

lack of jurisdiction, the matter was reviewed by the Commissioner on December 22, 2003 who upheld the substantiation.

4. The petitioner appealed to this Board on March 24, 2004. The substantiation is a particularly pressing issue for the petitioner because the Department of Corrections placed conditions on his release from prison requiring him to stay away from his girlfriend's children based on this substantiation. This posed a difficulty for the petitioner because he needed a place to stay in order to be paroled from prison and the place he had planned to stay was his girlfriend's home.

4. Because the petitioner was about to be incarcerated again, the hearing was delayed at his request. Finally, when it became clear that the petitioner would be incarcerated for some time, he asked for the hearing to go forward in order to resolve the matter as quickly as possible. He was allowed to participate in the hearing and to give his testimony by telephone from the correctional facility. Throughout the pendency of the appeal, the petitioner was advised to obtain legal counsel. He was provided with all pertinent documents relied upon by DCF in its case well in advance of the hearing and was allowed to adjourn the hearing in order for the Board

to issue subpoenas to witnesses and to supply him with copies of hearing tapes.

5. At hearing, testimony was taken from L.P.'s foster mother. L.P. had been placed into foster care as a teenager due to physical abuse by her father. She described an evening in November of 2003 when, following a disagreement with L.P., she found L.P. in her room crying in an hysterical and out-of-control manner. She had not seen such behavior by L.P. before and encouraged her to talk about what was troubling her. L.P. began to talk about her childhood and said that something had happened when she was young. The foster mother warned her to tell the truth about what happened because anything she said would have to be reported to DCF.

6. The foster mother testified that L.P. then told her that when she was about seven years old, she spent the night with her grandparents. In the middle of the night, she realized she had wet the bed and decided to change her clothes. When she went into the kitchen, she encountered the petitioner whom she knew as a friend of her grandparents. She said that he then dragged her to the barn, raped her in a hay stall and hit her in the face, splitting her lip. The

foster mother said L.P. told her this because she was afraid he would hurt some other young girls.

7. The foster mother informed L.P.'s DCF social worker of the disclosure and the social worker commenced an investigation. The social worker reported the disclosure to L.P.'s therapist and encouraged L.P. to make a statement to the police. L.P. told the social worker that she was reluctant to do so because she feared the petitioner, did not think anyone would believe her and was embarrassed to tell her parents and grandparents. Eventually, L.P., with the assistance of her therapist, did tell her parents who responded that they were sorry that they did not know of the incident at the time so they could have helped her.

8. The social worker also interviewed L.P.'s parents, therapist, case manager and foster mother. The social worker did not interview the grandparents where L.P. had stayed on the night of the incident.¹ The social worker did not speak with the petitioner herself following protocols that leave questioning of potential criminal suspects to the police.

She expected that he would be interviewed by the state police

¹ L.P.'s grandfather has since passed on. The petitioner asked for and was issued a subpoena to call in the grandmother for testimony. However, it was never served on her. There seems to be some consensus among the parties (DCF did not call her as a witness either) that poor memory caused by her advanced age would not allow her to testify accurately about anything which occurred during this period of time.

and that she would receive a report. However, such an interview never took place because the petitioner was incarcerated and L.P. told the police she was too scared to testify. After several months of hearing nothing from the police, the social worker made a decision to substantiate the report and placed the petitioner in the registry.

9. L.P., now twenty-one years old, testified under oath at the hearing in response to a subpoena issued by DCF. After attending college for a year, she is now employed in the health care field. She testified that when she was between five and seven years old, she lived in a trailer with her parents and siblings not far from her father's parents who ran a farm up the road. One night--L.P. believes it was either in the fall or spring because she could smell the mud --she stayed overnight with her grandparents, an unusual event for her. She woke during the night because she had wet the bed and decided to go downstairs to wash. She remembers when she came downstairs that she saw a light in the kitchen and a man rummaging through the drawers. She recognized that man as the petitioner, whom she described as her grandparents' nephew, a man she had seen several times before and whom she been told to stay away from by her parents. She knew he was not welcome in her grandparents' home and became

frightened when she saw him. She did not want to be seen because she had taken her soaked nightgown off so she turned to run back upstairs. Before she could do so, the petitioner grabbed her and put his hand over her mouth. He dragged her outside to the barn and got on top of her and put his penis inside her vagina "for quite a while." She recalled that it caused her pain. He also played with his genitals in front of her and hit her many times in the face, causing her lip to split. Before he left her he threatened to kill her if she told anyone what had happened. When he left the barn, she says she was filled with pain and had to limp back to the house. She was afraid to tell her grandparents and while waiting to fall asleep thought up a story to tell them when they would see her the next day. When her grandparents did comment about the split lip the next day, L.P. told them that she "had been playing too close to a heifer who kicked her." This explanation seemed to satisfy her grandparents.

10. L.P. testified that since that time she has gone out of her way to avoid the petitioner whom she believed to be stalking her about ten years later when she walked to school. She says that she feared the petitioner so much that she attempted to change her appearance by shaving her head.

She says that she still fears him and what he might do to her.

11. The petitioner testified that he knew L.P. as the daughter of his cousin and saw her frequently as a young child until he was incarcerated in 1987. Since that time he has been in and out of jail. At first the petitioner argued that he was incarcerated during the time at issue and, therefore, had no opportunity to have been the perpetrator. However, after records of the correctional facility were offered into evidence by DCF, the petitioner agreed that he had often been out of prison during some times during the years at issue. When he was not in prison, he lived with his parents in a nearby town. He says that he did visit his aunt and uncle's (L.P.'s grandparents') farm where the incident allegedly occurred. He said that he worked there occasionally when needed and felt he was welcome in their home.

12. The petitioner said that he never went to L.P.'s home a short way down the road because he did not get along with her mother who was "always calling the cops" about his drunk driving. He did get along with L.P.'s father, his cousin, and sometimes they worked side by side. He denies that the alleged incident ever happened and says that L.P.'s

story is not credible because he could not have entered his aunt and uncle's farmhouse during the night without causing their dogs to bark and waking the household.

13. The petitioner further says that the incident could not have occurred because L.P. presented no evidence that she sought medical attention at the time and would have needed such attention if her allegations were true. In addition, he is certain that if a physician were to examine L.P. now, that physician would find no evidence of permanent injury, an occurrence that he believes would be certain because of the disparity in their sizes at the time of the claimed incident. (She was seven and he was twenty-three at the time.) The petitioner was advised during the course of the hearing that he could obtain an expert's opinion on the medical issues and request an examination if the opinion so warranted. The petitioner did not obtain such evidence.²

14. Under cross-examination, the petitioner admitted that at the time period in issue he was often "pretty drunk" but that he had never blacked out. He also agreed that he had "many" convictions for theft and dishonesty, including

² The petitioner asked at one point for DCF or the Board to obtain a medical expert for which he offered to pay. The petitioner was advised that he had to obtain his own expert witnesses and was advised again to consult with an attorney.

theft from his relatives. He recalled that the aunt and uncle had several dogs over time but he could not match a dog to the time period at issue. He also agreed that his uncle (the grandfather) was the town road commissioner and sometimes had to leave the house at night to plow roads. He says that L.P. was put up to this accusation by her mother who disliked him.

15. The petitioner's mother testified that L.P. is the oldest of her four children. At the time in question, she lived about a quarter of a mile down the road from her husband's parents in a farmhouse which she and her husband bought after the grandfather passed away. The grandmother lives in a small home across the street. She recalls that when L.P. was six or seven, the grandparents had two dogs who either slept in the woodshed or the barn. She described them as friendly dogs who were unlikely to bark at anyone and certainly not at those they recognized. She said that L.P. did not stay at her grandparents' often because they are all dairy farmers and rarely go out of town. She does recall that Lisa was there three or four times during her childhood and particularly that she left her there overnight for several days during the time at issue when she and her husband went to a wedding in New York. She does not recall

seeing the split lip on her daughter when she returned to pick her up but says that it may have happened a few days before she returned and might not have looked like much by then. She said she would not have particularly noticed a bruise on her child. She said that Lisa started to have a lot of mood swings and anger when she was about five or six years old and that by the time she was thirteen things were bad enough that she went to live in a foster home.

16. The mother said that sometime eleven or twelve years ago, the petitioner tried to run her over with his car when he was drunk, an incident she reported to the police. She has not made any other reports to the police about the petitioner. The mother said the petitioner was often around the farm during the period at issue and that she warned her children to stay away from him and to never get into his car. She had also told the children's school that they were not to get into a car with him. She said that she did not trust him and that he had stolen from other family members before, including L.P.'s grandfather. She denies, however, encouraging her daughter to fabricate this story to cause trouble for the petitioner. By the time the story came out in 1999, her dealings with the petitioner were long past.

17. The testimony of L.P. with regard to her abuse at the hands of the petitioner is found to be entirely credible. There is no evidence that this story was suggested to L.P. by anyone or that she had any motive to fabricate such a story. Her recounting of the story to her foster mother, her DCF caseworker, and at hearing was consistent and detailed.³ Her continued fear of the petitioner as well as her distress in retelling the story was palpable at the hearing.

18. The petitioner's denial that this incident took place is found to totally lack credibility. He has failed to present any evidence supporting his medical theories, he was inconsistent about his opportunities to perpetrate this deed, and presented no persuasive evidence that this incident was fabricated as a retaliatory measure.

³ Inconsistencies between written statements and L.P.'s testimony pointed to by the petitioner in his arguments are deemed to be insignificant and immaterial (i.e. "he punched me in the head" vs. "he punched me in the face" or he was looking in "drawers" vs. the "hutch" (which could have had drawers in it)). The inconsistency alleged between L.P.'s testimony under oath about the story she told her grandparents and an earlier report is an inconsistency between what she said and what someone else (the DCF investigator) wrote that she said. It was not an inconsistency between two statements offered by the petitioner. The petitioner had an opportunity to ask L.P. under oath if she actually made that earlier statement to the investigator and also to ask the investigator if she wrote the statement down correctly, but did not do so. The actual written statement prepared by L.P. herself in October of 2003 and the petitioner's testimony in November of 2004 were entirely consistent on that point. The petitioner's failure to include all of her injuries-- split lip and black and blue side of the face-- in every recitation of the incident is not deemed significant particularly since considerable amounts of time passed between the incident, the report to the police and the testimony at hearing.

19. L.P.'s testimony recounted in paragraphs nine and ten above are hereby adopted as findings of fact in this matter.

ORDER

The petitioner's request to expunge the finding that he sexually abused L.P. is denied.

REASONS

The Department for Children and Families (DCF) is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are "unsubstantiated". 33 V.S.A. §§ 4914, 4915 and 4916.

The statute further provides:

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 not substantiated 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.

33 V.S.A. § 4916(h)

The petitioner relies heavily upon what he believes were poor procedures and processes as well as delays in the investigation of this case as a ground for expunging the

findings in this case. The findings above make it clear that the administrative delays in this matter were largely occasioned by the petitioner's difficulty in managing his review from prison, without an attorney, and from his own mistaken actions in going to the wrong forum for his appeal. Once he was in the correct forum, the appeal itself took longer than usual because many steps were taken to protect this physically-absent petitioner's rights by insuring that he had advance written access to all evidence relied upon at the hearing and by continuing the hearing as necessary when problems arose that he needed to address such as calling other witnesses and reviewing testimony by means of copies of tape recordings in order to prepare his cross-examination, rebuttal and written arguments. The petitioner cannot complain that the extraordinary procedural care taken in his case should now be a ground for dismissing the matter on its merits.⁴

It is not necessary to rule on whether DCF (now DCF) used poor procedures in the investigation of this complaint because hearings before the Board are de novo, meaning that all the facts are tried all over again in this forum. In re

⁴ The petitioner was advised early on that the hearing on his appeal could have waited until his release from prison. It was his choice to proceed with the hearing while incarcerated.

Bushey-Combs, 160 Vt. 326 (1993). In order to maintain its burden of showing that the substantiation should be upheld, DCF is first required to show that the registry report is based upon "accurate and reliable information." See 33 V.S.A. § 4912(10). In this case the Department's 2000 report of the abuse in question has been shown to be both accurate and reliable as to the facts, inasmuch as it is supported by highly credible evidence introduced at the hearing, namely the direct testimony of the victim corroborated by the testimony of the three persons to whom she first made the report in 1999. Contrary to the petitioner's assertion, DCF is not required to provide medical evidence from 1990 or currently that this event occurred. The credible testimony of the victim is sufficient to meet its burden. The petitioner had the right and opportunity to present medical or other evidence that would refute the allegations of the petitioner but, save his own testimony denying the incident, he failed to do so.

The second burden of the Department is to show that a reasonable person would believe that a child has been abused or neglected based on these facts. The statute at 33 V.S.A. § 4912 defines sexual abuse, in pertinent part, as follows:

- (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.

. . .

- (8) "Sexual abuse" consists of any act or acts 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. . .

In this case it must be concluded that the facts established by DCF demonstrate that the petitioner "sexually abused" his cousin's daughter, L.P., within the meaning of the above statute. Therefore, the petitioner's request to expunge the report from the Department's child abuse registry must be denied.

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