

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,053

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Appeal of)

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INTRODUCTION

The petitioner seeks a declaratory ruling that certain actions taken by the Department of Mental Health and Mental Retardation in his case were in violation of his constitutional rights and the statutes and regulations governing the Department's supervision and guardianship of mentally retarded persons.

FINDINGS OF FACT

The petitioner is a fifty-six-year-old mentally retarded adult who, since 1987, has been under the "protective supervision" of the Commissioner of the Department of Mental Health and Mental Retardation pursuant to 18 V.S.A. §§ 9301 *et. seq.* Pursuant to the statutes the Department has assigned to the petitioner a "guardianship services specialist" (hereinafter referred to as "the guardian"), who is an employee of the Department, to take individual responsibility for the petitioner's care and placement.

For several years prior to the events in question the petitioner resided in a group home operated by the county mental health agency for the area in which the group home is located. In addition to his Department guardian, an employee of this county mental health service served as the petitioner's "case manager" and was responsible for seeing that the petitioner's day to day needs were met.

On or about September 6, 1992, a town police officer came to the group home and informed the petitioner's case manager that the parent of a five-year-old boy had complained that the petitioner had sexually assaulted the boy outside a store located near the group home. The store owner had identified the petitioner, whom the officer knew from several past complaints of a similar nature involving the petitioner.

The officer interviewed the petitioner in the case manager's presence. The petitioner eventually admitted the assault, but the police officer did not believe he was competent to be charged with anything. However, the police officer asked the case manager to keep the petitioner under staff supervision at all times, and not to let the petitioner leave the home unescorted. The case manager expressed concern

about the legality and practicality of limiting the petitioner's movements on a 24-hour basis. She agreed, however, to notify the police whenever the petitioner left the home so that the police could keep him under "surveillance".

The next day the officer reported the incident to the state's attorney, who agreed with his assessment that, under the circumstances, the petitioner should not be criminally charged.

A few days later a meeting was held of the petitioner's "interdisciplinary team", which included the petitioner's guardian, case workers, doctors, and the Department's "community services specialist" for that service area. The team decided that it would be more in the petitioner's interest for him to "face the consequences" of his actions by being confronted with the charges in court. The team agreed that the petitioner's "impulses" were unlikely to go away, and that if his behavior was to change he would have to learn to "fear the system".

Shortly following the meeting both the petitioner's guardian and the Department's community services specialist contacted the state's attorney to tell her that they felt the petitioner should be charged in the matter so that he would learn that he was not "above the law". The petitioner's guardian then authorized the release of the petitioner's mental health records to the police and the state's attorney in order for them to determine whether the petitioner was competent to be charged with a crime.

As a result of these actions the petitioner was arraigned about a month later on the charge of "lewd and lascivious conduct", and was assigned a public defender. On February 9, 1993, pursuant to an agreement between the petitioner's and the state's attorneys, the petitioner was brought before the district court and orally reprimanded by the judge before all the criminal charges were dismissed.

At the fair hearing in this matter (held on December 22, 1993) the Department admitted that its unilateral decision to make the petitioner's mental health records available to the police and the state's attorney was a violation of its own regulations governing the disclosure of personal information regarding protective services clients. The petitioner's guardian testified that he is now aware of this provision and that such a disclosure will not occur in the future.

Both the guardian and the Department's community services specialist defended, however, their underlying decision to encourage the state's attorney to file criminal charges against the petitioner. They testified that although they were aware that the petitioner's crime carried with it the possibility of a jail sentence, they felt that, at the least, the petitioner's competency should be determined by the court; and that they were concerned that under the status quo the petitioner had been effectively confined to the group home with little chance of changing his behavior and being able to leave the home without continual police "surveillance". They reported that since going to court the petitioner has been able to move to a less-restrictive "cottage" environment and has not had any significant behavioral problems. They stated that they believe that the court proceedings were instrumental in changing the petitioner's life for the better.

ORDER

The Department's "policy of discretion" in determining whether or not to encourage the filing of criminal charges against any of its protective services clients is held to be not violative of the statutory and constitutional rights of such clients.

REASONS

The first issue presented in this matter is whether the petitioner's appeal is moot and/or whether the petitioner lacks legal standing to seek a declaratory ruling from the Board. As noted above, the Department admits that its decision to release the petitioner's mental health case records to the police and the state's attorney was contrary to its regulations governing the maintenance of case records of its protective services clients; and it maintains that such a release of records will not happen again. See Protective Supervision or Guardianship for Mentally Retarded Persons Rules, Section 19.

A more difficult question, however, both in terms of the Board's jurisdiction and the "merits", is presented by the continuing controversy between the Department and the petitioner over whether the Department's underlying efforts to have the petitioner criminally prosecuted for his actions violated the Department's duties and responsibilities under the Vermont Protective Services statutes and/or regulations. The Department argues, correctly, that it is entirely speculative at this time whether the petitioner will ever again be affected by its exercise of "discretion" as to when and whether it encourages or cooperates with the criminal prosecution of a protective services client. The actions in the petitioner's case occurred more than a year ago, and there is no question that unless and until the petitioner reoffends the complained-of "policy" by the Department will not affect him.

The Department does not, however, admit that there is anything wrong with such a policy. The question in terms of the Board's jurisdiction is whether the petitioner can be considered to be "aggrieved by (this) policy as it affects his . . . situation". See 3 V.S.A. § 3091(a).

In Fair Hearing No. 7872 (June, 1987), the Board considered a case in which the petitioner had been threatened by his Department of Social Welfare caseworker with the loss of his ANFC benefits if he failed to contact the worker to discuss the reported nonpayment of certain household bills. Even though by the time of the fair hearing in that case the Department had withdrawn its notice because the petitioner's circumstances had changed, the Board held:

Threatening a person with loss of his or her only income is undoubtedly a stressful event which generates a good deal of anxiety. The proposed action did not occur, not because the Department changed its policy, but because the petitioner changed his situation. The petitioner must, therefore, not only live with the unpleasant past memory of the Department's policy, but also risk facing it in the future. As such, it is not difficult to see that the petitioner was, and continues to be, aggrieved by a policy of the Department which remains unchanged. The Department cannot now claim that the petitioner has no grievance based upon actions he took to change the situation, especially since that situation can arise again. In all fairness, the petitioner deserves to know whether the Department's demands on him were proper both with regard to the past and future actions. It must be concluded, then, that the petitioner has been harmed by the Department's actions and that that harm has not been alleviated by subsequent actions of the Department.

Id. at pp. 5-6. In that case the board, citing a previous decision (Fair Hearing No. 6549 [Sept., 1985]), noted that "appropriate relief" under 3 V.S.A. § 3091(d) in such cases "may be nothing more than a declaration that the Department's decision was erroneous."

Although the petitioner in the instant matter is reportedly doing well since going to court, he has a diminished mental capacity along with a history of sexually inappropriate behavior, and is at least at some risk to reoffend. Like in Fair Hearing No. 7872, supra, it must, therefore, be concluded that the

petitioner herein has a distinct interest in knowing whether his protective services guardian will continue to claim and, perhaps, exercise the discretion to affirmatively encourage the police and the state's attorney to prosecute him for any future offenses. Thus, it must be concluded that the petitioner continues to be sufficiently aggrieved by the Department's "policy of discretion" in this regard to confer jurisdiction before the Board under 3 V.S.A. § 3091(a).

As to the "merits" of the petitioner's grievance, the petitioner does, of course, have the constitutional right against self incrimination and of procedural due process that the Board concludes were compromised by the Department's admitted mistake in furnishing confidential information about him to the police and the state's attorney. This action, however, is not the same as the Department merely contacting law enforcement agencies to encourage the filing of criminal charges against him.⁽¹⁾

In arguing that it was improper for his protective services guardian to have encouraged the police and the state's attorney to file criminal charges against him, the petitioner relies primarily on his reading of 18 V.S.A. § 9310, which provides as follows:

Powers of commissioner as guardian of the person

(a) The court may appoint the commissioner guardian of the person if it determines that a guardian is needed to supervise and protect the retarded person through the exercise of the following powers:

(1) The power to exercise general supervision over the retarded person. This includes choosing or changing the residence, care, habilitation, education and employment of the retarded person and the power to approve or withhold approval of the retarded person's request to sell or in any way encumber his personal or real property;

(2) The power to approve or withhold approval of any contract, except for necessities, which the retarded person wishes to make;

(3) The power to commence or defend against judicial actions in the name of the retarded person;

(4) The power to consent to surgical operations in non-emergency cases as provided in section 9312 of this title.

(b) Nothing in this chapter shall give the commissioner authority to place a mentally retarded person in a state school or hospital except pursuant to section 7601 et seq. of Title 18 or section 8801 et seq. of Title 18.

(c) The commissioner shall exercise his supervisory authority over the retarded person in a manner which is least restrictive of the retarded person's personal freedom consistent with the need for supervision and protection.

As noted above, the petitioner had a public defender appointed to defend him immediately upon the commencement of the "judicial action". However, the petitioner reads paragraph (a)(3) of the above-cited section as imposing an express duty on the part of the Department to prevent and discourage criminal actions from being filed against him. The Board concludes this is an unduly sweeping reading of this provision.

The resolution of this case probably hinges more on paragraph (c) of the above section, and whether the power of "general supervision" conferred under paragraph (a)(1), supra, includes the authority to expose a client to the risks inherent in criminal prosecution if that is deemed by the Department to be in the client's best interest. Indeed, this balance between "supervision" and maintaining the "personal freedom" of protective services clients permeates the entire statutory scheme, starting with the underlying legislative "policy" that is set out at 18 V.S.A. § 9301 as follows:

It is the policy of the state of Vermont to assure that mentally retarded citizens who are not residents of state schools or hospitals receive such supervision, protection and assistance as is necessary to allow them to live safely within the communities of this state. In furtherance of this policy, this Vermont protective services for mentally retarded persons act is enacted to permit the supervision of those mentally retarded persons who are unable to fully provide for their own needs and to protect such persons from violations of their human and civil rights. It is the purpose of this chapter to limit the state's supervision of mentally retarded persons who are living in the community to the extent necessary to ensure their safety and well-being.

See also, e.g., 18 V.S.A. §§ 9311 and 9313.

The petitioner's admitted burden in this matter is to establish that the Department is prohibited by law from encouraging the criminal prosecution of a protective services client who has committed a criminal act. The Board concludes that contacting law enforcement agencies in this manner does not constitute a "waiver" of the client's right against self-incrimination. The decision to prosecute is made by the state's attorney--not SRS. Moreover, if such a decision is made--as it was in this case--the client has the full protection of the criminal justice system in terms of asserting his constitutional rights. Therefore, it cannot be concluded that encouraging law enforcement to file criminal charges against a protective services client, in and of itself, constitutes an "exercise of authority" by the Department that is "restrictive of the retarded person's personal freedom" within the meaning of the guardianship statutes (supra).

The evidence in this case shows that the Department's decision to encourage the filing of criminal charges against the petitioner was motivated by its sincere, considered, and deliberative opinion that the petitioner's behavior and prospects for increased future independence would be improved if he were to face criminal prosecution. Moreover, it appears that this decision did, in fact, turn out to be beneficial to the petitioner. As a matter of personal opinion and philosophy one can certainly argue that the risk to the petitioner's personal freedom and emotional well-being should he have been sentenced to a term in jail outweighed any benefit that might have ensued from his having "faced the legal consequences" of his actions. However, the Board cannot conclude that this opinion is compelled as a matter of law. Indeed, under the above statutes, these appear to be precisely the kinds of difficult decisions that the Department, as the petitioner's guardian, is authorized to make.

Absent a showing that the Department is acting in violation of the client's constitutional rights or a specific statutory provision the Board cannot impose a limit to the Department's discretion based on questions it might have with the wisdom of any Department policy, or on a philosophical disagreement the petitioner might have with the Department over what is or is not in a protective services client's best interest.

For all the above reasons the petitioner's request for a declaratory judgement is denied.

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1. It should be noted, however, that under the Department's own regulations (see supra) any contact it has with law enforcement individuals or agencies absent a court order must not include the disclosure, even orally, of any personal information about the client.