STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 13,983

)

Appeal of)

)

INTRODUCTION

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) denying her a home day care registration certificate based on the presence in her home of a person who has a founding of child abuse against him entered in the SRS registry.

FINDINGS OF FACT

1. The petitioner lives with her fiance and a nineteen-year-old male relative, "C.", who had a finding of sexual abuse placed in the registry against him some four years earlier based upon his molestation of his nine-year-old step-sister. C. has never opposed nor sought to have that finding expunged. In fact, the petitioner admits that the finding was based upon a court finding that the petitioner committed "a crime and a felony".

2. C. has lived with the petitioner for two years and has been trying to finish his GED and think about college. The petitioner says that C. feels safe with her and is sorry about what he did when he was a juvenile. The petitioner believes that her willingness to take him into her home and to assist him has been pivotal to his recovery from his youthful ordeal and she is opposed to asking him to leave her household.

3. The petitioner cares for her sister's nine month old son in her home while her sister is at work. Her sister is a single parent and lives in the same building in the apartment next door. Her sister is an ANFC recipient and a Reach-Up participant. The petitioner is paid by the Department to care for her nephew but has been told that she could receive more money if she were a registered day care provider.

4. On August 28, 1995, the petitioner applied for a family day care registration certificate. Her application was assessed and she was notified on October 11, 1995, that she would be denied a registration certificate because she lived with a person who had a report of abuse substantiated against him in September of 1991, based upon a Family Court determination that he had abused a female child.

5. The petitioner appealed and that decision was reviewed by the Commissioner of SRS who issued a written decision on December 27, 1995. He upheld the decision based upon the sexual abuse by C. of his nine-year-old half sister. The review also indicated that C. had been in SRS custody himself until June of 1994, and had failed to successfully complete a sex offender program. The Commissioner felt that discharge reports indicated that he was a risk to re-offend and that he should not be placed in situations where he could be dangerous to other children.

6. SRS has indicated to the petitioner that she could be registered if she provided the care to her nephew in her sister's apartment. The petitioner is unwilling to take that step because her sister's apartment has no telephone, has fewer amenities (no television or rugs) and because it is inconvenient for her to be out of her own home when she is babysitting.

7. The petitioner says that C. and the baby get along very well and she does not fear for the baby's safety when he is in C.'s presence. C. often takes the baby for walks and helps out with his care but is never left alone with him. The petitioner also feels it is unfair for the Department to keep a record of actions which C. took as a juvenile and use them against him now. The petitioner asks for a temporary waiver only until June of 1996, when her sister completes her current training program. She is willing to accept conditions on her certification if necessary.

8. SRS does not contend that the petitioner must be a registered provider to care for her nephew in her home. The petitioner has sought that registration in order to qualify for improved day care payments. SRS takes the position that it cannot grant waivers to persons who live with founded abusers both because the potential for harm is to great and because it is unable to monitor conditions placed on registration certificates. In spite of the fact that the abuse occurred when C. was a juvenile, his name is still on the registry and he has done nothing to expunge it therefrom. SRS is not convinced that the petitioner has in any way rehabilitated himself.

ORDER

The decision of the Department is affirmed.

REASONS

The Department of Social and Rehabilitation Services is charged by statute with making "inquiry and investigation" into applications for day care registration certificates and is given the power to grant or deny such application. 33 V.S.A. § 306(b). The Commissioner of SRS is also authorized to "issue regulations necessary" to carrying out Departmental duties. 33 V.S.A. § 304(b)(1) and (2). On April 1, 1993, SRS promulgated regulations

governing registered day care homes which provide, in pertinent part, as follows:

. . .

4. The following persons may not operate, reside at, be employed at or be present at a Family Day Care Home:

. . .

b. adults or children who have had a report of abuse or neglect substantiated against them.

Section 1 - ADMINISTRATION

Regulations for Family Day Care Homes April 1, 1993

The applicant for a day care registration license in this case admits that she has an adult living with her who had a report of abuse substantiated against him when he was a juvenile. Such a situation is explicitly forbidden by the Department's regulation. The petitioner does not argue that the regulation is contrary to law. Rather she asks that a waiver be granted in her case based on the fact that the parties are all members of the same family, that the abuse occurred when C. was a juvenile and that a hardship is created when she must baby-sit for her nephew in the apartment next door. She is willing to accept conditions on her registration, including restriction to babysitting for her nephew.

The Department's regulations specifically give it the power to waive violations under certain circumstances:

16. The Commissioner, upon request in an individual case, and in his or her discretion, may grant a variance to a regulation. A variance may be granted when in unique and exceptional circumstances literal application of a regulation will result in an unnecessary hardship, and the intent of the regulation can be achieved by other means.

17. The Division may attach conditions to a Registration when circumstances warrant.

18. A Variance Review Panel may be established by the Commissioner to assist in consideration of variance requests. The burden of establishing that a variance should be granted rests with the applicant.

Section VI, Id.

The Department is aware of the petitioner's position but will not grant a waiver to nor condition the registration certificate of any applicant with regard to this particular regulation. See Fair Hearing No. 12,804. The Commissioner's reasons include the seriousness of the potential harm and the Department's inability to effectively monitor for the presence of individuals in registered day care homes, even for a short period of time. In addition, the Department has grave reservations with regard to this particular individual based on its experience with him as a juvenile. The petitioner, who has the burden in this matter, has offered no persuasive evidence that C. has actually been rehabilitated and is unlikely to molest another child. Without such a showing, it cannot be found that the Department has exercised its discretion to grant or deny the waiver in an unreasonable manner.

The petitioner is not totally without recourse here. She may still continue to care for her nephew in her home without a day care registration certificate although she may have to accept a lower rate of reimbursement. In the alternative, she can care for her nephew in a place where C. does not reside, such as her sister's apartment and reapply for a new certificate. In addition, C. could request an expungement hearing before the Board and if he is successful, the finding would be removed from the registry, thus eliminating the underlying problem. As the Department's decision to deny the registration in this case is in accordance with the law and its regulations, the decision must be upheld. 3 V.S.A. § 3091(d).

# # #