

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 14,543

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Appeal of)

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INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) "substantiating" a report of child sexual abuse against him and seeks to have the report expunged from SRS records. The issue is whether a preponderance of evidence established that the petitioner sexually abused his daughter. A recommendation was originally issued in this matter on October 23, 1996. Following consideration by the Board, the matter was remanded for a supplemental hearing which was held on December 3, 1996. The petitioner, although notified by letter dated November 5, 1996 of the Board's decision and the new hearing date, failed to attend the hearing. The following findings of fact and revised recommendation are based on evidence presented at both hearings.

FINDINGS OF FACT

1. On February 27, 1996, the Department received a report from both a neighbor and a school counselor that the petitioner's daughter had reported being sexually molested by her father.
2. The report was investigated by an experienced SRS worker who interviewed the girl, (C.M.), who was then twelve-years-old, the neighbor who made the report and the mother of the girl. C.M. herself was interviewed in the presence of a police officer. The worker did not interview the petitioner but was aware from a police interview of him that he denied the allegations.
3. Based upon these interviews, a substantiation was made that the petitioner had fondled the genitals of his twelve-year-old daughter, C.M. The substantiation was made because the worker felt the girl's statements to her were consistent with those made to her mother, her neighbor and the guidance counselor. She also felt her demeanor which was serious, frightened and reluctant enhanced her credibility.
4. The petitioner was notified on March 29, 1996, that the substantiation had been made and advised of his appeal rights.

5. Subsequent to this notification, the petitioner was afforded at least two internal Commissioner's Reviews which upheld the substantiation.

6. The credible evidence indicates that the petitioner and his then wife were going through a divorce. His ex-wife had custody of their three children. Each child visited individually over the Christmas school break, although all three were there together on December 23, 1995. In January of 1996, following the visit, the petitioner was notified by the guardian ad litem that the twelve year old daughter, C.M., was thinking of changing to his custody, although this may have been more out of a desire to be with the father's girlfriend, whom the child liked, than the father. In February of 1996, C.M. first disclosed to the neighbor that her father had molested her. The neighbor then encouraged the girl to tell her mother and the school guidance counselor. The petitioner asserts, however, that the twelve year old was coached by her mother to make the accusation of molestation in order to avoid a transfer of custody.

7. At the first hearing, the statements of C.M. were introduced through the testimony of the investigator. Based on her investigative notes, the worker was able to testify that the child said

. . . that while she was visiting her father's apartment approximately Christmas Eve she fell asleep in the bed of his room when she woke up his hands were down her pants touching her skin. She told him to stop and yelled for [name] his girlfriend but he told her not to tell anyone or he would "track her down like a dog".

The worker believes that C.M. must have given her some other details about what areas of the skin were touched but she could not recall what they were. She also recalled the child saying that "you'd wake up too if someone had their hands down your pants".

8. The petitioner denied the allegations of his daughter, C.M., as recounted by the SRS investigator. He has agreed to giving his wife temporary custody of his three children and he has visitation rights with the two younger children but not with the daughter in question (C.M.) due to this action. He believes C.M. was coached to make this accusation by her mother who did not want to give him custody of his daughter.

9. At the second hearing, the tape recorded interview of the child made on March 6, 1996, was introduced into evidence to show her testimony with regard to the above allegation. In addition, the police officer who questioned the girl, C.M., testified under oath as to her statements and the sworn written statements given to the police by both the neighbor and the school therapist were put into evidence. The testimony of the child on the tape was clear, specific and offered without undue suggestion or influence by the examiners. She freely offered a general description of the incident and later answered detailed questions about the incident. Her statements on the tape were consistent with the written statements offered by the therapist and neighbor with regard to her reports. There is nothing in the evidence which would indicate that the child had been coached or was fabricating any of the testimony she gave. She appeared to understand the questions asked of her, her obligation to tell the truth and was forthright, although embarrassed, during the interview.

10. Based on the credible statements of the child on the tape as well as the credible sworn oral testimony of the police officer and sworn written testimony of the neighbor and school therapist it is found that the following occurred with regard to this incident:

On December 23, 1995, the twelve-year-old child,, C.M., was visiting with her father at his house along

with her two siblings. Her siblings and her father's girlfriend were in the living room with her where she had been playing Nintendo. The petitioner had gone shopping at a neighborhood convenience store. C.M. became sleepy and went to take a nap on her father's bed as she had no bedroom at his apartment. She was awakened when she felt her father's hand in her pants moving around by her vagina. He also rubbed her breasts. When she awoke C.M. said, "What are you doing?" and asked her father to stop. She then began to scream for her father's girlfriend in the next room. Her father then put his hand over her mouth and blocked her exit from the bedroom. He told her that if she said anything to anyone, including his girlfriend, that he would "hunt her like a dog and kill her". Because she was frightened she did not tell her father's girlfriend. However, shortly before the February school vacation in 1996, C.M. confided to a neighbor that she was afraid of her father, did not want to spend the school break with him and that he had sexually and physically abused her. The neighbor reported the allegations to the child's mother and to SRS. The mother gave C.M. permission to spend the school vacation with the neighbor. On February 23, 1996, C.M. approached the school counselor and told her that her father had "molested" her in December and described essentially the same events as were on the tape. The counselor also reported that C.M. told her on March 4, 1996, that her father had approached her in a car on her way to school and that she had been frightened and tried to run away but then got in the car where he asked her for help in winning custody of her before delivering her late to school. The March 4, 1996 incident was also consistently reported on the tape recording made by the police officer on March 6, 1996.

ORDER

The petitioner's request for expungement of the finding of child sexual abuse made against him is denied.

REASONS

The petitioner has made application for an order expunging from the SRS registry the record of the alleged incident of child sexual abuse. This application is governed by 33 V.S.A. § 4916 which provides in pertinent part as follows:

(a) The commissioner of social and rehabilitation services shall maintain a registry which shall contain written records of all investigations initiated under section 4915 of this Title unless the commissioner or the commissioner's designee determines after investigation that the reported facts are unsubstantiated, in which case, after notice to the person complained about, the records shall be destroyed unless the person complained about requests within one year that it not be destroyed.

...

(h) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under Section 3091 of Title 3 on the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

Pursuant to this statute, the department has the burden of establishing that a record containing a finding of child abuse should not be expunged. The Department has the burden of demonstrating by a preponderance of the evidence introduced at the hearing that a child has been abused or neglected. 33 V.S.A. § 4912(10).

"Sexual abuse" is specifically defined by 33 V.S.A. § 4912 as follows:

(8) "Sexual abuse" consists of any act by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. Sexual abuse also includes the aiding, abetting, counseling, hiring, or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts a sexual conduct, sexual excitement or sadomasochistic abuse involving a child.

In this matter, as is most often the case, there were no witnesses to the alleged abuse and no physical evidence. The Department's case rests solely on the credibility of the alleged victim. The Board has often acknowledged that in such circumstances only two individuals, the alleged perpetrator and victim, will ever know for certain if the incident occurred. In such cases, however, if the alleged victim's allegations are deemed to be credible, and those allegations are deemed to constitute sexual abuse, the Department's decision must be affirmed.

At the supplemental hearing in this case, the Department presented evidence that was both substantial and credible supporting its findings in this matter. The evidence presented made it more likely than not that the description of the events made by the child as set forth in paragraph 8 above were accurate and reliable. Those credible statements describe an act which meets the definition of "sexual molestation" found in the statute. It must be concluded, therefore, that the Department has met its burden of showing that the child, C.M., was sexually abused by her father and the substantiation must stand.

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