

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 12,111

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Appeal of)

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INTRODUCTION

The petitioner appeals a decision of the Department of Social and Rehabilitation Services (SRS) denying him a certificate to become an in-home caretaker in the Vermont Day Care Program. The issue is whether the petitioner is precluded from receiving certification due to two felony drug convictions.

FINDINGS OF FACT

1. The petitioner filled out an application on or about May 10, 1993, to become certified as an in-home caregiver under the Vermont Day Care Program regulated by SRS. A certification means that the petitioner would be able to care for other people's children in their homes and be reimbursed for his services by SRS.
2. On May 22, 1993, the petitioner was asked by SRS as a routine matter to authorize a check of his criminal record, to which he agreed. That record received by SRS shows that the petitioner was convicted in 1979 of selling a regulated drug and in 1989 of dispensing a regulated drug, both felonies. The petitioner agrees that these records are correct and that he is still on parole for the latter offense.
3. On June 18, 1993, the petitioner was notified that his application was denied based on the two felony convictions and he was told of his appeal rights to the Human Services Board. The petitioner filed an appeal on June 22, 1993 and on July 9, 1993 the Commissioner confirmed that the decision had been reviewed and the prior decision was being upheld based on the rule in the "In-Home Caretaker Regulations" which prohibited approval of persons convicted of felonies.
4. A hearing was originally scheduled on July 12, 1993, at which time the petitioner complained that he had been wrongfully denied based on information which had been sent to him in pamphlet form at the time he filled out his application. That pamphlet, entitled "Requirements for In-Home Caregiver Approval" and dated October 1, 1992, states:

Persons who have had a report of abuse on neglect substantiated against them and persons convicted of an offense involving violence or other bodily injury shall not be approved as an In-Home Caregiver.

5. The Department countered that the pamphlet sent to the petitioners was a summary which contained an error and that regulations promulgated on August 1, 1985 were actually controlling. Those regulations stated that:

A9.21 No person shall be approved as an In-Home Caretaker who has been convicted of a felony or who has been convicted of any offence involving abuse, neglect, or sexual activity with a child, or who has had a report of abuse of children substantiated against him or her as defined in 33 V.S.A., Chapter 14. The prohibitions in this part may be waived by the Department when evidence of suitability due to rehabilitation, or other circumstances, is presented by the caregiver or potential caregiver and accepted by the Department.

6. The petitioner stated that he was unaware of this provision of the regulations and had not been informed of his right to seek a waiver. The hearing officer, therefore, declared that the case was not ripe for review by the Board and sent the matter back to allow the petitioner an opportunity to seek a waiver and for the Commissioner to determine whether a waiver was warranted in this matter.

7. On July 15, 1993, the petitioner officially requested a waiver of the Department's rules. He stated that he was rehabilitated and invited the Department to contact his parole officer. Most of his letter requesting a waiver was spent disputing the validity of the 1985 regulation and arguing that the requirements in the 1992 pamphlet, which do not exclude him, supersede the 1985 regulations.

8. On August 3, 1993, the Department responded to the petitioner's letter by stating that the only validly promulgated regulations were the 1985 ones and that the 1992 "requirements" had not been promulgated. The petitioner was notified that his parole officer had been contacted and was invited to submit additional evidence or character references with regard to his rehabilitation.

9. The petitioner's parole officer provided the Department with a written report which was in large part uncomplimentary to the petitioner and did not support his claims of rehabilitation. The truth of the contents of that letter were vehemently disputed by the petitioner who objected to its admission into evidence.⁽¹⁾ The petitioner did not provide any other evidence of his rehabilitation.

10. On October 1, 1993, the petitioner was notified by the Commissioner that the Department did not feel it had been provided with evidence which showed persuasively that the petitioner had been rehabilitated. In fact, the Department thought that the evidence it had received from the parole officer showed on the contrary that the petitioner had not been rehabilitated.

11. The petitioner brought this matter back for a hearing. At the hearing he produced no evidence of his rehabilitation other than his own statements that his drug convictions were behind him and that he had already been caring for children and was fit to care for them. The petitioner spent most of the hearing arguing that the 1992 pamphlet, whose terms would not have prohibited his eligibility, superseded the 1985 regulations used to deny his application.

12. The 1992 pamphlet sent to the petitioner was originally prepared by the chief of the children's day care licensing division in 1990, who was unaware that regulations regarding certifications for in-home

caregivers had been promulgated in 1985. The 1990 pamphlet was revised in 1992 but was recalled when it was discovered (during the course of this appeal) that it was inconsistent with the still effective 1985 regulations. New pamphlets have since been printed listing requirements consistent with the regulations. Criminal checks have been performed by SRS on all applicants who seek public payments and who have access to children since July 1, 1992, by request of the legislature.

ORDER

The Department's decisions denying the petitioner's certification as an in-home caregiver and denying the waiver request of its felony conviction regulation are affirmed.

REASONS

The Department of Social and Rehabilitation Services is required by statute to license, register or authorize child care providers involved in the provision of day care services funded through legislatively created programs. 33 V.S.A. § 3511(2). Pursuant to that authority, the Department adopted regulations on August 15, 1985, governing the certification of "in-home caregivers." Those regulations provide that :

An In-Home Caretaker Certificate is issued when the person has met all in-home caretaker requirements. Exceptions to the in-home caretaker requirements may be made when deemed by the Director of the Office, in her or his sole discretion to be in the best interest of the child served by the person and adequate protection of the children in care is assured.

...

These requirements have been developed to provide for the protection, safety and well being of children in such a manner as to complement and supplement the care and nurture provided by the child's own parent, as well as to provide for the normal growth and development of the children's intellectual, social, emotional and physical capacities during the times that children are in the care of persons other than their parents.

The following persons are subject to these requirements:

Any person who received compensation through the Vermont Day Care Program for child care services as an In-Home Caretaker.

IN-HOME CARETAKER REQUIREMENTS

...

A9.20 ABUSE, NEGLECT AND ILLEGAL ACTS

A9.21 No person shall be approved as an In-Home Caretaker who has been convicted of a felony or who has been convicted of any offence involving abuse, neglect, or sexual activity with a child, or who has had a report of abuse of children substantiated against him or her as defined in 33 V.S.A., Chapter 14. The prohibitions in this part may be waived by the Department when evidence of suitability due to

rehabilitation, or other circumstances, is presented by the caregiver or potential caregiver and accepted by the Department.

The regulations adopted by the Department create a presumption that the protection, safety and well-being of children is promoted when the Department does not pay persons convicted of felonies to care for them. The burden is on the person who has a felony conviction to show that the presumption is not true in his or her case. The petitioner here has presented no evidence, other than his own protestations of fitness, that an exception should be made in his case. The evidence which does exist shows that the petitioner is still on parole and was not supported in his request for a waiver by his parole officer. Therefore, there is no ground to find that the Commissioner abused his discretion when he declined to waive the requirement as to the petitioner.

The petitioner continues to urge, in spite of persuasive evidence that it was in error, that the 1992 pamphlet governs his application since it has the most recent date on it. Given the fact that he is a non-lawyer, the petitioner's confusion is understandable. However, there is no evidence that the 1992 pamphlet was ever validly promulgated (a process which requires notice to the public, and comment opportunities before final adoption and publication). The last validly promulgated regulation which has not been repealed is the one which is effective. In this case, it is the 1985 document which is styled "regulations" (as opposed to the "requirements" in the pamphlet) and which contains detailed and specific information (in contrast to the pamphlet which is a short summary) that is controlling, even though it bears an earlier date.

As the Department's actions are consistent with and authorized by its valid regulations, the Department's decision to deny certification for day care payments must be affirmed.

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1. The Department attempted to introduce a copy of the letter over the strenuous objection of the petitioner. The parole officer, the writer of the letter, was not called to testify. The petitioner stipulated that the letter was uncomplimentary and on that basis the hearing officer excluded the body of the letter from the evidence. Although the Department stated that the letter was not being introduced to prove the facts contained therein but rather to show that the Department exercised its discretion, the hearing officer determined that it was unnecessary (as the petitioner had stipulated to its negative character) and potentially prejudicial to the petitioner to place those hearsay statements into the evidence.