

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,090 &

) 13,240

Appeal of)

)

INTRODUCTION

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) revoking her day care registration certificate. The issue is whether or not the petitioner violated regulations involving the health and safety of children in her care and if so, whether the Commissioner properly exercised his discretion in determining that her registration certificate should be revoked based on those violations.

FINDINGS OF FACT

1. The petitioner operates a day care program in her home and has been registered with SRS to do so since 1989. She currently cares for ten children, aged newborn to twelve.
2. The SRS day care home registration program requires participants to follow a set of rules and regulations provided to them at the time they are approved for registration. Participants are expected to follow these rules without prompting or monitoring and SRS does not regularly inspect day care homes unless it receives complaints.
3. SRS first visited the petitioner's home in 1991 in response to an unrelated complaint. Subsequent complaints (also unrelated) caused the SRS investigator to come to the petitioner's home on several occasions in 1992. While visiting the site in 1992, the SRS investigator noted that the petitioner's trash can was uncovered and asked her to keep it covered in order to minimize the possibility of wild and rabid animals from coming into the yard. She was also advised that the water in a small wading pool was murky and was advised to keep it changed. No further inspection was done of the premises at that time and no action was taken based on that citation.
4. In May of 1994, the petitioner's day care again came to SRS' attention and the investigator was sent to her home. At that time, the worker observed hazards in the petitioner's barn and asked her to keep it

locked so the children could not go in, as the interior of the barn was not visible from the house. She also talked with the petitioner about the need to carefully supervise children while outside and to always keep them within sight and sound of her voice. The investigator, concerned by the state of the petitioner's yard, asked her supervisor to further inspect the premises.

5. On May 28, 1994, the supervisor went to the petitioner's home and observed a storage area under the deck easily accessible to children which contained sharp edges, unstable objects and possibly hazardous materials. He spoke to the petitioner about the problem and she agreed to block the area off from access to the children. He also spoke with her about the dangers posed by an abandoned quarry filled with water a few feet from her house, stressing the need for supervision of the children outside even though the quarry had a barbed wire fence around it.

6. On June 9, 1994, the worker again made an unannounced visit to the site and noted that the storage area under the deck had still not been blocked off from access by children, although the access area had been reduced to a few open feet that could be reached into. She noted as well that fiberglass insulation was exposed around the windows and that a second exit was not available to the children because there were no stairs from the dining room door from which there was a six foot drop. Electric outlets were also missing their coverplates and there was no flooring material which could be cleaned on the floor. The petitioner advised the worker that the house was in the middle of renovations and that all the problems would be remedied by July 1.

7. On June 30, 1994, the worker made a follow up visit to the day care center. She noted upon arrival that the garbage bin was overflowing with one to two weeks of garbage, that the barn was unlocked and that older children were going in there to get bicycles. The petitioner was not home that day and her daughter was in charge. During her visit, the worker noted that the older children (aged 7-10 years) left the play area and went to an old cabin out of sight and hearing of the house without an adult supervising them. The plaintiff was notified of these facts in a follow up letter the next day.

8. The petitioner responded, by letter, that she had been letting the boys play at the cabin but was having difficulty getting them to come back when she called. In the future she promised to have someone with them. She replied that the garbage was piled up outside because it was about to be picked up that day and produced a receipt showing that such a pick-up had actually occurred. Later she stated that it was not her policy to allow the children to play out of her sight and that she would not employ her daughter any longer at her day care facility because she had not followed policy. She also advised the Department that she was going to tear the cabin down which would eliminate the attraction for the children outside of the play yard.

9. On August 5, 1994, the SRS supervisor returned to the premises to see what work had been done and what hazards, if any, remained. He noted that the trash situation seemed to be under control and that the stairs had been added to the door, although there was no safety gate to keep children from falling out the open door down the stairs. He also noted that the storage space under the deck was partially cleared out but still had an opening accessible to small children and that a can containing gas was sitting there. He noted further that insulation was still exposed in the house and that cover plates were still missing from some electrical outlets (although different outlets than were noted the first time). The barn door was again unlocked and boards with nails were scattered about the premises in areas adjacent to the play area and he noticed horse manure in the play area. The petitioner explained that the boards were there because the cabin had been torn down and promised that they would be removed. She also stated that she usually kept the barn tied closed but that others using it sometimes forgot to latch it as they came in

and out.

10. On August 18, 1994, the SRS day care licensing chief sent a letter to the petitioner proposing to revoke her day care registration. A copy of that letter is attached as Exhibit No. One and incorporated by reference herein. On October 4, 1994, the petitioner attended a review hearing with the Commissioner's designee in order to tell her side of the story and to ask that revocation not occur. Before a final decision was reached in that matter, SRS decided to make another unannounced inspection visit which occurred on October 26, 1994.

11. On October 26, 1994, the SRS supervisor who had visited on August 5, 1994, again went to the petitioner's home. At that time he observed that the barn was not locked and that there was a can of gas in there with the top off, a plastic bottle of antifreeze, rolled barbed wire and old toys. He also noticed an electrical wire running along the ground to the barn with a couple of unprotected splices in it and nearby effluent surfacing from the septic system. A section of the fence surrounding the quarry which was accessible to the road was down and boards with nails were still just inside the woods next to the lawn and one board with nails was on the lawn next to the play area. A gas grill, which could easily be tipped over, was next to the house. In the interior of the house, he found uncovered trash cans, a cabinet under the kitchen sink containing poisonous cleaning items which was accessible to children, and exposed electrical connections to the dishwasher at ground level. While he was discussing this with the petitioner, a child came, unaccompanied, into the kitchen. In the bathroom used by the children he found that the counter was covered with objects including medicine, cleaning fluids and shaving lotions all accessible to children. He also found covers off of electrical outlets, although different outlets from the one which were cited before. He advised the petitioner that these hazards had to be abated immediately.

12. The supervisor returned twenty-four hours later to see what had been corrected. The effluent was still visible along with some dyes he had put in the toilet the day before, leading him to conclude that raw sewage was surfacing in the yard. The electric wire was still running on the ground, the fence on the quarry was still down and nails were on the ground. The petitioner had fixed the dishwasher, padlocked the barn and covered the trash

13. The petitioner does not disagree that the above hazards exist or existed but replies that she has carefully supervised the children and that no injuries have occurred. She claims that children in her care are not allowed into the kitchen and bathroom without an adult. She has since padlocked the barn, had the septic fixed (which she first noticed in May 1994), and had the wire on the ground buried and disconnected from the fuse box. The petitioner was unsure as to whether the wire was live or not. A friend who helped her with this wire stated that it may have been live at some time (but not when he buried it) but contact with the wire would not have killed a child, although it possibly would have caused a burn or shock. The petitioner believes that the children never went near the wire which ran from the house to the barn because they could get to the play area without crossing over it. She also has instructed children not to play near the quarry or in areas other than the play yard.

14. On November 8, 1994, the SRS licensing chief sent the petitioner an amended letter of revocation which is attached hereto as Exhibit No. Two and incorporated herein by reference. Two Commissioner's review meetings were subsequently held on December 7 and 19, 1994. At those hearings the petitioner presented evidence that she had been in a difficult situation because she was renovating her home, that her husband moved out in the midst of renovations, that she has made conscientious efforts to respond to the Department's concerns and to protect the children and that no children have ever been hurt while in her care. In addition, she has padlocked the barn and has had the septic system fixed by adding gravel to

the leachfield and has repaired the quarry fence and is considering a more substantial picket fence.

15. The licensing chief does not dispute that the petitioner may have been in difficult circumstances or that she has made good faith attempts to comply with the regulations. He recommended revocation to the Commissioner because in spite of the petitioners good intentions, serious safety hazards were not identified and were allowed to exist on the property (he cited specifically the electric wire, the unlocked barn, the unfenced quarry and the horse pasture next to the play yard) which he felt endangered the health and safety of the children in care. In spite of specific instructions on at least eight visits by SRS, several problems continued to exist and new ones were cropping up constantly.

16. On December 19, 1994, the petitioner was provided with a review letter from the Commissioner which is attached hereto as Exhibit No. Three and incorporated herein by reference. The Department relies on the incidents outlined in this letter and the other letters as the basis for its revocation with the exception of staffing violations, broken glass, welding tanks, frozen pork and sunken areas in front of the swing sets outlined in the first three paragraphs under "Analysis and Conclusions" on p. 4 of the Review letter.

17. In addition to the above findings, the following facts are also specifically found:

a. The petitioner allowed an electrical wire with unprotected splices to lie partially uncovered across her yard from the house to the barn in an area accessible by children without knowing whether the wire was "live" or not for some weeks until instructed to bury the wire by SRS.

b. The petitioner failed to secure and lock a barn, the inside of which was not visible from her house and which contained dangerous and hazardous materials accessible to children, and which barn was in fact accessed by them, for several months in spite of several warnings from the Department and her promise to secure it.

c. The petitioner failed to keep raw sewage from surfacing on her land in an area accessible to the children in care although she was aware for several months that she had a problem with her septic. It appears she did make some inquiries with a septic contractor about the problem two times during the summer but failed to take corrective action until the Department required her to do so, thereby allowing the existence of a health hazard to children in her care.

d. The petitioner failed to repair and put up a suitable fence to prevent access to a quarry filled with at least five feet of water which is situated very near to her house although she was warned of its dangers on several occasions by SRS workers, until she was ordered to do so by SRS.

e. The petitioner repeatedly failed to recognize other more minor hazards to children and to remedy them until they were pointed out to her by SRS employees including, but not limited to, overflowing garbage cans, uncovered electrical outlets, exposed insulation, easily accessed hazardous storage areas both inside and outside the house, unprotected falling hazards, hazards from animal fecal matter and sharp hazards from nails in boards and falling sharp objects.

f. The petitioner's contention that the children are always strictly supervised and are not allowed access to hazardous areas is found to be unconvincing both as a matter of common sense (because those areas were not fenced off and were near areas where the children typically play) and because the facts show that she or those working under her direction have not always strictly supervised the children and that

children have gone unaccompanied into the kitchen and areas outside other than the play yard, the latter both with the petitioner's permission and without it.

ORDER

The decision of the Department to revoke the petitioner's day care registration is upheld.

REASONS

The Commissioner of the Department of Social and Rehabilitation Services has the authority to adopt rules and regulations governing the day care registration program and to inspect the premises of registered day care homes. 33 V.S.A. § 306(b)(1) and (4). Such rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes", effective January 3, 1991. Furthermore, the Commissioner has the specific authority to revoke registrations if rules are broken which affect the health and safety of children in care. 33 V.S.A. § 3502(d).

There can be no doubt in this matter that conditions discovered at the petitioner's home did violate several specific regulations involving the health and safety of children. Those regulations are set forth as follows:

Section II, Number 2. - . . . During outside play:

b. preschoolers and school age children may be monitored from inside the home if their area of play is within sight and earshot of a caregiver.

Section V, Number 3. - The sewage disposal system shall function so as not to create a health hazard.

Section V, Number 10. - Children in care shall be protected from any and all conditions which threaten a child's health, safety and well-being. This includes protecting children from stoves, pools, poisons, asbestos, wells, known vicious animals, medications dust or chips from lead paint, traffic and other hazards.

Section V, Number 20. - Areas used by children shall be well lighted, well ventilated, clean, free from hazardous substances and sufficient in size to permit children to move about freely.

In addition, the regulations contain several

general requirements regarding supervision and hazards:

Section I, Number 5. - The Registrant shall be responsible for the actions of all caregivers, as well as all other persons in the home, and shall ensure that compliance with the Family Day Care Home Registration Regulations is maintained.

Section II, Number 1. - A registrant is responsible for the health and safety of children in care.

The children in the petitioner's care were for varying periods of time exposed to a potential risk of severe electric shock, drowning, falling from unprotected heights and toxic poisoning from substances

of all kinds which could have been accessed by the children. The petitioner does not really dispute that these hazards exist or existed at one time on her property but says that the children were never in any real risk from these dangers because she supervised them well and because she cooperated in remedying problems identified to her as hazardous.

The Commissioner has rejected the petitioner's contention and determined that children in the petitioner's care were placed in danger for several reasons. The mere existence of certain hazards such as exposed electric wires and open quarries were felt by the Commissioner to be so hazardous that no degree of supervision could overcome the serious nature of those unprotected hazards on the property. Secondly, the Commissioner, although sympathetic to the petitioner's financial and personal difficulties, felt that she lacked insight in her ability to identify hazards and the speed with which she remedied them. Finally, the Commissioner clearly lacked confidence that the petitioner was really able to provide the high level of supervision that she claimed, particularly in light of its discovery of unsupervised children during the unannounced visit on June 30, 1994.

The Commissioner has the authority to determine whether or not regulatory violations are actually placing children in danger and whether revocation is the appropriate remedy in a given situation. 3 V.S.A. § 8814, Huntington v. SRS, 139 Vt. 416 (1981), Fair Hearing No. 10,414. The Board may only overturn that decision if the Commissioner has acted arbitrarily, capriciously or has otherwise abused his discretion. Fair Hearing No. 12,804. The petitioner has failed to show that the Commissioner's decision was unfounded in this case. There are sufficient facts in the record to support the Commissioner's belief that children placed in the petitioner's care are not in a safe environment, thereby justifying the decision made to revoke the registration. The Board may not, in that case, substitute its judgment for that of the Commissioner. Therefore, the decision is affirmed.

With regard to the Petitioner's Proposed Findings of Fact, the hearing officer recommends the following to the Board:

Paragraphs 1-8; 11-22; 25-28; 31-33; 36, 38, 41, and 45-49 should be granted.

Paragraphs 9, 10, 23, 24, 29, 30, 34, 35, 37, 39, 40, and 42-44 should be denied.

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