

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 11,104
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) to revoke his foster care license.

FINDINGS OF FACT

1. The petitioner has been licensed by the Department of Social and Rehabilitation Services to operate a foster care home since September of 1991. For several months prior to his licensing, including July of 1991, he was provisionally licensed by the Department to care for foster children.

2. In December of 1991, SRS had occasion to speak with the town police department during an investigation regarding a foster child in the petitioner's care on a matter totally unrelated to the petitioner. During that investigation, the police chief remarked to the SRS investigator that the petitioner had been involved with the police during the previous summer and made its records on him available to SRS.

3. The police records received by SRS concerned two incidents which occurred at a supermarket on July 26 and 27, 1991. The police records contained an affidavit from a store clerk which stated in essence that while checking out

at the store on the evening of July 26, the petitioner, dissatisfied with the way the clerk had bagged his groceries, seized her by the left arm and pulled her over the cart to show her a loaf of crushed bread. At that point, the clerk told him the petitioner was out of bounds and he apologized several times. The police were not called at that point. However, when the petitioner returned to the supermarket the next day, the manager of the store, who had learned of the previous night's incident from the affected clerk and another clerk who had been working nearby, asked him to leave the premises. The police records show that the petitioner refused to do so and that the police were called in to handle the matter. According to the reports, the petitioner was loud and confrontational with the deputy who came to the store and demanded a written trespass order before he would leave. After a written demand and order were filled out and handed to him, the petitioner refused to sign his acceptance of the order until he received a copy, whereupon he voluntarily left the store and went to the police station where he was provided with one. The reports also showed that some members of the petitioner's family came to the store later that same day allegedly to harass the store clerk. The petitioner was thereafter notified by the police that both he and his family were to stay away from the supermarket.

4. SRS's investigator, in addition to reading the police reports, also spoke with the police chief and the

deputy chief. The chief informed SRS that he had been called with regard to the petitioner's confrontational behavior on at least one other occasion by another party but that no action had been taken. He expressed a belief to SRS that the petitioner was confrontational and could be dangerous when angry. The deputy confirmed to the Department the information contained in the records regarding his presentation of the no-trespassing notice.

5. Based upon this information, officials in the SRS foster care licensing division concluded that the petitioner had probably "manhandled" one of the clerks in the store and that he had been "physically removed" from the Grand Union Store by the police. It was concluded by SRS that such action violated Section 201 of the licensing regulations and that such violation should result in a revocation of the petitioner's license. The Department stated that the revocation was appropriate because the petitioner had shown a lack of judgment in the way he handled the situation, and was not a good role model for children. The Department expressed a concern that most of its foster children come from violent backgrounds and need to be in homes where parents control their emotions and handle conflicts in a non-violent manner.

6. On February 12, 1992, the petitioner was notified of the licensing division's recommendation and told of his right to "invoke the Department's discretion concerning whether revocation is the proper course of action" through a

meeting with the Commissioner's representative, and of his right to appeal.

7. At hearing, the Department's witness presented the police records, including the affidavits contained therein as well as the statements of the two police officers as a basis for its decision. The Department also presented the testimony of the deputy chief who had been called upon to eject the petitioner from the supermarket. He reaffirmed the statements in the police report and added that the petitioner exhibited a loud, shouting manner when he asked him to leave the store. He emphasized, however, that the petitioner left the supermarket voluntarily after being presented with a notice of trespassing and was calm when he came to the police station for the copy. He also stated that he had had no subsequent official contacts with the petitioner and that his few informal contacts thereafter had been pleasant. The deputy's testimony is found to be credible.

8. The petitioner subpoenaed the store manager as his witness. The manager reiterated his sworn statement to the police regarding the events on July 27 when he asked the police to eject the petitioner from the store. In addition, he stated that he had personally had at least two unpleasant confrontations with the petitioner in which he complained in a menacing, intimidating, and loud manner about prices, the quality of goods, and the manner in which his groceries had been bagged. The manager stated that he had received other

complaints from other employees about the petitioner's rudeness in the store over the last few years. He added that he had not taken any action to bar him from the store before because it was the store's policy, for business reasons, to tolerate a certain level of anti-social behavior, but he felt the petitioner had finally crossed the line when he physically threatened an employee. He stated that he rarely takes such actions (estimating that he had ejected customers only two to three times in his sixteen years as store manager) and said that he felt it necessary in this case to protect the safety of the bagging clerk and his other employees. He also stated that the bagging clerk involved in the confrontation on July 26 was not one who had a history of difficulty in dealing with customers and that he believed her story and took action based on it not only because of his personal knowledge of his employee and the petitioner, but also because the story was corroborated by another employee who witnessed the event. The manager's testimony is found to be entirely credible.

9. The Department did not ask the affected employee nor the other employee-witness to appear at the hearing because it believed its legal burden could be met by showing that the Department had a reasonable ground to believe that the facts it had were true (based on all of the above) and does not have an obligation to prove the absolute truth of each fact. SRS also represented that the witnesses involved felt intimidated by the petitioner and were reluctant to

confront him.

10. The petitioner's testimony was that he was indeed present at the supermarket check out counter with his children on the evening of July 26, and that he had politely requested that the bagging clerk not crush his bread or cookies. She, according to him, replied that it would be "no problem" but nevertheless succeeded in crushing his bread because she carelessly bagged his groceries. He stated that he tried to bring this to her attention by repeatedly tugging on the left sleeve of her shirt but that she was involved in a conversation with the cashier and ignored him. It is the petitioner's contention that when it came to the bagger's attention that he was tugging on her sleeve, she began to scream at him out of all proportion to the event humiliating him, and upsetting his children. He apologized several times to calm her. He stated that she repeated her tirade when he politely pointed out a second loaf of bread she had crushed. The petitioner denies that he touched the bagging clerk's arm or pulled her over the wagon. While he basically agrees with what occurred in the supermarket the next day with regard to his ejection, he denies raising his voice at any time, and denies that he was physically removed from the store.

11. Based on the above, it is found that it is reasonable for the Department to believe that the petitioner grabbed a store bagging clerk's arm and pulled her over a wagon in his frustration over the way his groceries had been

bagged. It is also reasonable for the Department to believe that the petitioner refused to leave the grocery store when requested to do so the next day and engaged in a loud public confrontation with the police over the request to leave. However, the facts do not support a belief that the petitioner was forcibly removed from the supermarket. All of the evidence indicates that the petitioner ultimately left the store voluntarily when presented with a written order of trespass by the police officer.

12. It is not necessary for purposes of this hearing to choose between the petitioner's sworn testimony as to the facts as he remembers them and the sworn affidavit of the clerk as she remembers those incidents, nor between the testimony of the police officer and those of the petitioner as to his behavior. In the absence of any other evidence which tends to prove or disprove any of the facts testified to, the Department would have acted reasonably in believing either version of the facts presented to it. As each story presents a consistent and believable version of the events, and as the actual facts need not be conclusively proven, the hearing officer declines to make a finding as to which version of the facts is most likely or to make a finding that any of these witnesses lacks credibility.

ORDER

The Department's decision is affirmed.

REASONS

The roles of the Department and the Human Services Board in appeals of foster home licensing decisions was set forth in detail in Fair Hearing No. 8688, decided by the Board on July 14, 1988:

The Department of Social and Rehabilitation Services is charged by statute to design programs "to provide substitute care of children only when the family, with the use of available resources, is unable to provide the necessary care and protection to assure the right of any child to sound health and normal physical, mental, spiritual and moral development." 33 V.S.A. § 2591(5). This obligation imposed by statute has been previously described by the Board as a "grave and unenviable responsibility" which, in effect, places the Department in an in loco parentis posture. Fair Hearing Nos. 6505 and 8168. The Department has further been given considerable discretion by statute to promulgate regulations and to administer licenses governing foster care facilities, including the power to deny or revoke licenses. See 33 V.S.A. §§ 2594, 2595 and 2596.

The Department is specifically authorized "to prescribe standards and conditions to be met" for licensure. 33 V.S.A. § 2596(b)(1). With regard to foster care licensing, the department has promulgated regulations which set minimum standards which must be met by foster care licensees. Among those standards is the following:

Regulation 201

As exemplified by past performance and general reputation, which may be demonstrated by written references or collateral interviews, members of the foster household must be responsible, emotionally stable people of good character who have shown they can exercise good judgement and act as appropriate role models for children.

The Department is, in addition, empowered by the legislature to revoke a license for cause after a hearing.

33 V.S.A. § 2596. In this instance, the Department argues that it has reason to believe that the petitioner behaved in the supermarket in such a way as to violate its regulations as set forth above and that those violations constitute "cause" for revocation of the license.

In a statutory scheme which gives so much discretion to the Department to determine how children in its custody will be cared for and by whom, the Board has consistently held that the petitioner must show that the Department acted arbitrarily, either in making its factual findings, or in its determination of the existence of cause in order to justify reversal of the decision. See Fair Hearings No. 8688, 9688, and 9795.

The petitioner herein has failed to demonstrate that the Department acted arbitrarily or unreasonably in choosing to credit the allegations of physical assault and disproportionately aggressive, angry and confrontational behavior made by the bagging clerk, the store manager and the deputy sheriff. Although the petitioner denied these allegations he could not produce any evidence other than his own testimony (which was no more powerful than that of the other witness) which would tend to show that the Department acted unreasonably in believing in their truth.

The behavior which the Department reasonably believed was engaged in by the petitioner is clearly contrary to behavior expected of foster parents in Regulation 201. In the exercise of its broad discretion in this area, the

Department has determined that this particular violation constitutes cause for revoking the foster license it granted last fall for reasons set forth in the findings. As the petitioner has not shown that the decision to revoke is unreasonable or arbitrary, the Board, even if it would have reached a different decision, is bound by the Department's determination. Therefore, the decision should be affirmed.

3 V.S.A. § 3091(d) and Fair Hearing Rule No. 19.

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