious physical injury when A. fell as a result of petitioner's actions;

p. although C. was crying after the fall, A. did not observe that C. had sustained any bruises or injuries from the fall; and

³ The Board notes that petitioner's testimony in paragraph 4, above, corroborates A.'s testimony that petitioner was trying to pull her and C. back into the house while she was trying to leave and further shows that petitioner was physically restraining A. at that point during the incident.

⁴ Petitioner asserts that "[d]uring testimony [A.] stated that though she fell onto the same side as she was holding her child, she automatically shifted the child to avoid injury to the child." Petitioner's Post-Hearing Memorandum at 3. Petitioner's assertion is rejected as there is nothing in the record reflecting that A. testified she shifted C. during the fall.

q. A. was angry about falling on the deck with C., so after she stood C. up, A. slapped petitioner in the face and then picked up C. and walked over to her in-laws' house.

ORDER

The Department's decision to substantiate petitioner for risk of harm is affirmed.

REASONS

The Department for Children and Families is required by statute to investigate reports of abuse, neglect or risk of harm of children and to maintain a registry of all investigations unless the reported facts are unsubstantiated.⁵ 33 V.S.A. §§ 4914, 4915, and 4916.

The pertinent subsections of section 4912 of Title 33 define abuse and harm as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at *substantial risk of harm* by

⁵ Petitioner argued that a hearing should not have been held in this case because the Department did not follow its statutes and policies for investigations. Petitioner suggested the investigation was inadequate because the DCF Investigator did not visit the home of petitioner's parents or interview his parents (with whom the children resided part-time following the incident). However, the DCF Investigator credibly testified that she did not interview petitioner's parents or visit their home because they did not witness the incident and it did not take place in their home. In any event, petitioner's argument is rejected because even if there were inadequacies in the Department's investigation, petitioner's due process interests were protected through the hearings held *de novo* before the Board. See Fair Hearing No. S-12/13-915.

the acts or omissions of his or her parent or other person responsible for the child's welfare.

. . .

6) "Harm" can occur by:

(A) Physical injury or emotional maltreatment.

. . .

11) "Physical injury" means death or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

. . .

(14) "Risk of harm" means a *significant danger that a child will suffer serious harm other than by accidental means*, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.

33 V.S.A. § 4912 (emphasis added).

The legal standard in applying the above statute is whether the petitioner's actions were "egregious" enough to lead a reasonable person to conclude that he placed his daughter at substantial risk of harm. Fair Hearing No. Y-11/11-661, *citing In re R.H.*, 2010 VT 95 (2010); and *In re D.McD.*, 2010 VT 108 (E.O. 2010).⁶

⁶ Petitioner argues that "even if gross negligence is found, the issue remains whether placement on the registry is appropriate given this one incident[,]" and cites Fair Hearing No. A-08/08-384 as supporting precedent. Petitioner's Post-Hearing Memorandum at 4. However, this Board decision was reversed by the Vermont Supreme Court in *In re R.H.*, 2010 VT 95 (2010), which the Board now looks to for guidance in the application of Policy 56 to cases such as this one.

The policy implementing the above statute is found at Family Services Policy No. 56, effective July 1, 2009⁷

("Policy 56"), and provides in relevant part:

Risk of harm is substantiated when the person responsible for the child's welfare:

1. Engaged in a single, egregious act that resulted in significant risk that the child could have been seriously physically injured.

The Vermont Supreme Court has ruled that the Department's policies and/or regulations provide statutory interpretation when determining whether risk of harm has occurred. Fair Hearing No. B-01/12-69, *citing In re R.H.* at ¶ 31. See also *In re D.McD.* at ¶ 8 (instructing that "the Board must apply DCF's policy on single egregious acts to determine if petitioner placed his children at risk of harm.").⁸

Policy 56 incorporates the Court's directive that the applicable statutes do not allow for consideration of the parent's circumstances and conduct, including rehabilitative measures, after an alleged egregious act. Policy 56 at 6 ("steps taken by the individual to reduce or eliminate the risk" will not be considered if "the risk of harm is due to a

⁷ Policy 56 has been revised effective July 1, 2015. The language regarding risk of harm for serious physical injury is not materially different from the policy issued in 2009.

⁸ The policy that was in effect at the time of the events leading to the appeals in *In re R. H.* and *In re D.McD.*, Policy 55, has been replaced by Policy 56.

single egregious act"). Thus, "[u]nder the statutory scheme in place, the only question before the Board [is] whether a reasonable person would believe that the child was placed at a substantial risk of harm due to the petitioner's actions on the date in question." *In re D.McD.* at ¶ 7, *citing In re R.H.* at ¶ 22.

To answer that question, Policy 56 identifies specific factors that must be present to affirm a substantiation: (1) a parent or a person responsible for the child's welfare committed the alleged act; (2) the act was egregious; (3) there was a significant risk that child could have been physically injured as a result; and (4) the physical injury would be serious. Policy 56 at 5; *In re R.H.* at ¶ 28.

There is no dispute that petitioner is C.'s parent, and petitioner does not appear to dispute, nor could he reasonably do so, that there was a significant risk that C. could have been physically injured during the incident.⁹ However, petitioner vigorously disputes that his conduct during the incident was egregious and that C. could have suffered a *serious* physical injury when A. fell on the deck.

⁹ Petitioner acknowledged, as set forth in paragraph 7, above, that if C. had "put her arms up or her hands out" during the fall, "maybe she would end up with a jammed wrist or possibly a broken arm. . .").

At hearing petitioner attempted to contrast his actions with an example of an egregious act set forth in another DCF policy which provides, "[e]xamples [of] egregious acts include, but are not limited to: . . . DUI with children in the car with excessive speed or accident resulting;. . ."

Policy 51 (Screening Reports of Child Maltreatment, effective 8/22/11) at 10. Petitioner argued that in this example the driver was less capable of mitigating a risk of harm from an accident because of speeding and inebriation, and asserted that unlike such a driver, A. was fully capable of mitigating the risk of injury from the fall. Petitioner argued that because he had no contact with A. as she fell, she was just as capable of mitigating the risk of injury to her daughter from the fall as she would have been if she had walked out any door unimpeded onto an icy deck. Petitioner's argument is rejected because it is nothing more than an attempt to shift the responsibility for A.'s fall from petitioner to A., and it does not address the question of whether *petitioner* acted egregiously when he caused A. and C. to fall.

The evidence in the record unambiguously shows that petitioner rapidly became angry and physically aggressive towards A. during their argument. He hit A. over the back of her head with his baseball cap and physically restrained her

against her wishes while she was holding their child with one arm. Then, acting with reckless disregard for the safety of C., petitioner abruptly let go of A. while she was pulling against him, causing A. and C. to fall suddenly onto the deck. Under these circumstances, the Board must conclude that petitioner's actions were egregious.

The last question is whether C. could have been seriously injured during the incident. Petitioner argued that the absence of stairs and sharp or hard objects where A. and C. fell posed less of a risk of injury than falling on just the deck. That argument is not convincing here. If a two-year old struck her head hard enough to sustain a serious injury during a fall, it would make little difference whether she hit a hard object on the deck or the equally hard deck.

Petitioner's additional arguments that C. could use her arms to protect herself from serious injury, and that a two-year old has the "physical structure to endure falls, trips and slips"¹⁰ are equally without merit. As previously described, petitioner's abrupt release of A. caused her to fall suddenly on her left side, with C. in her left arm, showing she had lost control of how she and C. landed on the deck. While it is reasonable to conclude that a two-year old

¹⁰ Petitioner's Post-Hearing Memorandum at 3.

could use her arms to safely cushion her own fall if she lost her footing, it is not reasonable to conclude that she could effectively react to a sudden uncontrolled fall in her mother's arms. The greater height, along with the momentum of the fall as a result of petitioner's abrupt release of A., would overwhelm the ability of any two-year old to protect herself from hitting her head and suffering a serious injury. Nor is it reasonable to conclude that a child, feeling herself falling while being held by a parent, is going to extend her arms to cushion the fall. Instead, the child would hold more tightly onto her mother and not extend either arm, increasing the likelihood that she would directly strike her head or her back on the hard deck. Under those circumstances, it is certainly not reasonable to conclude that a two-year old child has the physical attributes to withstand such a fall without serious injury. Accordingly, it must be concluded that C. faced a significant risk of serious physical injury as a result of the incident.

Finally, petitioner has suggested that his daughter was not at risk of harm of a serious injury because she was essentially unharmed by the fall. While it is very fortunate for all concerned that C. escaped serious physical injury during altercation between petitioner and A., given the

nature of the incident, the fact that C. was unharmed is not a basis for finding no *risk* of harm of such injury. See Fair Hearing No. V-02/10-92 at 7.

Based on the foregoing, the Board must conclude that the Department has met its burden of showing, by a preponderance of the evidence, that C. faced a significant danger that she would suffer a serious physical injury when A. fell, and that harm would have resulted from other than accidental means. Therefore, the Board must affirm the Department's decision to substantiate petitioner for placing his child at risk of harm. 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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