STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 19,752
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Family Services Division (formerly SRS) substantiating a report that the petitioner sexually abused a child, and he requests that the Board expunge the report from the child abuse and neglect registry maintained by the Department. The Department has moved for summary judgement based on a criminal conviction of lewd and lascivious conduct following a trial by jury in Vermont District Court regarding the incident in question. The issue is whether the fact of the petitioner's criminal conviction in binding on the Board as a matter of collateral estoppel.

ORDER

The Department's decision is affirmed as a matter of collateral estoppel.

DISCUSSION

The petitioner has made an application for an order to expunge a substantiation of sexual abuse of a female child placed by SRS in its registry. This application is governed by 33 V.S.A. § 4916, which provides in pertinent part as follows:

> (h) A person may, at any time, apply to the human service 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.

Under the statute's definitions, a report is substantiated when "the commissioner or the commissioner's designee has determined after investigation that a report is based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912(10). Abuse and neglect are specifically defined in the statute 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. . .

. . .

(8) “Sexual abuse” consists of any act or acts by an 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. . .

33 V.S.A. § 4912

The Department has shown that on February 27, 1991 the petitioner was found guilty by a jury in Vermont District Court of the crime of “lewd and lascivious conduct with child” and was later sentenced to serve three to five years in prison (Docket No. 255-1-90CnCr). The record also shows that the petitioner’s appeal of that conviction was dismissed by the Vermont Supreme Court on September 18, 1992. The record also shows that the petitioner’s name was placed in the Department’s registry on November 29, 1989, and that the record of the Department’s investigation of sexual abuse of the child in question was made available to the petitioner’s attorneys prior to his criminal trial regarding the same incident.

At the time of the petitioner’s conviction, the statute defining the crime of “lewd and lascivious conduct with child” was as follows:

A person who shall willfully and lewdly commit any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of

> sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions of sexual desires of such person or of such child, shall be imprisoned not less than one year nor more than five years.
>
> 13 V.S.A. § 2602

The petitioner in this matter does not specifically argue that the crime of lewd and lascivious conduct with a child falls outside of the definition of "sexual abuse" as that term is used in 33 V.S.A. § 4912(8), above. At a status conference in this matter held on September 7, 2005, the petitioner primarily argued that a finding of sexual abuse of a *female* child cannot be used by the Department to determine whether he can have contact with male children.[1] At this time, however, the sole issue for purposes of this appeal is whether the Department's motion that the Board adopt the petitioner's criminal conviction in Vermont District Court under the doctrine of collateral estoppel should be granted.

The Board has consistently adopted the doctrine of collateral estoppel in prior proceedings and has relied on the test established in Trepanier v. Getting Organized, Inc.

[1] The Department indicates it has substantiated the petitioner's abuse of two children, a boy and a girl, in four separate incidents. However, it has moved for summary judgement in the matter concerning only the incident concerning the child who has the victim in the above criminal proceedings. Upon being informed of the lack of gender specificity in the Department's registry the petitioner abruptly left the status conference without indicating whether he wised to proceed with separate hearings on the incidents involving the other three incidents. The petitioner is still free to make such a request if he so chooses.

155 Vt. 259 (1990), to determine whether it is precluded by the findings in another court proceeding from making its own findings in the context of an expungement hearing. See e.g. Fair Hearing No. 19,692. The criteria set forth in Trepanier are as follows:

> (1) preclusing is asserted against one who was a party or in privity with a party in the earlier action;
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> (2) the issue was revolved by a final judgment on the merits;
>
> (3) the issue is the same as the one raised in the later action;
>
> (4) there was a full and fair opportunity to litigate the issue in the earlier action; and
>
> (5) applying preclusion in the action if fair.
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> Id at 265.

In this matter, the petitioner was the defendant in the earlier criminal proceeding. The matter was resolved by a jury trial in District Court and became final when the Vermont Supreme Court affirmed his conviction. At all times in that matter the petitioner was represented by counsel. The issue, whether facts exist which constitute sexual abuse by the petitioner, was clearly resolved by his conviction for lewd and lascivious conduct with the same child regarding the same incident. The petitioner may be aggrieved by the repercussions of this conviction, but it is clear that he had

a full and fair opportunity to litigate the factual basis of the Department's findings at his trial. Therefore, it cannot be concluded that considering the petitioner's criminal conviction as the basis for placing his name in the registry as having committed sexual abuse of this child is unreasonable or unfair. Therefore, the Department's request for a preliminary ruling in its favor must be granted.

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