

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. N-04/10-181  
 )  
Appeal of )

ORDER

INTRODUCTION

The petitioner appeals the decision by the Department for Children and Families substantiating a report that he sexually abused a child by touching the child's penis and anus with his finger. The issue is whether the Department's decision is supported by a preponderance of evidence.

Following the parties' arguments at its meeting on November 3, 2010, the Board issued an Order remanding the matter to the hearing officer to consider additional evidence that the Department had represented to the Board would affect the admissibility and credibility of its video-recorded interview of the alleged victim.

Pursuant to subsequent instructions by the hearing officer, the Department submitted a written proffer of evidence from its investigator in the matter, whose testimony the hearing officer had previously excluded on the grounds of relevance and cumulativeness. The petitioner submitted a written reply to that proffer, and the parties presented

further oral legal arguments at a telephone status conference with the hearing officer, held on January 10, 2011, and at the meeting of the Board on April 6, 2011.

The following findings of fact and discussion are based on the testimony and exhibits offered at the hearing, and on the proffer of evidence subsequently submitted by the Department.

DISCUSSION AND FINDINGS OF FACT

In September 2008 the Department initiated an investigation regarding K, who at the time was five years old, following a report that K and an older child had been observed acting out during play in a sexually inappropriate manner. On September 18, 2008 a Department investigator interviewed K's mother about that incident. K's mother told the investigator that she had concerns that K had been sexually molested, and she asked the investigator to interview K about that. K's mother did not indicate to the investigator whom she thought may have molested K.

K's mother arranged for K to be interviewed by the Department's investigator later that day on September 18, 2008. The interview was digitally recorded on video. A year later (see *infra*), on September 15, 2009, the Department

substantiated a report of sexual abuse of K by the petitioner.

There is no dispute that when K's interview took place, the petitioner, who was or had been K's step-father, was incarcerated on unrelated charges (not sexual abuse).<sup>1</sup> It appears from the record that the criminal investigation regarding K was not concluded until July 2009, and there is no dispute that it did not result in any criminal prosecution being brought against the petitioner. The Department maintains that the one-year delay in its substantiation determination in the case was due to the fact that the petitioner was in jail in Kentucky during this time and "could not be interviewed by law enforcement" (apparently per Department protocols) until he returned to Vermont (see *infra*).<sup>2</sup>

Following the Department's decision to substantiate K's allegations, and the petitioner's timely appeal, a review hearing was held by the Department on January 25, 2010. On March 19, 2010 the Department affirmed its decision to

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<sup>1</sup>At least by the time of the hearing, two years later, the petitioner and K's mother were divorced. It is not known if they were still married when K was interviewed.

<sup>2</sup>The petitioner remained incarcerated for these unrelated crimes through the date of the hearing. He participated in the hearing by phone from a Vermont correctional facility.

substantiate the report as one of sexual abuse of K by the petitioner. Following the petitioner's timely request for a fair hearing, several status conferences were held by the hearing officer with the parties' attorneys. The matter was continued for several months to allow the Department to contact K and his mother (who had moved out of state) and to locate and provide the petitioner with the video recording of its interview with K. On September 7, 2010 the hearing officer denied the Department's request to take the testimony of K and his mother by telephone.

The hearing was held on September 15, 2010. K and his mother were available as witnesses, and K's mother testified briefly (see *infra*). The parties stipulated that K, now seven, would have credibly testified that he had no recollection of the alleged incident. Therefore, he was not called as a witness by either party. Other than the testimony of K's mother and some of its case notes, the Department's evidence consisted of the video recording of its interview with K on September 18, 2008. The hearing officer watched the video in the presence of the parties' attorneys and took their oral arguments on the record. However, he deferred ruling on the admissibility of the video as evidence until the parties had submitted additional written arguments

on this issue. At the hearing, the hearing officer sustained the petitioner's objection to allowing the Department's investigator to testify "regarding her interview techniques and her determination regarding the substantiation" (see *infra*).

As noted above, following the Board's remand, the Department submitted a proffer of its investigator's testimony, which the hearing officer had previously excluded. For purposes of this decision it is presumed that the proffer is a truthful and accurate summary of the testimony the investigator would give or would have previously given in the hearing had she been afforded the opportunity to do so.<sup>3</sup> However, for the reasons set forth below, the proffered testimony is found to be unconvincing as it relates to the admissibility and credibility of the Department's other evidence in this matter.

The first issue in this matter is whether the hearsay video recording of K's interview by the Department is admissible under either Rules 803(5) or 804a of the Vermont Rules of Evidence. As a general matter, Rule 803(5) allows as an exception to the exclusion of hearsay evidence a

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<sup>3</sup>Other than his written response, the petitioner has not had an opportunity to cross examine the Department's investigator regarding the proffer.

“recorded recollection . . . made or adopted by the witness when the matter was fresh in his memory and to reflect (his) knowledge correctly.” In this case, K’s mother testified that at the time of K’s interview by the Department (September 18, 2008) the petitioner had been incarcerated for “about a year”, and it is undisputed that K’s allegations at that interview concerned incidents that had to have been at least a year old. The Department’s investigator alleges she was told of the petitioner’s incarceration by K’s mother, but it is not clear whether the investigator learned this information before or shortly after her interview with K.

At any rate, whenever the investigator learned of the petitioner’s incarceration, this “time lapse” factors significantly in the assessment of the circumstances and credibility of K’s interview, as will be discussed below. As a preliminary matter, however, it must be concluded that the lapse in time of at least one year between the alleged incident and K’s interview does not meet the “freshness” requirement of Rule 803(5), *supra*, and cannot, in and of itself, form the basis of admitting the recording of that interview into evidence in this matter.<sup>4</sup>

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<sup>4</sup>This assumes, *arguendo*, that the other requirements of Rule 803(5) were met, issues that need not be reached.

V.R.E. 804a is another exception to the hearsay rule, in which hearsay statements by a witness under twelve may be admitted under certain circumstances. This rule requires: (1) that the statements were made by the alleged victim, (2) that they were not taken "in preparation for a legal proceeding", (3) that the witness is "available to testify"<sup>5</sup>, and (4) that the "time, content, and circumstances of the statements provide substantial indicia of trustworthiness". In this case, there is no dispute as to the requirements of provisions 1 and 3, above, being met. Moreover, it is now well-established law in Vermont that statements obtained during a Department investigation regarding possible sexual abuse of a child cannot be considered to have been made "in preparation for a legal proceeding" under part 2 of § 804a (*supra*). See *State v. Tester*, 179 Vt. 627 (2006).

Thus, the crucial evidentiary questions in this case are whether "the time, content and circumstances" of K's statements recorded in his interview by the Department on September 18, 2008 provide "substantial indicia of trustworthiness" under § 804a(4). The Vermont Supreme Court

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<sup>5</sup>An exception to this section, applicable only to Human Services Board fair hearings, does not require the availability of the child if a specific finding is made that the child would be subject to "a substantial risk of trauma" if called to testify. See 33 V.S.A. § 4916b. No such claim was made in this case.

has held that a trial court has "great discretion in admitting or excluding evidence under this rule". *State v. Tester*, Id. (citing *State v. Fisher*, 167 Vt. 36, 39 [1997]). Some of the factors the Court has noted are whether the child's statements were obtained after leading questions, whether they were sufficiently clear, consistent, and detailed, and whether the child's demeanor was consistent with those statements.

In this case, the Board agrees with the Department that K's statements to the interviewer were spontaneous, unsuggested, clear, and sufficiently detailed so to as to conclude that the petitioner's actions, *if they happened*, constituted sexual abuse (see *infra*). Although, as the petitioner argues, *some* of the interviewer's questions were leading, and *some* of K's answers were inconsistent, *overall* the Board deems the interview to be "trustworthy" evidence under § 804a as to the "*content*" of K's allegations.

Much more problematic, however, are the questions regarding the "*timing*" and "*circumstances*" of the interview. As noted above, the Department now admits that the interviewer either was aware at the time or was made aware shortly thereafter that K was relating incidents to her that could only have occurred at *least a year* prior to the date of

the interview, i.e., when he was only four years old--or maybe even younger. Inasmuch as K, himself, never mentioned during the interview that the petitioner was in jail, and had, in fact, earlier in the interview specifically named the petitioner (along with several family members and pets) as a person who at that time was "living in his house", it seems inexplicable that the Department never questioned K at all as to the timing of the alleged events. Although the Department now proffers that its investigator would testify that she "knew" that K, due to his age, would be unable to tell her the "date" the alleged abuse occurred, it strikes the Board as highly remiss that she never *attempted* to ask K *any* questions regarding the timing of those events, either during the interview or anytime in the weeks and months thereafter that her investigation was still "open".

An even bigger problem for the Department, however, especially in light of the distantly-past time frame in which the alleged events could have occurred, is the lack of any attempt on its part to explore and rule out any other possible explanations for K's allegations. K's mother testified at the hearing that until she was told by the Department what K had said in the interview, she was unaware that the petitioner may have sexually abused him, and had not

discussed this at all with K. Whether or not the Board were to credit the mother's testimony in this regard, the fact that the interviewer failed to at least "test" for, and thus effectively rule out, other (perhaps-cynical-but-certainly-plausible) explanations for K's allegations renders the interview at best incomplete, if not patently suspect. Even if the interviewer, both now and in retrospect, thinks that her "training and experience" are sufficient to have allowed her to unquestioningly believe K and his mother, this does not excuse her failure to have at least attempted to probe with K the *possibility* (which unfortunately, but nonetheless inarguably, exists in every such case) that someone *may* have "coached" him. Moreover, it strikes the Board as remarkable, if not odd, that a five-year-old child would be able to recall and almost blithely recount year-or-more-old events in such significant detail, and then, two years later, not be able to remember anything whatsoever about them.<sup>6</sup>

The Board also considers it highly suspect that when asked by the interviewer if the petitioner had said anything

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<sup>6</sup>The mother did testify, credibly, that the petitioner had been abusive to her in some ways similar to what K described, and that she had told this to the interviewer. However, this information can just as reasonably be viewed as raising more questions than it resolves regarding whether the mother, or someone else, may have discussed anything with K beforehand, and it is *all the more reason* for the interviewer to have questioned K about it.

to him after touching him, K replied, calmly and unprompted, "he said not to tell anyone or I'd get in trouble (short pause) but I really wouldn't". This answer suggests either a preternaturally sophisticated five year old, or the fact that *somebody* had discussed the incident and/or the Department's upcoming interview with K in advance. Again, however, the interviewer asked no follow-up questions. The Department's proffered explanation for this failure, that K finally felt "really safe" at the interview, strikes the Board as an inadequate excuse for failing to follow up in any way on this kind of unsolicited statement from a five year old.

Based on the hearing officer's observations of K's calm and matter-of-fact demeanor during the interview, and the details that K provided, it appears highly unlikely that this was the first time that K was relating these events to anyone. At a minimum, the seriousness of K's accusations surely merited at least *some* inquiry by the Department into who K *may* have also talked to; and if K had answered nobody, why (since the petitioner had by then been in jail for a year) he had *not* told anyone else about them previously.

The Department's interview with K took about 35 minutes overall, no more than the last half of which involved a discussion of the allegations against the petitioner. As

noted above, throughout the entire interview K was responsive, articulate, and cooperative, and did not appear to be under the slightest discomfort or distress. Even if the investigator was initially caught off guard by K's allegations, there was certainly no reason that she or someone else from the Department, or the police, could not have attempted to question K further anytime during the *full* year in which the Department waited before "substantiating" the matter. Despite its proffer as to having a "general policy" against repeat interviews, in oral argument the Department readily conceded (and it has certainly been the Board's experience) that multiple interviews of children are not at all uncommon, and sometimes desirable, especially when, as here, the child is cooperative and shows no sign of trauma.

The *evidentiary* issues raised by the above-noted shortcomings of the Department's investigation appear to be ones of first impression for the Board, and it must be acknowledged that there is no court precedent clearly dispositive as to standards to be applied by the Board and its hearing officers in rulings regarding the admissibility of hearsay interviews of children under Rule § 804a. However, even if the recorded interview is admitted into

evidence, it is well settled law that there is a significant distinction between the *admissibility* of any evidence and its *sufficiency*. See *State v. Robar*, 157 Vt. 387, 392 (1991). To conclude that any certain hearsay evidence may meet "indicia of trustworthiness" under § 804a certainly does not dictate that it be deemed credible.

Thus, the Board considers it crucial to clearly make the *factual* ruling that, even if the recording of K's interview is admitted, for all the reasons discussed above the Board does not find it and the other evidence submitted by the Department in this matter nearly credible enough to establish by a preponderance of evidence that the petitioner sexually abused K.

#### ORDER

The Department's decision substantiating the report of sexual abuse by the petitioner is reversed.

#### DISCUSSION

The statutory sections relied upon by the Department in this matter include the following:

(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

In this case there is no dispute that the incidents reported by K, *were they found to have occurred*, would constitute sexual abuse under the above definition. However, in a *de novo* hearing, there is no question that it is the Board's (more particularly its hearing officer's) province, not the Department's, to weigh the credibility of evidence. *In re R.H.*, 2010 VT 95. Indeed, if the credibility assessments of Department investigators (or any other "expert") were dispositive, or even relevant, there would be little, if any, need or point for appeals to the Board. See *State v. Fisher*, Id. at 44.

33 V.S.A. § 4915b(a)(8) requires the Department to include in any child abuse investigation "all other data deemed pertinent". Surely, the time frame of any alleged abuse and the determination of whether any child witness may

have been coached are crucial elements in most, if not all, such investigations. In these cases, it is the statutory duty of the Department to at least *attempt* to address these issues directly in its interviews, and not rely solely on the presumptions of an investigator or prevailing social work theories to take the place of an actual investigation into the salient facts and circumstances surrounding a report of child sexual abuse.

In this case, no matter how sincerely its investigator came to believe (and still believe) in this petitioner's guilt, it was nonetheless incumbent upon the Department, as a basic part of any thorough<sup>7</sup> and impartial investigation, to have at least attempted to fill in what are the considerable factual gaps and uncertainties that exist in K's initial, and only, interview. This was especially so because the prolonged delay in concluding the investigation, even if it was unavoidable,<sup>8</sup> had the distinct potential (which, as it turned out, was fully realized) to deprive the petitioner, through no fault of his own, of *any* opportunity to exercise

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<sup>7</sup>This includes the understanding and appreciation of its evidentiary burdens on appeal.

<sup>8</sup>The Department has not explained why a timely interview with the petitioner, even if he was in jail in Kentucky, could not have been attempted *by phone*.

his due process rights to confront and cross examine the only direct evidence against him.

Even if all the Department's evidence in this case is deemed admissible (including its latest proffer), the most that that evidence can be found to establish is that the petitioner *could have* sexually abused K. As set forth above, however, it is found that the evidence in this matter falls well short of the preponderance required by law for the Board to conclude that the petitioner, in fact, did so.

Accordingly, the Department's decision must be reversed. 33 V.S.A. § 4916b(a), 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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