

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. Y-04/09-239
)
Appeal of)

INTRODUCTION

The petitioners (Mr. and Mrs. P) appeal the decision by the Department for Children and Families, Family Services Division substantiating a report that the petitioners placed their children at risk of harm from sexual abuse by allowing a convicted sex offender (E.W.) into their home and to have contact with their children. The petitioners' appeal stems from a Department "Review of Substantiation" decision dated April 24, 2009. The preliminary issues are whether the Department has alleged facts sufficient to support its decision as a matter of law and whether the Department has failed to comply with a ruling by the hearing officer that it provide a written proffer of evidence prior to the scheduling of any further evidentiary hearing in the matter.

DISCUSSION

In this case there is no dispute that the petitioners, over an extended period of time, knowingly allowed a convicted child sexual abuser, E.W., to have contact with

their children. However, there is also no dispute (or at least no finding by the Department to the contrary) that none of the children suffered any actual harm from their contacts with E.W., and that the petitioners eventually ceased all such contact when the Department demanded it. At all times, the petitioners have maintained that they never left their children alone unsupervised with E.W., except for a single isolated incident in which E.W. had some brief (and, they claim, "accidental") contact with one of their daughters, from which no harm is alleged to have actually ensued. The petitioners essentially maintain that they befriended and trusted E.W. as an act of charity, trust, and belief in redemption consistent with their religious beliefs, and that their children were never at risk as a result of E.W.'s relationship with the family.

Following several telephone status conferences, the matter was set for hearing on July 30 and 31, 2009. On the first day of hearing the Department called Mrs. P. as its first witness. Her direct testimony consumed the entire morning. Following a break for lunch the hearing officer met "in chambers" with the parties' attorneys.

The hearing officer informed the parties at that time that he believed that through the direct testimony of Mrs. P.

the Department had not yet established that there was ever any "unsupervised" contact between the petitioners' children and E.W., except for one brief incident with one child that appeared to have been "accidental". The hearing officer questioned the Department as to how it planned to prove that the petitioners were anything more than "naïve" in their relationship with E.W., that their conduct was motivated by anything other than what-appears-to-be their personal and religious views regarding charity, trust, and redemption, and that the petitioners would be at risk to their, or anyone else's, children in the future.

The Department responded that it planned to produce evidence through several other witnesses, including the petitioners' children, that the petitioners' conduct had been either intentional or grossly negligent. The parties' estimates of the amount of hearing time necessary to present and counter this evidence were several more days of testimony. This was based partly on the fact that just the *direct* testimony of the Department's first witness, Mrs. P., had already taken half a day, and on the apparent likelihood that the cross and redirect examinations of Mrs. P. would consume the remainder of that afternoon.

The hearing officer then ruled that testimony would be suspended until further notice, and he directed the Department to submit (what he termed) a written "offer of proof" regarding the testimony it planned to submit, along with any written argument that such testimony would establish that there had been a "risk of harm" to the petitioners' children as defined by the pertinent statutes. The petitioners requested and the hearing officer agreed that the Department's offers would be in the form of affidavits, except for the offers concerning the testimony of the petitioners themselves and their children (some or all of whom the Department indicated it was intending to call as witnesses). The Department strenuously objected to this procedure, but agreed that it would produce its offers and written arguments by September 11, 2009 (which then was six weeks away). The hearing officer followed up this ruling with a written Memorandum (inadvertently left undated) that he issued a few days later.

On September 8, 2009 (three days before the deadline) the Department submitted a **Motion to Enforce Human Services Board Rules and Request for Leave to Present Additional Evidence and Motion to Extend Deadline within which to File "Offer of Proof"**. In these motions the Department set out

only its factual *allegations* and argued that the hearing officer's directive to provide a written proffer of evidence was "unfair and not provided for in the rules".

On September 16, 2009 the hearing officer issued a Recommendation that the Department's substantiation of abuse by the petitioners be reversed. In that Recommendation the hearing officer pointedly noted that the Department had not complied with his directive regarding a written "offer of proof", and he included an unequivocal warning to the Department of the "tactical risk" it was running in its continued failure to do so.

On September 29, 2009 the Department filed a **Supplemental Memorandum in Support of Motion to Enforce Human Services Board Rules and Request for Leave to Present Additional Evidence.** The Board notes that this memorandum was largely a reiteration of the arguments the Department had made previously, and did not contain any proffer of evidence in the matter. In its oral argument to the Board on October 7, 2009, the Department essentially repeated these same arguments.

To date, the Department has not complied with the hearing officer's directive, nor has it made any credible

claim or showing that doing so would have been unduly burdensome or prejudicial.

I. Legal standards regarding substantiation of risk of harm.

The statutory section primarily relied upon by DCF in this matter is 33 V.S.A. § 4912(4), which provides:

“Risk of harm” means a significant danger that a child will suffer serious harm other than by accidental means, which harm would likely cause physical injury, neglect, emotional maltreatment or sexual abuse.

In its consideration of the interplay of “by other than accidental means” with the rest of the abuse statute the Board has consistently used gross negligence or reckless behavior in determining whether an individual’s actions rise to the level of abuse or risk of harm, referring to the definition of “gross negligence” found in Rivard v. Roy, 124 Vt. 32 (1963). Recently, in Fair Hearing No. Y-01/08-22, the Board reiterated that gross negligence or reckless behavior is whether the petitioner’s conduct:

...(a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

(See also Mullin v. Flood Brook Union School District, 173 Vt. 202 [2001]). The Vermont Supreme Court, at least tacitly, has affirmed the Board’s discretion and analysis in

this regard. See *K.G. v. Dept. of S.R.S.*, 171 Vt. 529 (2000).

In light of the above, the Board concludes that the Department's burden of proof in this matter entailed a showing that the petitioners were guilty of conduct more serious than naïvety, misjudgment, and lack of cynicism.

II. The hearing officer's and the Board's authority to order the Department to submit a written proffer of evidence.

The Board's authority is governed by its own rules and by 3 V.S.A. § 3091. See *In re Houston*, 904 A2d 1174; 2006 VT 59 (2006). Human Services Board Rule No. 1000.3A provides that the "hearing officer shall rule upon all motions and questions relating to the presentation of the appeal". Rule 1000.3H includes: "...at any time when directed by the hearing officer, the department or office involved in the appeal, unless prohibited by statute or the compelling confidential rights of others, shall make available to the appellant all documents and records relevant to its decision". A directive from the hearing officer that the Department provide a written proffer of evidence addressing a clearly defined legal issue is surely within the meaning and

contemplation of the Board's rules. See also F.H. Rules 1000.3C, 1000.3D, 1000.3F, 10030.3G, 1000.3I, and 1000.3O(1).

Even if it weren't, it is well-settled case law that state administrative bodies have "implied" powers that are reasonably necessary to function fairly and efficiently. See e.g., *Perry v. Medical Practice Board*, 169 Vt. 399 (1999). In this regard it has been held that administrative hearing officials need not conduct an evidentiary hearing when disputed factual issues may be adequately resolved on the written record. See, e.g., *The Organic Cow, LLC v. The Northeast Dairy Commission*, 164 F.Supp.2d 412 (2001); *J.D. v. Pawlet School District*, 224 F.3d 60 (2d Cir. 2000).

As he stated "in chambers", the primary purpose of the hearing officer's ruling was to save *both* parties, as well as the Board, the time and expense of lengthy testimony that could well have been unnecessary, irrelevant, and/or cumulative. The above notwithstanding, the Department persists in arguing that the hearing officer's directive to furnish a written proffer of evidence prior to taking further testimony is somehow "unfair"--this despite the fact that the Department represented that it had (as would be expected) already interviewed and/or prepared its examinations of all the witnesses involved in the hearing. Inasmuch as the

Department has also represented that the presentation of testimony would take several more days, and assuming that its case against the petitioners consists of more than simply hoping for lightning to strike during the course of that testimony, it is eminently reasonable for, if not incumbent upon, the Department to identify to the petitioner and the Board what particular testimony it feels would meet its burden of proof in the matter. Having heard no convincing evidence of this in the lengthy direct testimony of Mrs. P., the hearing officer was clearly within his authority to have ordered the Department to make a written proffer of evidence in this regard before scheduling, sight unseen, what-the-parties-advised-would-be several more days of testimony. Indeed, it could more properly have been viewed as a violation of the *petitioners'* due process rights (to say nothing of their potential financial burden) if the hearing officer had *not* required the Department to make such a proffer.

CONCLUSION

In light of the foregoing, it must be concluded that the Department has failed to identify any evidence that would meet its burden of proof in the matter. It is, therefore, necessary and appropriate that its decision substantiating the report that the petitioners subjected their children to risk of harm from sexual abuse be reversed. 3 V.S.A. § 3091(d), Fair Hearing Rule 1000.4G.

ORDER

The Department's decision substantiating the report that the petitioners placed their children at risk of harm from sexual abuse is reversed.¹

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¹The Department is hereby advised that if it chooses to seek any further relief from the Board in this matter, the Board's consideration of any such request will be *preconditioned* on the Department furnishing the petitioners and the Board with the written proffers of evidence as directed by the hearing officer. See F.H. Rule 1000.4K.