

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-12/14-1221
)
Appeal of)
)

INTRODUCTION

Petitioner appeals his substantiation by the Vermont Department for Children and Families ("Department") for sexual abuse of a minor. The sole issue is whether collateral estoppel should result in summary judgment for the Department. The following is based upon the written submissions of the parties, with the record closing in November of 2015.¹

FINDINGS OF FACT

1. The relevant facts of this appeal revolve around events that occurred February 27, 2014. On that day, petitioner reportedly grabbed the breasts and buttocks of a minor child (age fifteen) through her clothing while they were in a convenience store. Petitioner was acquainted with the minor child through her mother.

¹ Review of the parties' submissions was inadvertently delayed. Given that this appeal has been continued and delayed on numerous occasions at petitioner's request and/or due to his failure to be available for status conferences, it cannot be concluded that petitioner has been prejudiced by the delay.

2. This incident was reported to the Department in March of 2014, and an investigation commenced. Petitioner was charged and subsequently arraigned (on March 24, 2014) with Lewd and Lascivious Conduct with a Child.

3. In the meantime, petitioner was substantiated by the Department for sexual abuse, based on the same allegations. A Commissioner's Review was completed on November 26, 2014, upholding the substantiation for sexual abuse, based on the finding that petitioner "followed [the minor child] into a convenience store while . . . intoxicated, and grabbed her breasts and buttocks over her clothes against her will."

4. On March 26, 2015, the charge against petitioner was amended to "[PETITIONER], IN THE COUNTY OF FRANKLIN, AT ST. ALBANS, ON OR ABOUT FEBRUARY 27, 2014, ENGAGED IN LEWDNESS, TO WHIT, GRABBED THE BREASTS AND BUTTOCKS OF [THE MINOR CHILD] . . . IN VIOLATION OF 13 V.S.A. § 2362(A)(8)."

5. On March 30, 2015, petitioner entered a plea of guilty to the above amended charge. This plea was accepted by the court and found to have a factual basis.

ORDER

The Department's decision is affirmed.

REASONS

The Department is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916. Appeals from a substantiation determination are heard de novo and the Department has the burden of establishing the substantiation by a preponderance of the evidence. See *In re R.H.* 189 Vt. 15, 14 A.3d 267, 2010 VT 95, at ¶16; *In re Selivonik*, 164 Vt. 383, 670 A.2d 831 (1995); Fair Hearing No. B-01/12-69.

The pertinent sections of the statute (in effect at the time) are 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 the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

33 V.S.A. § 4912.²

The following definition of "sexual abuse" was in effect at the time of the events in question:

² Substantial amendments to the statute were effected July 1, 2015. See Act No. 60 (2015-2015 VT Legislative Session). These changes would not, in any event, affect the outcome here.

(8) "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.

33 V.S.A. § 4912(8) (as amended by Act No. 168 of 2007-2008 Legislative Session, May 24, 2008).³

The Department has also adopted policies governing abuse and neglect allegations. The policy in effect at the time included the following as to sexual abuse:

Any person may be substantiated for sexually abusing a child. Sexual abuse is substantiated when a reasonable person would believe that one of the following has occurred: sexual molestation or exploitation of a child including, but not limited to, incest, prostitution, rape, sodomy, any lewd and lascivious conduct involving a child or 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 sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

Sexual abuse by a person age 18 or older can be substantiated if:

- The contact was incestuous;

- the perpetrator was entrusted to care for the child by the authority of the law or the child is the

³ This definition of sexual abuse was, if anything, expanded in the amendments effected July 1, 2015. See Act No. 60, *supra* note 3, §3.

perpetrator's child, grandchild, foster child, adopted child or stepchild;

- the child is being exploited, or prostitution is involved;
- a significant difference in age, size or developmental level is used to victimize the child; and/or
- force, threat, or coercion is involved; or the victim did not have the ability or opportunity to consent.

DCF Policy 56 (Substantiating Child Abuse and Neglect), at pp. 5-6 (Eff. 7/1/09).⁴

The sole issue in dispute is whether petitioner's plea of guilty to the charge of lewdness and in particular "grabbing the breasts and buttocks" of a minor child establishes, without the need for further hearing, the Department's substantiation under the principle of collateral estoppel, also known as issue preclusion. Collateral estoppel - long applied and recognized by the Board - may be appropriate under a five-part test:

- 1) preclusion is asserted against one who was 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.

⁴ In conjunction with the 2015 statutory amendments, this policy was superseded by a new policy effective July 1, 2015.

In re P.J., 2009 VT 5, ¶ 8 (citing *Trepanier v. Getting Organized*, 155 Vt. 259, 265 (1990)).

Petitioner was obviously a party to the criminal proceeding and it was resolved - via his own plea agreement - with a final judgment on the merits, meeting prongs one and two of the *Trepanier* test. Petitioner had counsel for this proceeding and his plea was accepted by the court - thus, he had a "full and fair" opportunity to litigate the issue and applying preclusion here is fair. The remaining question is whether the issue in this appeal is "the same" as that in the criminal case.

That test is clearly met here. Petitioner pleaded guilty to a charge with the same underlying facts which formed the basis of his substantiation - that he grabbed the breasts and buttocks of a minor child on the date in question. Moreover, petitioner agreed that he committed the act of "lewdness" under 13 V.S.A. § 2632(a)(8) ("A person shall not . . . engage in prostitution, lewdness or assignation.") (falling under Chapter 59 of Title 13, Lewdness and Prostitution). The issue here is whether petitioner's conduct "leads a reasonable person to believe that the child had been abused or neglected." *In re P.J.*, *supra*, ¶ 12. Petitioner's acknowledged "lewdness" and his conduct towards a minor child

fall into the definition of "sexual abuse" contained in the statute and Department policy. Thus, the issue is the same here as it was in his criminal case, and he is precluded from litigating it again under the doctrine of collateral estoppel.

For these reasons, the Department's substantiation of petitioner for sexual abuse must be affirmed by the Board. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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