

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 18,938
)
Appeal of)
)

INTRODUCTION

The petitioner appeals a decision by the Department of Social and Rehabilitation Services (SRS) suspending her home day care registration certificate. The issue is whether SRS had cause to suspend the registration under the statute and regulations.

FINDINGS OF FACT

1. The petitioner has been a day care home registrant for about eight years. She was a licensed day care provider for many years prior to that time. Many of the children in her care are paid for by SRS through day care subsidies. On February 27, 2004, the petitioner received a hand-delivered notice from SRS that her day care registration license would be suspended immediately for "repeated denial of entry to Department representatives who have properly introduced themselves." She was advised that her actions violated a number of regulations relating to allowing day care home inspections and impeding an SRS investigation. The supervisor

who delivered the suspension notice gave the petitioner an opportunity to provide SRS with information rebutting the findings or suggesting alternatives before it was executed. She asked for and received an expedited fair hearing due to the suspension.

2. SRS enforces the regulations of the day care registration program by making unannounced visits to day care homes during their hours of operation either of its own volition or in response to a complaint. Investigators who do these inspections typically identify themselves and present their business cards prior to conducting an inspection. They also have photo identification cards which they carry with them to investigations but which are not ordinarily presented to identify investigators.

3. The petitioner's home has been visited some ten to fifteen times since 1994 both in the normal course of conducting business and in response to specific complaints about her day care home. She has dealt with at least six different investigators during this time period. On two occasions prior to the one which triggered this suspension action, the petitioner or her care staff acting at her direction have refused to allow Department investigators access to her day care area premises as follows:

- a. On November 9, 1994 an investigator went to the petitioner's day care center to investigate a complaint that there were too many children in care and inadequate supervision. A care staff member who was in charge of the premises during the petitioner's absence refused to allow the inspector to enter because she had been told by the petitioner to let no one in. She would not attempt to contact the petitioner, who was attending the birth of her granddaughter, to gain permission for SRS to enter. The petitioner was cited for failure to allow SRS to inspect but no action was taken against her license at that time. The petitioner raised no concern at that time that the inspector had not properly identified himself although he did not present his photo identification that day and was unknown to the caretaker.
- b. On April 13, 2001, an investigator and her supervisor went to the petitioner's day care center for an unannounced follow-up of a January 25, 2001 visit during which SRS determined that an excess number of children were in care and required the petitioner to take corrective action. At the

follow-up visit, the petitioner was not on the premises and her daughter, who was the caretaker that day, refused to allow SRS to inspect the premises or to examine the attendance records. The investigator and supervisor returned to the car to write up the refusal. After a few minutes, the daughter approached the car and said that the petitioner was on the telephone and that they could come into the home. The investigator and supervisor returned and were shown the care area which was under renovation. The petitioner would not allow them to inspect the part of the home where four children were in care and would not allow them to see the attendance records. She refused the latter because the records were in the renovation area and the children were upstairs with their caretaker and she did not want her to leave the children. She told the supervisor that he had to call before he came to inspect or see records. Following this incident, SRS wrote a letter to the petitioner describing her obligation to permit visits and inspections of the home and examination of its records whether she had been contacted first or not.

No action was taken against the petitioner's registration certificate at that time, SRS preferring, in its words in a letter of November 9, 2001 "to work with this provider to assist her in meeting the statutory and regulatory requirements and to improve the quality of care she provides to children." No issue was raised by the petitioner with regard to identification of the SRS employees although neither showed their photo identification to the petitioner's caretaker. The investigator was known to the caretaker but the supervisor was not.

4. The petitioner as part of her annual registration agreement signed a statement each year from 1996 through 2004 indicating that she would agree to comply with SRS' regulations and that she understood that a representative of SRS had a right to visit and inspect her day care home during reasonable hours. In addition, since 2002, she has agreed in writing that she understood that any complaints about her family child care home "may be investigated by a representative of SRS without prior notification."

5. On February 18, 2004, an investigator who had never been to the petitioner's day care home was assigned to investigate a complaint received in the last week with regard

to the number of children in care and level of supervision. The petitioner's daughter, who was the sole caretaker that day, answered the door when the investigator visited. The investigator identified herself, showed the petitioner her business card which identified her as an SRS "child care licensing specialist" and stated the reason she had come. The caretaker invited her inside but told her to wait on the landing of the split-level home. The caretaker went downstairs and the investigator overheard her using the telephone. She heard the caretaker say, "Mom, come home, the state is here. I let her in because I thought she had papers." When the caretaker came back upstairs she said that her mother had said that the investigator could not come in. She did not say why. She did not indicate that she doubted the investigator's identity or that she needed to see additional credentials. She did say that her mother had to go to the hospital due to a relative's emergency medical problem. The investigator said again that she wished to conduct an inspection at that moment and cited the regulation that required the caretaker to allow entrance into the day care area. She was again told that she could not do so. While still standing in the hallway, the investigator filled out a report saying that she advised the caretaker of the entry rule

and had been denied access to the children. The caretaker read and signed the report indicating that she had seen it. The investigator then left and went across the street to another day care home operated by another daughter of the petitioner. Although she has conducted hundreds of inspections, this is the first time the investigator has ever been prevented from inspecting a day care home.

6. The petitioner and her daughter claim that when the investigator came to the door, her daughter called her to report that someone who said she was from the state was there. The petitioner says she asked her daughter on the telephone if she knew the person from the state. When her daughter said "no", the petitioner claims that she told her to tell the woman to leave. The petitioner acknowledges that the investigator showed her business card to her daughter but maintains that such cards are easy to forge and that she should have been shown the photo identification card in order to protect the children from strangers. The allegations of the petitioner and her daughter that the investigator was turned away because they could not verify that she was from SRS are totally lacking in credibility. At no time did the caretaker indicate to the investigator that she doubted her identity. Rather, she invited her in, described her to her

mother on the telephone as "from the state" and signed the field form citing the violation given to her by the investigator. No actions were taken consistent with their claim such as asking the investigator to wait while they called the SRS licensing chief or asking for more identification. The petitioner also admits that although she has been involved with many persons from SRS over the years, she has never had any trouble with a stranger impersonating an investigator. Based on the weight of the credible evidence it is found that the petitioner's refusal to allow the investigator into her day care home was a tactic to delay the inspection and not a genuine concern for the identity of the investigator.

7. The petitioner arrived home within ten minutes of the telephone call from her daughter. When she arrived, the investigator's car was across the street at her daughter's house. Soon thereafter, she called SRS and talked to the licensing chief. She said at that time that they were unfamiliar with the investigator, that she should be sent back to the house and that the petitioner should not receive a citation. The petitioner says that she called her daughter across the street to tell her to have the investigator return but she did not come back. The licensing chief told the

petitioner that he would get back to her about her request for a re-inspection.

8. The licensing chief opted not to attempt to re-inspect the premises but began a review of the case for a possible suspension of operations. Sometime after February 18, the petitioner did call and speak to the licensing supervisor who attempted to explain the importance of inspection to her but was abruptly cut off by her.

9. The day care licensing chief received the above information, and reviewed the history of this case. That history shows considerable attempts by SRS to work with the petitioner on this and other issues. The history also shows a number of complaints, including one in the week before the unsuccessful inspection, about excess numbers of children in the day care home and at least two observations recorded by staff members of overcapacity on February 7, 1996 and January 25, 2001 for which the petitioner was cited.¹ He recommended to the Commissioner that he suspend the petitioner's day care registration certificate based upon the petitioner's repeated

¹ SRS indicated that these allegations would be included in a revocation letter to the petitioner. Since the petitioner has not had an opportunity to respond to these allegations of overcapacity, no findings are made that these incidents actually occurred. Evidence of these events was allowed in order to show that SRS had a reasonable belief that the children could be harmed.

refusal to allow access to the day care despite her knowledge of her obligation to do so. It was his opinion that he could not protect children if he could not see what was going on. He was particularly concerned that the petitioner may have had too many children in care which would compromise her ability to supervise them and expose them to harm. The licensing chief presented evidence that a substantiation of child on child sexual abuse had occurred at the petitioner's home in 1994 as an example of the kind of harm that could come to unsupervised children, although he did not say whether the petitioner had too many children at that time.

10. On February 27, 2004, the supervisor hand carried a notice of immediate suspension of the day care registration to the petitioner's home². The reason that he hand carried it was to give her an opportunity to reply to the allegations in the letter before he executed it. He told the petitioner that he was there to hear what she had to say with regard to any information they may not have considered and any alternatives she could propose to satisfy the Commissioner's need to

² The petitioner argues that the nine days it took to suspend her license is evidence that SRS did not really believe that there was immediate harm. While this does raise some concern that such an emergency situation could be tangled up in a bureaucracy for nine days, the weight of the evidence still indicates that SRS' concern was genuine.

protect the children. The petitioner told the supervisor that the reason they did not let the investigator in on February 18 was that they did not recognize her. They also asked for another chance because the day care was their sole source of income. The supervisor determined that these allegations were already known to SRS and that he should execute the suspension. The supervisor did not do a formal inspection of the premises that day but he did note that he did not see any violations.

11. Three of the petitioner's clients offered the opinion that their children were well cared for at the petitioner's day care and that they were not in danger of any harm. The parents expressed appreciation of the petitioner's attempts to keep their children safe from strangers in the home. None of the parents was present at the day care during any of the instances of alleged refusal to allow inspection of the premises. They were not interviewed by anyone at SRS prior to the closing of the day care on February 27, 2004.

12. Based on the above evidence it is found that the petitioner or persons acting on her behalf refused entry to SRS investigators on two prior occasions on November 9, 1994 and April 13, 2001; that no action was taken with regard to those incidents because SRS opted at that time to work with

her to correct the problems; that following those incidents the petitioner knew or should have known that she was required to allow state inspectors into her day care home and that her failure to do so could have serious consequences; that the petitioner nevertheless on February 18, 2004 refused entry to an SRS employee after that employee had identified herself and announced the reason for her visit; that although the petitioner did not know the employee there is no evidence that the petitioner actually doubted her identity; that there is ample ground to believe that the children might be in danger solely from the refusal of the petitioner to allow access to the children in her day care; that, in addition, there is reason to believe that there are too many children in care based on a recent complaint to that effect and observations by staff members of crowding in the past; that too many children in care can compromise a caretaker's ability to supervise children thus creating immediate peril to their health, safety, well-being; and that SRS was justified in taking immediate action to stop the operation of the day care home.

ORDER

The decision of SRS suspending the petitioner's day care home registration certificate is affirmed.

REASONS

SRS has duly adopted "Regulations for Family Day Care Homes" (October 7, 1996) which are enforced through the mandated cooperation of day care providers. The following regulations were adopted pursuant to and consistent with the authority given to SRS by 33 V.S.A. § 306 (b)(1),(2) and (3):

Section VI -Relationship Between Registrant and Division of Licensing & Regulation

. . .

- 6. The Registrant shall permit visits, inspections and examination of the Family Day Care Home, its records, equipment and materials at reasonable hours by representatives of the Division. The Division representatives shall make a reasonable effort to announce their presence and identify themselves prior to entering the home.³

. . .

- 7. The applicant or Registrant shall not interfere with, impede, deter, provide false information or cause another to do any of the aforementioned, or in any manner hinder the Department or its agent(s) in an investigation or inspection.

. . .

³ While the regulation does not require Division representatives to show photo IDs as a means of identification, the Board recommends to the Department that a better practice would be to require all employees to show all identification provided to them by the Department, including photo IDs when they visit day care homes. However, it must be emphasized that the representative's failure to show her photo ID in this case is not relevant as the Board has found that the petitioner's claim that she doubted the identify of the worker who came to her door is totally lacking in credibility.

10. When there is reason to believe that the health, safety or well-being of children in care is immediately imperiled, the registration certificate may be suspended.

Refusal to allow an agent of SRS who has identified herself and announced the purpose of the visit to come in to inspect the day care premises is a clear violation of both paragraphs 6 and 8 above. The preponderance of the credible evidence shows that the investigator reasonably identified herself yet was refused entry by the petitioner on February 18, 2004. She or her agents had done this before on at least two occasions. The petitioner had received ample notification of what her obligations were and warned of the seriousness of her act. Her most recent refusal was not based on some misapprehension of her duties. Her refusal was done with the knowledge that she was violating a regulation. The fact that she was willing to be inspected at a later time, even a later time the same day of the investigator's visit, does not cure the refusal. Conditions in a facility, particularly the number of children, can change from moment to moment and can be adjusted for an expected visit. SRS has met its burden of showing that the petitioner violated the two regulations above. The Board has held that violation of these regulations

is ample ground to revoke a day care license. See F.H. No. 15,588.

Under paragraph ten of the regulation cited above, SRS may suspend a day care registration before a hearing is held if it has reason to believe that the health, safety or well-being of children in care is immediately imperiled by the actions of the provider. When a day care provider refuses to allow access to the day care home, SRS has no way of knowing what is occurring in that home and is justified in believing that the well-being of children in care is in immediate jeopardy. The petitioner cannot fault SRS for a lack of hard evidence of harm when that lack is based on her refusal to cooperate with unannounced inspections. SRS has tried to deal with this problem in the past through educating the petitioner with regard to the reasons for the regulation and her need to conform. That approach was not successful. SRS' burden with regard to its decision to revoke for the already-proven violation of its regulations is not to definitively prove that the health, safety or well-being of children is being harmed, only that it is reasonable to believe this to be the case. The refusal of the registrant to allow access to the facility is in and of itself alone sufficient to trigger a reasonable

belief that something harmful is occurring at the day care home.

Although the inspection refusal alone is sufficient to infer harm, SRS also offered evidence that it was concerned that an overcrowding situation might exist in the day care home. It is reasonable to believe that an overcrowding situation exists at the day care home based on the recent complaint of overcrowding, the past observations of employees that too many children were in care during specific site visits and the petitioner's refusal to allow access to the facility when the inspector arrived at her door to investigate the complaint.⁴ This condition may not exist at all but the petitioner cannot fault SRS for lack of specific knowledge when she will not permit surprise inspections. Though the truth of this belief can be tried at a fair hearing in the future if it is used to revoke the petitioner's registration, SRS need only show that it was reasonable to believe that such harm might be occurring. SRS has met that burden.

⁴ The fear that the petitioner may have had too many children in care is not specifically stated in the suspension letter. SRS relied solely on the petitioner's failure to allow inspections and impeding investigations as the basis for this matter. However, when the petitioner pressed SRS to offer proof as to what harm was occurring at her home, SRS offered this information. The petitioner had full access to all of SRS' records and witnesses prior to the hearing and was well-aware that this was the issue that prompted the unannounced inspection.

Since failure to allow an inspection alone is sufficient reason to find that there is an immediate peril to the health safety or well-being of children, it is not necessary to fully address the petitioner's arguments that SRS' regulatory definition of "serious violation" wrongfully includes group size violation. See Regulations for Family Day Care Homes, supra, at "Definitions." The petitioner should note, however, that the issue of overcrowding was of such concern to the legislature that it was the only violation specifically named as a "serious" one in the statute itself:

. . . A serious violation shall include violation of group size and staffing requirements and any violation involving a situation which immediately imperils the health, safety or well-being of persons in the care of the licensee or registrant.

33 V.S.A. § 306 (b)(7)

The petitioner's interpretation of this statute is that group size is set off in the above sentence from other violations which immediately imperil safety and as such should be read as not being included in that group. That reading completely twists the plain meaning of that statute which specifically includes a group size violation as a serious offense which also can imperil the health, safety or well-being of a child in care. To read it any other way guts the meaning of the word "serious" and is contrary to the

interpretation made by the agency charged with the statute's implementation in its duly promulgated rules.

The petitioner has knowingly violated one of the most important rules this program has for protecting children - allowing access and inspection of the day care premises. The summary suspension of her registration has no doubt impacted greatly on the petitioner's business⁵. However, as the Connecticut Court of Appeals said in a similar case, "The plaintiff's right to pursue her chosen employment [day care] is not without limits, but is subject to the state's exercise of its police power to protect the health and welfare of the public." Elf v. Department of Public Health 66 Conn. App. 410 (2001), 784 A.2d 979 citing State v. Vachon 140 Conn. 478, 101 A2d. 509(1953). The petitioner's continued unwillingness to follow the inspection regulation has given SRS ample ground for closing down her operation pending a full hearing on the issues. In this case SRS reasonably concluded that her need to continue to earn a living is far outweighed by the real concerns for the safety of children in her care. The decision of SRS suspending the license should be affirmed as consistent with the statute and regulations and as an appropriate

⁵ The petitioner is allowed to serve two families without a day care registration certificate.

exercise of its discretion to choose the action it wishes to take in response to a proven violation. See Fair Hearing No. 12,804, Huntington v. SRS 139 Vt. 416 (1981).

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