

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 17,263
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department of Social and Rehabilitation Services (SRS) closing her registration to operate a family day care home. The issue is whether the Department's decision is in accord with the pertinent statutes and regulations.

FINDINGS OF FACT

1. The petitioner applied for a Registration to operate a family day care in her home on March 27, 2001. Pursuant to that application the Department issued her a Registration effective April 24, 2001. On her application the petitioner listed several family members as residing in her household. The application did not mention her stepfather or her brother. There is no dispute in this matter that the petitioner's brother had a felony conviction in 1995 for lewd and lascivious conduct and that the petitioner's stepfather had several felony convictions between the years 1960 and 1973.

2. On July 16, 2001 the Department received information that the petitioner's brother was residing in the petitioner's home. On that day a Department licensor called the petitioner to check on this report. The petitioner denied that her

brother lived with her and agreed to furnish the Department with a written statement that her brother would not be allowed in her home during the hours she operated her day care.

3. Upon further investigation the Department determined that on the morning of July 13, 2001, a Friday, the petitioner's stepfather and mother, both of whom were living in the petitioner's home, had told the Vermont State Police that the petitioner's brother had been living in the home and had been paying rent to the petitioner's mother for the last four years. The Department also learned that the police had obtained the brother's address from their records, and that they had found him sleeping in the petitioner's home that morning.

4. On August 7, 2001 the Department's licensor visited the petitioner's home. At that time the petitioner told the licensor that her brother's children (her nieces and nephews) lived in her home (they had been listed as household members on the petitioner's application) but that, although her brother was their legal custodian, he lived "somewhere in Swanton" and only came to the house on weekends. The licensor also spoke to the petitioner's mother that day who told her that the petitioner's brother (her son) lived "in Franklin or Fairfield" and only came to the house occasionally.

5. Based on its investigation the Department determined that the petitioner had failed to list her stepfather and brother as members of her household, and that because of their

criminal records the petitioner was in violation of the regulations and that her Registration would be revoked.

6. At the hearing in this matter, held on November 26, 2001, the State Police officer who had helped arrest the petitioner's brother testified credibly as to what the petitioner's stepfather and mother had told him and other police officers on July 13, 2001 as to the petitioner's brother living in their home.

7. The petitioner declined to testify at the hearing. However, her stepfather, who handled the presentation of her case, testified that the petitioner's brother has a phone and gets mail at addresses in Swanton and Fairfax. He admitted, however, that the petitioner's house is considered the brother's "home", that he has his own room there in which he keeps clothes and personal belongings, that he lists that address on his drivers license, and that he "can come and go as he pleases".

8. Based on his demeanor and the weight of evidence to the contrary the testimony of the petitioner's stepfather that the petitioner's brother resided elsewhere than in the petitioner's home is found to be not credible.

9. The petitioner's stepfather and another witness also testified that in March 2000, during the time the petitioner applied for her Registration, the stepfather had been living in Maine due to a temporary dispute he was having with his wife (the petitioner's mother). Therefore, the stepfather

argued, the petitioner's failure to list him on her application was inadvertent and she should not be found to have misled the Department even though he had moved back into the household several weeks before the Department issued the petitioner her Registration.

10. This argument is severely undercut, however, by the uncontroverted fact that the stepfather had continuously lived in the household for several years prior to March 2001. During this time, his wife (the petitioner's mother) had held a Registration to operate a day care at the same address. The petitioner's application in March 2001 was essentially to take over her mother's business. Tellingly, however, the petitioner's mother had never reported her husband's presence in the household during the entire time she held her day care registration. Based on this it is reasonable to infer that the petitioner was fully aware of her stepfather's criminal record and that, like her mother before her, she intentionally failed to list him as a member of her household.

11. Similarly, the petitioner's mother never listed her son as a member of her household when applying to SRS for her Registration. Again, this and the credible evidence that the petitioner's brother was, in fact, residing at their home, leads to the reasonable inference that the petitioner intentionally failed to report this member of her household whom she knew had a criminal record.

12. The stepfather also testified that as of May 2001 he

had constructed a separate entrance to the day care. Therefore, he argues that he and the brother were living elsewhere in the building, and that the petitioner had a valid reason not to list them as living in the household. This argument is undercut by the fact that the petitioner listed her mother and her nieces and nephews as members of her household when she applied for her Registration even though they were living in the same part of her house as her stepfather and brother. Again, the petitioner's failure to list her stepfather and brother cannot be found to have been the result of confusion or inadvertence.

ORDER

The Department's decision is affirmed.

REASONS

33 V.S.A. § 306(b)(3) and 3 V.S.A. § 814 authorize the Commissioner of Social and Rehabilitation Services to issue licenses for day care facilities, promulgate regulations applicable to those facilities, and to deny or terminate licenses for "cause after hearing". Among the regulations promulgated by the Commissioner is the following, which appears in the Department's Regulations for Family Day Care Homes:

Section I, No. 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. . .

As noted above, the petitioner does not dispute that her stepfather and brother have criminal records of felony convictions. Although the petitioner may be a good provider of care to children, the Board has expressly upheld the Department's policy that, unless expressly waived by the Department under exceptional circumstances, the above regulation imposes an absolute bar to persons with such criminal records from operating or residing at a family day care home. See Fair Hearing No. 14,993. Nothing in the regulations supports the position that a separate entrance to the area in the home where day care is provided, per se, negates the above regulation.

Had the petitioner been forthright from the start in this matter, she may have been able to demonstrate to the Department that neither of these individuals poses a threat to the children in her care. Instead, however, she chose to continue the deception, apparently started by her mother, of trying to mislead the Department as to who lives in her home. Thus, it cannot be concluded that the Department has abused its discretion in determining that the violation of this regulation was "cause" for revocation and denial of the petitioner's day care registration. The Board is, therefore,

bound by law to affirm the Department's decision. 3 V.S.A. §
3091(d), Fair Hearing Rule No. 17.

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