



reported to have said that on a daily basis, the petitioner played games which involved exposing and touching many body parts including the genital areas. These games involved himself, his brother and a friend. Reportedly the petitioner on at least one occasion sucked on his penis and asked him to have intercourse with her but he refused. These "games" were allegedly played with his younger brother and another friend as well. He reportedly expressed a desire to kill the petitioner and stated that he had suppressed the information until sexual abuse came up in a school health class. (The petitioner objected to the admission of these reports to prove their truth because of their hearsay nature. The fifteen-year-old was not present to personally testify as to these alleged events. The Department requested that the worker's testimony be accepted for the truth due to the hardship and trauma of having an abused child repeat his story and confront his abuser.)

4. On November 6, 1990, following the above interview, R.P.'s younger brother, S.P., who was then twelve years old, was also interviewed by the state trooper in the presence of his mother and the social worker. No notes or tapes of that meeting were introduced but rather the social worker again offered her summary of the testimony. She reported that the younger boy recalled games being played with blindfolds involving touching the genital parts but does not remember any further activity such as oral genital contact. (The

same objections were raised by the petitioner as to the admission of this evidence as in paragraph three, and the same justification for relaxing the hearsay rule was offered by the Department.)

5. On November 8, 1990, an interview of R.A., the brother's friend who was allegedly involved in the games and who is now fifteen years old, was conducted by the state trooper with the social worker and a school guidance counselor present. The boy had not had an opportunity to talk with his friends and was shocked when told why he was there and was embarrassed and reluctant to talk about the events. No transcript or tape recording were offered regarding that meeting but the social worker summarized his testimony (subject to the same hearsay objections as before). She reported that the boy recalled being tricked by the petitioner through games into having his stomach and penis rubbed and was touched by her breasts. He did not recall any licking or sucking.

6. Based on conversations with the school guidance counselor, the social worker believed that R.P. has been having difficulty in school for several years and is in an alternative school. She was told that he had tried to harm himself by driving into a tree and running into the road. By report at his interview he claimed that his problems are a result of these events. However, the worker believed from speaking with the guidance counselor that R.P. has been in therapy for many years as a result of verbal and physical

abuse by his alcoholic father. The social worker admitted that this could also be a source of his anger.

7. The petitioner herself, who is now twenty but at the time of the alleged events was fifteen, agreed to be interviewed by the state trooper with the social worker present on November 5, 1990. She admitted that she and the boys, especially R.P., used to play games which involved showing and touching the genital areas and her breasts. She denies that any licking or sucking of body parts ever took place and she characterized the games as mutual exploration agreed to by herself and the boys.

8. The social worker, who investigated this case has a bachelor's degree and over seven years of experience as a social worker. She has had over 150 hours of training in identifying sexual abuse and has handled over 250 child sexual abuse cases where perpetrators were minors. She concluded after hearing the testimony of the three boys that it was credible because, in her opinion, it was consistent and accompanied in each case by affect and details supporting its credibility. She also was unable to discover any motive for fabrication and stated, in fact, that it was emasculating for R.P. to make such admissions. She also concluded that what occurred was not mutual exploration but rather exploitation of a younger child by one four years older who was in a position of authority. On December 27, 1990, she determined that the report was substantiated.

9. For the last two years or so the petitioner has been a teacher's aide for children aged 5-14. There have been no allegations of abuse regarding these children. She is a registered day care provider herself and has two nieces in her care right now. As a result of the finding, the Department has proposed that the petitioner's day care registration certificate be revoked in a letter dated November 15, 1990. (Exhibit A.)

10. On November 13, 1990, the petitioner received a notice that there was insufficient evidence to substantiate the investigation. However, as it turned out later, that investigation involved yet another boy who was a year or so older than the petitioner who agreed that sexual activity occurred but explicitly stated that the events occurred due to mutual consent. On December 27, 1990, a notice was sent to the petitioner stating that the Department had found evidence sufficient to substantiate abuse against R.P. The petitioner appealed the findings to the Commissioner who held a review on December 13, 1990, through his representative, and afterwards determined that the report was substantiated.

ORDER

The decision of the Department of Social and Rehabilitation Services that the report of child sexual abuse by the petitioner with regard to R.P. is "founded" is reversed and the record concerning this matter shall be

expunged from the registry on the grounds that it is not founded.

REASONS

The petitioner has made application for an order expunging the record of the alleged incident of child abuse from the SRS registry. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

- (a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

. . .

- (h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing not only that the report is based upon accurate and reliable information, but also that the information would lead a reasonable person to believe that a

child has been abused or neglected. 33 V.S.A. § 4912(10), Fair Hearings No. 8110 and 8646.

The Board rejects, at the outset, the Department's contention that the hearing process contemplated by the statutes is anything but de novo. As a general principle of law, it is well-established that administrative tribunals are "creatures of statutes" and have only those powers which are specifically delegated to it by statute (and those implied as necessary for the full exercise of those expressly granted). See In Re Boocock, 150 Vt. 422 (1988), N.H. - Vt. Physicians Service v. Commerce of Banking and Ins., 132 Vt. 592 (1974)). The statute that creates the Board's power is at 3 V.S.A. § 3090. That statute specifically states that "The duties of the board shall be to act as a fair hearing board on appeals brought pursuant to Section 3091 of this title". 3 V.S.A. § 3090(b). Section 3091 in turn states, in pertinent part,:

Hearings

(a) An applicant for or a recipient of assistance, benefits or social services from the department of social and rehabilitation services, the department of social welfare, the office of economic opportunity, the department of aging and disabilities, or an applicant for a license from one of those departments or offices, or a licensee, may file a request for a fair hearing with the human services board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits or services is denied, or is not acted upon with reasonable promptness; or because the individual is aggrieved by any other agency action affecting his or her receipt of assistance, benefits or services, or license or license application; or because the individual is aggrieved by agency policy as it

affect his or her situation.

(b) The hearing shall be conducted by the board or by a hearing officer appointed by the board. The chairman of the board may compel, by subpoena, the attendance and testimony of witnesses and the production of books and records. All witnesses shall be examined under oath. The board shall adopt rules with reference to appeals, which shall not be inconsistent with this chapter. The rules shall provide for reasonable notice to parties, and an opportunity to be heard and be represented by counsel.

(c) The board or the hearing officer shall issue written findings of fact. If the hearing is conducted by a hearing officer the hearing officer's findings shall be reported to the board, and the board shall approve the findings and adopt them as the findings of the board unless good cause is shown for disapproving them. Whether the findings are made by the board, or by a hearing officer and adopted by the board, the board shall enter its order based on the findings.

(d) After the fair hearing the board may affirm, modify or reverse decisions of the agency; or may determine whether an alleged delay was justified; and it may make orders consistent with this title requiring the agency to provide appropriate relief including retroactive and prospective benefits. The board shall consider, and shall have the authority to reverse or modify, decisions of the agency based on rules which the board determines to be in conflict with state or federal law. The board shall not reverse or modify agency decisions which are determined to be in compliance with applicable law, even though the board may disagree with the results effected by those decisions.

. . . 3 V.S.A. § 3091

The plain language of the above regulations shows that the term "appeal" is used synonymously and interchangeably with the phrase "request for a fair hearing". The regulations further make it clear that the attendance and testimony of witnesses may be compelled by the Board chairman and that the "board or hearing officer shall issue

written findings of fact". The taking of testimony by witnesses and the finding of facts is indisputably part and parcel of an evidentiary hearing, not an appellate review hearing. Even though the words used by a legislature in enacting a statute must be interpreted as having some meaning, and not as mere surplusage, (see State v. Stevens, 137 Vt. 473 (1979)), the Department's argument ignores all of the language which makes the Board's duty more than clear--to hold a fair hearing to determine the facts. If the Department finds this language too obtuse, the Supreme Court some seven years ago specifically interpreted 3 V.S.A.

§ 3091(c) as requiring that the hearing officer appointed by the Board make findings of fact which, unless there is good cause for disapproving, must be adopted by the Board. The Court specifically said:

In another administrative context, we have observed that (t)he hearing examiner functions as the trier of fact in this kind of case. If there is evidence tending to support his findings, they will, in the ordinary situation, be sustained here, since the evaluation of that evidence is for him.

Thus, the hearing officer acts as the fact finder for the Board; the hearing officer does not render an intermediate decision subject to review by the Board.

Pratt v. DSW 145 Vt. 138, 142 (1984)

There can be no other conclusion than that the Board (through its hearing officers) acts as the trier of and finder of fact in all requests for fair hearings by persons aggrieved by decisions of the Department of Social and Rehabilitation Services under 3 V.S.A. § 3090 et. seq.

There is no reason or authority in the statute for the Board to defer to or give weight to findings of fact made by the Department.

The Department's reliance on the line of cases cited in its brief with regard to the presumptive validity of agency decisions is unpersuasive. In fact, the Department's reliance on those cases is based on a grave misunderstanding of the role of the parties involved. Every one of those decisions refers to judicial review of an administrative decision, not an administrative agency developing its own record on appeal from a Departmental decision. The Department's argument in effect elevates itself to an administrative board and the Board to a judicial tribunal. Such an analysis misses the essential and crucial point in this matter: It is the Board's decision which is the agency's final decision for purposes of any judicial review.

See 3 V.S.A. § 3091(a)-(h). If any presumptions of validity or deference is owed to a decision, it is by a reviewing Court towards the Board's decision (as the final administrative decision) not by the Board towards the Department's initial determination.<sup>1</sup>

There is nothing in the child abuse and reporting statute itself at 33 V.S.A. § 4911, et seq, which takes registry expungement fair hearings out of the requisites of 3 V.S.A. § 3090 et. seq. At 33 V.S.A. § 4912(10), the statute does set a standard for the Department ("accurate

and reliable information that would lead a reasonable person to believe that the child has been abused or neglected.") in making its factual determination, but nowhere states that the Board is bound by these determinations, even if the Department feels it has met these standards in its investigation. The Board is still required by 3 V.S.A. § 3091 et seq., to make an independent finding of facts after a fair hearing.

The Board's rules generally require that evidentiary burdens be met through the submission of evidence used by civil courts in Vermont:

14. Rules of Evidence. The rules of evidence applied in civil cases by the courts of the State of Vermont shall be followed, except that the presiding officer may allow evidence not admissible thereunder where, in his judgment, application of the exclusionary rule would result in unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs.

The Vermont Rules of Evidence provide that:

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute.

Those same rules define "hearsay" as ". . . a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted". Rule 801(c). The Board has repeatedly held that the statutory purpose of protecting children from harm found at 33 V.S.A. § 686(d) "is defeated if the child-victim is unnecessarily required

to appear to testify at the hearing." See Fair Hearing No. 8816. Therefore, the Board has routinely allowed transcription and tapes of children's statements under the "relaxed" hearsay rule in these cases based on the hardship to the children and the inherent reliability of those methods for accurately relaying the investigator's questions and the responses of the child. Statements of others (psychologists, social worker and parents) have also been allowed into evidence but no specific ruling has ever been requested or made regarding the admissibility of those statements to prove the truth of the matters asserted therein.<sup>2</sup>

This case presents squarely the question of whether or not the Department can meet its burden solely through testimony of the investigator summarizing statements purportedly made by the child and other child witness to herself and to others. The board concludes that while such evidence may not run afoul of the board's "relaxed" hearsay rule as to its admissibility, hearsay evidence, such as the type relied on by the Department in this matter, need not be accorded the same weight as non-hearsay evidence. See Longe v. Dept. of Employment Security, 135 Vt. 460 (1977).

"Sexual abuse" is specifically defined by 33 V.S.A. § 682 as follows:

(8) "Sexual abuse" consists of any act 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.

In its "Casework Manual", provided to all its social workers and investigators, SRS has attempted to define further the requirements of the above statutes. Pertinent sections (see Manual No. 1215) include the following:

- C. Sexual Abuse - The statutory definition is quite explicit and all-encompassing, but provides little clarity around abuse by children and by adolescents on children. The Department differentiates sexual abuse by adolescents and children from other types of sexual exploration according to the following criteria:
1. The perpetrator used force, coercion, or threat to victimize the child, or
  2. The perpetrator used his/her age and/or developmental differential and/or size to victimize the child.

In this case, even if admissible, the evidence put forth by the Department is insufficient in terms of reliability to establish that the petitioner used force, coercion, or threat to victimize the child. Neither was there sufficient evidence that the petitioner's age, size or developmental differential was used by the petitioner to victimize the children. The social worker testified that the petitioner's actions must have been abusive because she was four years older and placed in a position of baby-sitter to the two boys. That relationship, however, was created by the boys' mother and may say as much about the mother's lack

of judgment in choosing a baby-sitter, as it does about the petitioner's maturity. The hearing officer and the board need not, and do not, accord much weight to the solely-hearsay evidence that the boys later felt they were victimized. All the children involved referred to the activities as "games". The alleged victim and the alleged perpetrator were mature enough and close enough in age that no assumptions about the nature of their relationship are warranted based on the bald facts of their ages. Based on the evidence presented, including the credible testimony of the petitioner, it is found that the petitioner and the boys in question were involved in mutual exploration.

Given the above, it cannot be concluded that the petitioner "abused" R.P. or any other boys within the meaning of the statute and the Department's own guidelines (supra). Because the Department has failed to meet its statutory burden, the petitioner's request to expunge the report in question is granted.

FOOTNOTES

<sup>1</sup>The Supreme Court in a case cited by the Department makes this clear:

Courts presume that the actions of administrative agencies are correct, valid and reasonable, absent a clear and convincing showing to the contrary. Therefore, judicial review of agency findings is ordinarily limited to whether, on the record developed before the agency, there is any reasonable basis for the finding. (emphasis added)

State Department of Taxes v. Tri-State Indep. Laundries,  
138 Vt. 292, 294 (1980).

<sup>2</sup>Rulings have specifically been made that testimony by parents and psychologists regarding statements made to them by the child are specifically admissible for other purposes. See Fair Hearing No. 8816. In addition, evidence of this type has routinely been admitted because of a lack of objection by the other party.

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