STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,009
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) denying her a Family Day Care Home Registration certificate. The issue is whether the petitioner is in violation of regulations involving the safety of children because her husband, who lives with her, has a criminal conviction for cruelty to animals.

FINDINGS OF FACT

1. In the Spring of 1999, the petitioner applied for a Family Day Care Home Registration certificate. On the application she included the name of her husband who lives with her. The Department did a criminal record background check on every member of the petitioner's household and found that the petitioner's husband had a 1996 conviction for cruelty to animals.

2. Based on that information, SRS notified the petitioner on June 3, 1999 that her request for a certificate

would be denied. In the notice, SRS relied on a regulation which it characterized as prohibiting "persons convicted of fraud, felony or an offense involving violence. . ." from residing at a family day care home. The petitioner was advised that she had a right to appeal that decision.

3. The petitioner did appeal that decision to the Commissioner of SRS. In the course of the appeal, the petitioner and Department got into some of the facts involved in the conviction and the veracity of those facts. The Commissioner determined that some of the facts alleged by the petitioner were untrue. Following the appeal, the Commissioner determined to uphold the decision to deny the certificate because facts indicated a violation of both Sections I (4)(a) and VI, (8) which involves providing false information.

4. Following this review, the petitioner appealed to the Human Services Board and, after some delay, obtained an attorney. The petitioner's attorney asked that the Board's review be limited to a determination of whether the language of the regulation prohibited a person with a charge involving violence against an animal from living in the home of a day care registrant. The petitioner agreed that he had a 1996 conviction based on a pro se nolo contendere plea in the

Windham County criminal court. He was convicted under 13 V.S.A. § 352 of cruelty to animals. Pursuant to his plea, the court made no findings in the matter other than that the petitioner admitted there were sufficient facts to enter the conviction based upon his killing a neighbor's dog with a gun.

5. SRS wished to go forward as well on the false statements charge as a ground for denial. It intended to rely on charging affidavits in the criminal court records to show that the petitioner was not telling the truth about the incident. The hearing officer ruled that such affidavits would not be sufficient under the rules of evidence to establish the truth therein and that only findings made by the Court could be admitted to prove the underlying facts of the charge. Since the court made no findings with regard to any alleged facts (which is typical with a nolo contendere plea), the hearing officer ruled that the false information issue could not be substantiated at the hearing on this kind of evidence. Therefore, the hearing was limited to the legal issue regarding the meaning of the Department's regulation.

ORDER

The decision of the Department denying the petitioner's application based on the criminal conviction of her husband is affirmed.

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, including standards to be met and conditions for denial of a certificate. 33 V.S.A. § 306(b). Those rules and regulations are required by statute to be "designed to insure that children in . . . family day care homes are provided with wholesome growth and education experiences, and are not subjected to neglect, mistreatment, or immoral surroundings." 33 V.S.A. § 3502(d). Such Rules and regulations have been adopted and are found in the "Regulations for Family Day Care Homes, effective October 7, 1996. Among the regulations adopted by the Commissioner are the following which are pertinent to this case:

DEFINITIONS:

> REGISTRATION CERTIFICATE – The official document awarded by the Division to applicants who have provided the Division with documentation that they have met the prerequisite requirements. . .

SECTION I - ADMINISTRATION

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

   a. persons convicted of fraud, felony or an offense involving violence or unlawful sexual activity or other bodily injury to another person, including, but not limited to abuse, neglect or sexual activity with a child;

. . .

SECTION VI – RELATIONSHIP BETWEEN REGISTRANT AND DIVISION OF LICENSING & REGULATION

7. The Division may deny the issuance of a Registration Certificate if it has found that the person who has submitted the Application for Registration has not complied with these regulations or has demonstrated behavior which indicates an inability to care adequately for children.

The petitioner argues that the above regulation at Section I(4) should be read as applying to offenses involving violence to another person only. He argues that the word "violence" in the second sentence is modified by the phrase "to another person" in the third sentence. He concludes, therefore, that if the conviction for violence is with regard to animals or property, the regulations would not apply.

The Department argues that the word "or" in the above regulation is a separator forming several distinct phrases or ideas. It argues that the term "offense involving violence"

should not be linked with the phrase "another person." The Department also argues that its interpretation is entitled to great deference in this matter.

In construing an administrative rule or regulation, the primary rule is to "give language its plain, ordinary meaning". Slocum v. Department of Welfare 154 VT 474 (1990) According to Webster's II New College Dictionary, Houghton Mifflin Co. 1995, the word "or" is a conjunction "used to indicate an alternative, usually only before the last term in a series." (Definition 1.) In that case, each phrase which is linked by "or" must be considered an alternative idea. There are many "ors" in the above regulation but the main "or" appears to be the one separating the three ideas of "fraud" "felony" and "offense" The rest of the sentence following the noun "offense" is a phrase modifying that word. That modifying phrase is further divided by "ors" into three more alternative ideas: offenses which involve violence, offenses which involve unlawful sexual activity and offenses which involve other bodily injury to another person. The final idea, offenses which involve other bodily injury to another person is further modified to describe, but not limit, those offenses to those such as abuse, neglect or sexual activity with a child. Grammatically speaking, modifiers found in one

phrase should not be applied to ideas found in an alternative phrase. On the contrary, "[m]odifiers should come, if possible, next to the words they modify." The Elements of Style, William Strunk Jr. and E.B. White, Macmillan Publishing Co. Inc. (1979), p. 30. Using common meanings and accepted grammar, it must be concluded that the prepositional phrase "to another person" is modifying only the noun within its own phrase "bodily injury" and is not modifying the nouns in the alternative phrases. Therefore, the regulation is properly read to include a person convicted of any offense involving violence of any kind in the list of persons who cannot reside at day care homes.

While this regulation is hardly a model of clarity, it cannot be found that the regulation is ambiguous. Even if it could be so termed, rules of interpretation would require that the regulation be read in a manner that is consistent with the other regulations and the purpose of the legislation authorizing it. See Id. at p. 482. The legislature has clearly given SRS the obligation and authority to protect children in day care homes from mistreatment. A regulation which prevents persons convicted of criminal violence against animals or property from living in day care homes cannot be said to be inconsistent with that mandate. Violence against

animals or property is ultimately violence against the owners of that animal or property. A person who commits a crime of violence has demonstrated a serious lack of control over his or her emotions and actions. It is not unreasonable for the Department to conclude that any crime involving violence could place children in a day care home at risk. The petitioner in this matter was convicted of "intentionally killing an animal belonging to another person without first obtaining legal authority or consent of the owner." 13 V.S.A. § 352(1). The Department has a right (and perhaps an obligation) under the statute and its regulation to determine that persons who committed violent actions severe enough to carry criminal penalties pose a risk of harm for children in care.

SRS was justified under this regulation to deny the petitioner a day care registration certificate. If she cannot comply with the regulation on convicted criminals in the household, she cannot be granted a day care registration certificate. Section VI (7). Thus, the Board is obliged to uphold the Department's decision. See 3 V.S.A. § 3091(d) and Fair Hearing Rule 17. The petitioner is aware that she can request a waiver by presenting evidence of mitigating circumstances to the Commissioner. This decision is strictly

discretionary with the Commissioner and will be reviewed only for abuse of discretion by the Board.[1]

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[1] The petitioner should be aware that the Department had the burden to prove the facts alleged in this hearing and was unable to meet that burden with regard to the allegation of regulatory violations based on false information with hearsay affidavits of persons involved in the criminal complaint. If the Commissioner should decide, however, not to waive the regulation based on facts alleged in those hearsay affidavits, the Board would not require proof that those facts were true, only that the Commissioner had a reasonable belief that the factual allegations might have been true. This is a distinction the parties should keep in mind.