

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. 19,895
)
Appeal of)

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families, Family Services Division substantiating a report from 1998 that the petitioner sexually abused his then-five-year-old nephew, and he requests that the Board expunge the report from the child abuse and neglect registry maintained by the Department.

PROCEDURAL HISTORY

The petitioner filed a request for "a review of my substantiation" with the Board on August 22, 2005. Following at least one continuance granted at the petitioner's request, a telephone status conference was held on November 15, 2005. At that time the Department represented that it had notified the petitioner by letter in 1998 that a report of child sexual abuse had been substantiated against him involving his nephew P.C., who was five years old at the time. The petitioner's wife claimed that the petitioner had never received the

letter.¹ The parties agreed that the Department would furnish the petitioner with copies of its record in the matter, including videotapes of an interview with P.C., and that it would conduct another Commissioner's Review of the matter² to consider any additional information the petitioner wished to submit.

Two follow-up status conferences were held in December 2005 and January 2006, at which time the parties informed the Board that they were attempting to set up a time for the petitioner to speak by phone with a designee of the Commissioner. Subsequent contacts between the Department and the petitioner's wife failed to resolve the matter. Further continuances were then granted due to the petitioner's illness and scheduling conflicts of the Department's attorney.

On May 17, 2006 a status conference was held with the petitioner's wife and the Department's attorney. At that time the Department orally filed motions to have admitted into

¹ As noted in more detail below, the petitioner's appeal in this matter appears to have been triggered by a dispute involving the Department and his wife regarding whether she can be approved as a child care provider for other children in her home in light of the fact that her husband has been identified as a perpetrator in the Department's child abuse registry. The instant appeal has been prosecuted almost entirely by the petitioner's wife. Other than some brief testimony as a witness (see *infra*), the petitioner has not been personally involved in any dealings with the Board or the Department during this appeal, including status conferences and the hearing itself.

² The Department represented that it had conducted a previous Commissioner's Review in 1998.

evidence the videotaped interview of the alleged victim, P.C., made in March 1998, and to limit the manner and circumstances of the testimony of P.C. in this hearing (see *infra*). The parties agreed to a continuance to allow the Department to file written legal arguments in connection with its motions and to allow the petitioner time to respond. The Department filed its motions (**Motion in Limine #1** and **Motion in Limine #2**) on June 16 and 19, 2006 respectively.

A status conference was held on June 22, 2006. At that time the petitioner's wife did not take issue with the Department's offer of proof that P.C.'s present therapist had requested that P.C. be spared the potential trauma of testifying in the presence of either the petitioner or his wife. The parties agreed that the hearing officer would conduct an *in camera* oral examination of P.C. using questions submitted to him in advance by the Department and the petitioner. The parties further agreed that the hearing officer would defer ruling on the admissibility of the 1998 videotape of P.C. until the *in camera* testimony of P.C. had been obtained, and the parties had been furnished with an audio copy of it and given an opportunity to comment on it.

The hearing officer conducted an *in camera* examination of P.C. on August 29, 2006 using questions furnished to him and

agreed upon in advance by the parties.³ Also by agreement of the parties, P.C.'s foster parent was the only other individual present during his testimony, but she took no part in it.

Following P.C.'s testimony, a telephone status conference was held on September 18, 2006 with the petitioner's wife and the Department's attorney. The hearing officer orally summarized P.C.'s testimony (see *infra*), and informed the parties that based on that testimony he would grant the Department's motion to admit the videotape of P.C.'s 1998 interview as evidence in the matter. The parties were advised that the matter would be set for hearing in November 2006 and that they were to furnish each other with witness lists as soon as possible.

On October 3, 2006 the petitioner's wife submitted a written list of twelve individuals she wished to subpoena as witnesses. A telephone status conference scheduled for October 16, 2006 was continued by agreement when the petitioner's wife did not answer at the appointed time but later called to reschedule. At a telephone status conference on October 24, 2006 the petitioner's wife admitted that only

³ Audio copies of this hearing were furnished to the parties on September 29, 2006.

six of the witnesses she had previously listed could reasonably be expected to offer relevant testimony in the matter. That same day, the hearing officer issued subpoenas for three of them. The parties agreed that the other three witnesses were children related to the petitioner who were presently in DCF custody. The Department represented that it would file a motion objecting to their being required to testify. The parties agreed that any ruling regarding subpoenas of these three witnesses would be deferred until after the conclusion of the testimony of all other witnesses at the hearing.

On October 26, 2006, the Department filed a **Motion for a More Detailed Proffer** regarding the three witnesses in DCF custody. A hearing in the matter was held and concluded on November 8, 2006. At the conclusion of the hearing the petitioner's wife did not renew her request for subpoenas of any additional witnesses (see *infra*).

FINDINGS OF FACT

1. No objection was raised by the petitioner to having P.C. testify before the hearing officer *in camera*, using questions submitted in advance by both parties. Nonetheless, the Department submitted credible evidence, in the form of an

affidavit by P.C.'s therapist, that P.C.'s present emotional stability and current therapeutic progress would be jeopardized by having to physically confront the petitioner or his wife at a hearing. Therefore, such examination was deemed to be allowable and consistent with the Board's rules and precedent. Fair Hearing Rule No. 11; Fair Hearing No. 13,154, *Aff'd, Passion v. Dept. of S.R.S.*, 166 Vt. 596 (1997).

2. At his testimony on August 29, 2006, P.C. identified himself as a nephew of the petitioner. He is now fourteen years old. He recalled that when he was five years old the petitioner's wife babysat for him at her house while his mother was working. He testified that he does not now recall any details regarding the incident in question in 1998 or its subsequent investigation. He firmly stated, however, that he now believes that any statements he may have given at the time regarding the incident were truthful. He emphatically denied that he has ever subsequently told anyone that his allegations in 1998 had been false. He stated that any allegation or testimony to the contrary from anyone (i.e., that he has ever recanted) would not be true. P.C.'s demeanor at the hearing was responsive and forthright, and the hearing officer deemed his testimony to be credible.

3. Based on P.C.'s credible testimony that he does not recall the incident in question or its investigation, the hearing officer admitted into evidence a videotape of an interview of P.C. on March 26, 1998 by an investigator from the Department (then S.R.S.) and a local police detective.⁴ V.R.E. 803(5), *State v. Marcy*, 165 Vt. 89. In that interview, P.C.'s overall demeanor was responsive, cooperative, and appropriate to his age, which was then five. Although somewhat fidgety, he appeared to be comfortable and outgoing. He answered almost all the questions put to him directly and openly. The questions asked by the Department's investigator were not inappropriately leading or suggestive.

4. In the interview P.C. said that he had talked with his therapist about "dirty stuff". When pressed for details, P.C. described the following:

a. "Uncle John⁵ touches my privates" (using an anatomically correct doll, he clearly identified his "privates" as his genital area);

⁴ As noted above, the Department had provided the petitioner with a copy of the videotape well in advance of P.C.'s testimony and the main hearing. In light of the facts that the petitioner did not request it and that there would be no perceivable prejudice to the petitioner if the tape itself was admitted, the hearing officer did not deem it necessary to either play the tape at the hearing or to have it transcribed.

⁵ There is no dispute that "Uncle John" is the petitioner in this matter.

b. that the touching occurred two times when he was at Uncle John's house;

c. that the touching consisted of Uncle John touching him with his "hands" and "fingers" and (demonstrating with the dolls) rubbing his own genital area against him;

d. that the touching occurred in "Anne's bedroom", and that Anne was Uncle John's wife;

e. that Uncle John would take his (P.C.'s) pants and underpants down;

f. that Uncle John "babysat" him when Anne was at work;

g. that it happened sometime "after Christmas" when his mother was working at "Foley's";

h. that Uncle John told him not to tell anyone or he would do it again;

i. that he understood the difference between truth and a lie, and that his answers were the truth.

5. Based on P.C.'s demeanor during the interview, as well as the detail and consistency of his responses, the above information given by him at the interview is deemed to be highly credible.

6. All the other testimony in this matter was taken at the hearing on November 8, 2006. The police officer and the Department investigator who were on the videotape testified

that P.C.'s allegations at his taped interview were consistent with the information the Department had received from P.C.'s therapist, who had initially reported the allegations to the Department.

7. At the hearing the petitioner's wife called several witnesses to testify in the petitioner's behalf. The first witness was her and the petitioner's son, who is now twenty-four. He stated that two or three years ago, when P.C. was ten or eleven, he had been present when P.C. was confronted with the allegations in the presence of several family members, and that P.C. told them "it never happened". In response to a specific question from the petitioner's wife he testified that she uses "timeouts" as discipline.

8. The next witness was a friend of the petitioner's wife who lived near P.C. and the petitioner during the time in question. She stated that P.C. was a "handful", and hard to control. She stated that the petitioner's wife was working during this time, and that the petitioner had been employed at Carris Reels from January 26, 1998 through March 27, 1999.⁶ The point of her testimony was not clear, in that it fully corroborates P.C.'s taped statements (*supra*) that the incident

⁶ A copy of a statement from that employer verifying those dates was admitted as Petitioner's Exhibit #1.

happened "after Christmas" when the petitioner (Uncle John) was babysitting him when his wife (Anne) was working.

9. Another nephew of the petitioner, who is now eleven, and who is P.C.'s cousin, also testified. He stated that he had written a statement in which he claimed that he was present when "Uncle John" had asked P.C. about the incident and he had heard P.C. answer "it wasn't true".⁷ On cross examination the witness could provide no details whatsoever regarding when P.C. had allegedly made the statement, and he was inexplicably evasive when asked to describe the circumstances under which he had written his statement. His testimony and demeanor made it clear, however, that he had written the statement at the specific direction of the petitioner's wife, and that she had also provided him with the substance of what he should write.

10. The petitioner's mother, who is also P.C.'s grandmother, also was called as a witness. She testified that the petitioner's wife babysat both P.C. and his brother at the time. She stated that P.C. was a behavior problem, and that she does not believe that the petitioner is a child abuser.

⁷ A copy of the witness's written statement was admitted as Petitioner's Exhibit #2.

11. P.C.'s brother was also called as a witness by the petitioner's wife. He stated that he co-wrote the letter (Petitioner's Exhibit #2, *supra*) with his cousin. He stated that he wrote the letter about a year ago because he was upset that he is not allowed to visit the petitioner's house due to the allegations. However, he could not recall when P.C. had actually made the statement alleged in the letter. His testimony and demeanor also made it clear that the petitioner's wife had directed him to write the letter and advised him what to put in it. He stated that the petitioner had never "touched him in a wrong spot", but he could not recall that the petitioner and his wife had ever babysat him. He also responded that the petitioner's wife used "timeouts" as discipline.

12. Another cousin of P.C., who is now thirteen, also testified. He identified a letter he had written, in which he said P.C. "came over and said it was all a lie and said his mother made him say the things he said about Uncle John touching (him)".⁸ Like the other witnesses, however, on cross-examination he could not recall any details whatsoever about the timing and circumstances of P.C.'s alleged statement. Although he was only three at the time of the

alleged incident, he testified that P.C.'s mother had had a fight with the petitioner at that time and he stated that the petitioner never babysat children. Like the other witnesses, it was transparent that his testimony was the result of considerable coaching beforehand by the petitioner's wife.

13. As noted above, unlike P.C. himself, none of the witnesses who alleged that they had heard P.C. recant were themselves credible. Their testimony and demeanor was uniformly rote, stiff, and rehearsed. A telling example was each of their identical and unhesitating responses (noted above) that the petitioner's wife uses "timeouts" for discipline.

14. Even if they were credible, however, (i.e., even if it could be found that P.C. actually told them what they alleged he had) one of the few details that *some* of the witnesses *could* "recall" was that P.C. was then about ten or eleven, and that it was the petitioner, himself, who confronted him in the presence of the other family members, who were upset they were not being allowed to visit the petitioner's house. Thus, even if it could be found that P.C. actually responded to the petitioner in the way reported by

⁸ A copy of the letter was admitted as Petitioner's #3.

the witnesses, this would hardly constitute credible evidence that he was actually recanting his earlier allegations.⁹

14. The petitioner testified briefly in his own behalf (the only appearance of any type that he has ever made in these proceedings). He stated that he was charged criminally in the incident but that charges were dropped after he passed a polygraph test that his lawyer had arranged.¹⁰ The petitioner has consistently denied ever touching P.C. However, nothing in the evidence or the petitioner's demeanor persuaded the hearing officer that he was being truthful. (The petitioner also reflexively responded that his wife uses "timeouts" for discipline.)

15. The petitioner's wife offered her own testimony, which consisted of a rambling and, at times, incoherent testimonial, purportedly in the petitioner's behalf. She described serious marital problems she and the petitioner were having at the time, and stated that he then had a severe

⁹ It is for this reason that further testimony in this regard from other family "witnesses", even if the petitioner's wife had renewed her request to subpoena them, would conceivably be helpful, much less crucial, to the petitioner's case.

¹⁰ A copy of the polygraph report was admitted as Petitioner's Exhibit #4. The police detective previously called by the Department had testified that another polygraph test commissioned by the state's attorneys' office at that time had been "inconclusive" as to the petitioner's truthfulness. He stated that he believed that the criminal charges against the petitioner had been dropped for reasons entirely unrelated to the polygraph tests.

alcohol problem. It was plain from her statements that the appeal in this matter is being driven mostly, if not entirely, by her frustration in not being able to be approved to provide day care for children in her home with the petitioner present. Much of her testimony was a plea to forgive mistakes *she* has made, including losing parental rights over her own children in 1993. Unfortunately for the petitioner, nothing in his wife's testimony and demeanor added any credible evidence to his position in this matter.

ORDER

The petitioner's request to expunge the report in question from the Department's child abuse registry is denied.

REASONS

The petitioner has made an application for an order to expunge a substantiation of sexual abuse of a child placed by DCF 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 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. . .

33 V.S.A. § 4912

Based on the above findings, it must be concluded that the petitioner in this matter sexually abused P.C. within the meaning of the above statute. Therefore, his request to

expunge the report of that abuse from the Department's registry must be denied.

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