STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,838
	)	
Appeal of	)	

INTRODUCTION

The petitioner seeks an order pursuant to 33 V.S.A. § 4916(h) expunging his name from a registry of sex offenders kept by the Department of Social and Rehabilitation Services (SRS). The issue is whether the Commissioner has met his burden of showing that the record should not be expunged.

FINDINGS OF FACT

1. This matter came on for hearing on April 17, 2001 based on an appeal of a substantiation made by SRS that the petitioner had sexually abused two children (a boy and a girl) under the age of ten.

2. Prior to the start of the hearing, SRS' counsel made a motion to remove the petitioner's counsel based on an alleged conflict of interest. The conflict, in SRS' view, arose because petitioner's counsel who had called the investigator as a witness was also representing her in another matter involving her employment with SRS. SRS' concern was that the petitioner's counsel may have received confidential

information with regard to the case in the course of his representation of SRS' investigator.

3. The hearing officer deferred consideration of that request until she could determine what the nature of the evidence to be presented was. SRS indicated that its case would be based on statements of the social worker who investigated the case. SRS confirmed that the children were not being called as witnesses as their current guardians did not think it was in their best interests to attend. SRS also confirmed that no physical evidence relating to the alleged abuse would be presented, that no other eyewitnesses to the alleged events existed and that no admissions of sexual abuse had been made by the petitioner. The evidence to be presented was strictly in the form of hearsay testimony.

4. The hearing officer informed SRS that such hearsay testimony could not be admitted into evidence to prove the truth of the allegations based on Vermont Rules of Evidence 804(a) which had been made applicable to these hearings by a decision of the Vermont Supreme Court. Under the Court's ruling, hearsay could only be admitted if the alleged victims—the two children--were present at the hearing for cross-examination. The hearing officer informed SRS that it could

not meet its burden based on hearsay testimony and that the petitioner would be entitled to have the record expunged.

5. The petitioner's attorney made a motion to dismiss the matter orally at the hearing following the hearing officer's ruling. SRS asked for an opportunity to respond in writing which request was granted.

6. SRS' written response was a reiteration that it did not intend to make the children available at the hearing because it was not in their best interests. It more explicitly stated that it planned to call four witnesses: the SRS investigator, a social worker who had been involved with the children since 1996, a parent educator who had worked with the petitioner and a tape of an interview with the boy. There was no offer made that any of these witnesses had seen the abuse, would present physical evidence of the abuse or would relate admissions by the petitioner that he had abused the children. However, SRS raised, for the first time, that it felt that it could meet its burden of proof with regard to one of the children (the girl) if the Board adopted facts found in a termination of parental rights proceeding before the family court in 1999. SRS asked that no action be taken on the substantiation with regard to the boy until the issue of conflict of interest was addressed. No argument was offered

contesting the ruling of the hearing officer that SRS could not meet its burden with hearsay testimony alone.

7. A copy of the Windsor County Vermont Family Court order dated July 26, 1999 was appended to the response. That document shows that the parties who were either notified of the hearing or who were present at the hearing were the parents of the two children, the children's guardian ad litem, an SRS social worker and their attorneys. There is no indication that the petitioner was notified of or was present at the hearing. The proceeding was one to terminate the rights of both parents of the children who were already in the custody of SRS pursuant to a 1996 CHINS petition. The petitioner is not the parent of either child and was identified in the Court's finding of fact as the live-in boyfriend of the children's mother. He was described as participating in an SRS reunification plan designed to return the children from SRS' custody to their mother's custody. According to the Court's findings, both the petitioner and the children's mother began to resist services offered in the reunification plan. SRS workers were described as becoming concerned about the petitioner based on court orders against him involving domestic violence with other women. The children were removed from their mother's home again and lived

with their grandparents. According to the Court, the girl reported to her grandparents that the petitioner had required her to expose her vaginal area to him and had placed his finger in her vagina. The Court noted that SRS had made substantiation based on this allegation which had yet to be appealed by the petitioner. The Court also noted that the petitioner came to the SRS office in January of 1999 to protest the allegation that he had sexually abused the girl. There is nothing in these fact findings that indicate that the Court believed that these allegations were true, although, later in the conclusions of law, the Court stated that the mother "has chosen to remain with a man who has sexually abused her young daughter".

ORDER

The petitioner's request to expunge the record of sexual abuse of the two children is granted.

REASONS

Very frequently, allegations of sexual abuse occur in a context where there is no physical evidence and no eyewitnesses. The only evidence that such an event occurred is the statement of the victim. It is the task of the trier

of fact to determine whether the victim is telling the truth. Other evidence may be offered that helps the trier to determine whether the statement is true or not but, under the Vermont Rules of Evidence, this other evidence may not be used to establish the underlying facts. V.R.E. 802. That is because such evidence, usually the reports of other persons as to what the alleged victim said, meets the definition of "hearsay":

> "Hearsay" is a statement, other than one made by the decalarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
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> V.R.E. 801

The general rule is that hearsay is not admissible unless it falls under a specifically enumerated exception. V.R.E. 802. Thus, under the rules of evidence it is expected in the ordinary case that a fact will be proved through the testimony of the person who asserts first-hand knowledge of the fact. In sexual abuse cases where there is no physical evidence or eyewitness, the only person with first-hand relevant knowledge is the alleged victim. It is expected, then, that the abuse would be proved through the direct testimony of the alleged victim.

The Human Services Board is bound by its own rules to follow the "rules of evidence applied in civil cases by the courts of the State of Vermont". Fair Hearing Rule 12. This requirement frequently presents a dilemma for social services agencies defending abuse substantiations before the Board. Such agencies may be loathe to subpoena alleged victims to testify at hearings out of concern for causing further trauma as a result of requiring them to appear at a hearing against their will, forcing a confrontation with the alleged abuser and subjecting them to a hostile cross-examination. The Board has been sensitive to this problem in the past and has used its "relaxed hearsay rule" to allow substitutions for direct testimony of alleged victims when it feels the result would be "unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs". Fair Hearing Rule 12. Most commonly, child and adult welfare agencies have been allowed to present recordings or transcripts of interviews made with the alleged victims at or near the time of the occurrences alleged as the basis for abuse. Sometimes, statements told to and recorded by therapists have been allowed as well.

In a fairly recent case, the Board determined to allow a young sexual abuse victim's allegations into evidence

primarily through the testimony of her mother and aunt. Fair Hearing No. 13,720. The Board felt that the two were accurately recounting the child's statements and were sincere in their beliefs that the child was telling the truth. The Board concluded that the child's statements that the father had sexually abused her were true based on that testimony. The father appealed to the Supreme Court which reversed the Board's decision and criticized it for relying on the mother's and aunt's statements to find that the child was telling the truth. In re C.M. 168 Vt. 389 (1998). The Court said that the credibility of the mother and aunt were irrelevant because "[t]he point . . . is not whether the witnesses relating the hearsay were telling the truth, but whether the hearsay was worthy of belief". Id. at 394. The Court made it clear that it was inappropriate to determine the credibility of the victim solely from the testimony of those who heard her story.

Furthermore, and more critical to this case, the Court pointed out as well in that decision that the Board should not have used the "relaxed" hearsay rule to admit any hearsay into evidence because administrative proceedings involving child sexual abuse cases are governed by the requirements of Vermont Rules of Evidence 804a. That rule applies to the following proceedings:

> RULE 804a. HEARSAY EXCEPTION; PUTATIVE VICTIM AGE TEN OR UNDER; MENTALLY RETADED OR MENTALLY ILL ADULT
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> (a) Statements by a person who is a child ten years of age or under or a mentally retarded or mentally ill adult as defined in 14 V.S.A. § 3061 at the time of trial are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:
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> (1) the statements are offered in a civil, criminal or administrative proceeding in which the child or mentally retarded or mentally ill adult is a putative victim of sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. § 3253, lewd or lascivious conduct under 13 V.S.A. § 2602, incest under 13 V.S.A. § 205, abuse neglect or exploitation under 33 V.S.A. § 6913 or wrongful sexual activity and the statements concern the alleged crime or the wrongful sexual activity; or the statements are offered in a juvenile proceeding under Chapter 55 of Title 33 involving a delinquent act alleged to have been committed against a child thirteen years of age or under or a mentally retarded or mentally ill adult, if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under Chapter 55 of Title 33, and the statement related to the sexual abuse of the child:

In In Re C.M., as in the present matter, the proceeding involved a substantiation of child sexual abuse under 33 V.S.A. 4916. Although proceedings under that chapter are not specifically enumerated in the proceedings covered by V.R.E. 804a, the Court, nevertheless, held that V.R.E. 804a applied because the reputed child victim was under the age of ten. The Court found that the legislature "intended this hearsay exception to apply to any civil, criminal or administrative

proceeding in which such statements are offered" and not just those which were specifically enumerated (the majority of which were criminal proceedings). Id at 395. The Court concluded that V.R.E. 804a is a rule of general applicability in all administrative proceedings involving sexual abuse, including expungement hearings before the Human Services Board. Id at 396.

As both the children in this matter are under the age of ten, the Department's hearsay evidence is only admissible, then, if it meets all the requirements of V.R.E. 804a. Those other requirements are:

> . . .
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> (2) the statements were not taken in preparation for a legal proceeding . . .
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> (3) the child or mentally retarded or mentally ill adult is available to testify in court or under Rule 807[1]; and
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> (4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.
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> V.R.E. 804a(a)

The first criterion is that the hearsay statements were not taken in preparation for a legal proceeding. That criterion appears to be met. These statements were obtained

in the course of an investigation primarily concerned with the protection of the children, not with the prosecution of the petitioner. The Court has already ruled that such statements are not excluded as statements taken to prepare for a legal proceeding. See. State v. Duffy, 158 Vt. 170 (1992) and State v. Blackburn, 162 Vt. 21 (1993).

The second requirement is that the child must be available to testify in court or appear pursuant to Rule 807. The Department has indicated that it does not plan to subpoena the children to the hearing, that they do not plan to attend the hearing and that no arrangement has been made to provide their testimony through Rule 807. The questions arises, then, has the child been made "available" under 804a.

There is no definition of "available to testify" offered in 804a. There is no caselaw discussing availability in the context of this rule of evidence other than to say that it encompasses a meaningful opportunity to cross-examine the alleged victim to test the reliability of the hearsay. In re M.B., 158 Vt. 63 (1992) and In re C.K. 164 Vt. 462 (1995). There is nothing in the definition or regulations that

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[1] Rule 807 allows recorded testimony and testimony via two-way closed circuit television.

indicates whether "availability" is destroyed when the Department decides not to subpoena the witness.

There is helpful language, however, in another rule governing hearsay exceptions that defines when a witness is "unavailable". V.R.E. 804. Among the situations in which a witness is "unavailable" is when the declarant is "absent from the hearing and the proponent of his statement has been unable to procure his attendance . . . by process or other reasonable means". V.R.E. 804 (a)(5). This definition clearly contemplates that the proponent of the statement, that is, the party who wants to use the hearsay statements of the witness, is required to attempt to procure the attendance of the witness at the hearing for purposes of cross-examination before any finding of unavailability is made. It stands to reason, then, that a witness is made "available" under V.R.E. 804a when the party who wants to use his hearsay statements compels the witness to attend at least part of the hearing in order to be available for cross-examination.

The Department in this case is the proponent of the hearsay testimony. The Department's decision not to compel the children to attend the hearing coupled with the guardians' desire not to have the children attend the hearing means that the children are not available under Rule 804a. They cannot

be cross-examined by the petitioner's attorney to test the accuracy of their testimony. In that circumstance, any hearsay statements made by the other witnesses regarding what the children said that are offered to prove the truth of the children's statements will not be admissible under the rule. The Department cannot make its case solely through the hearsay statements of the children and thus the matter must be dismissed unless the Department can meet its burden some other way. See 33 V.S.A. 6906 and Fair Hearing No. 16,479.

Subsequent to the hearing, the Department argued, as an alternative, that the Board is bound by findings made by a family court in a prior parental termination proceeding concerning these children. A review of those findings shows that the court recited the allegations of one of the children that the petitioner had sexually abused her without making any specific finding that the allegation was true. In its conclusions of law, the court referred to the allegations again, this time reciting them as if they had been proven. The written decision of the court left much doubt and confusion as to whether an evidentiary finding had actually been made that the petitioner had abused one of the children.

Assuming for the moment that such a finding of sexual abuse had been made, the Department argues that the Board

would be bound to accept the finding of sexual abuse by the doctrine of res judicata. The Board has been presented with this contention in the past and has rejected the notion that it is bound by any conclusion of sexual abuse made by any other forum. See Fair Hearing No. 11,444. This is because the Board is the only forum which can grant an expungement under 33 V.S.A. 4916 and is specifically directed by that statute to make the finding of whether sexual abuse has occurred as it is defined in that statute. The petitioner has properly brought his claim for expungement to this Board. He could not have raised that claim before the family court. The Board would be incorrect to conclude that this matter has already been decided by another forum.

That being said, the Board clearly has the obligation to prevent the relitigation of underlying facts which have already been litigated in another forum under the doctrine of "collateral estoppel". Trepanier v. Getting Organized, Inc. 155 Vt. 259 (1990) According to the Vermont Supreme Court, the Board is precluded from relitigating issues (i.e. whether certain acts occurred or not) if another forum has already made findings with regard to these facts provided the following criteria are met:

(1) Preclusion is asserted against one who was a party or in privity with a party in the earlier action.

(2) The issue was resolved by a final judgement 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;

(5) Applying preclusion in the later action is fair.

Id at 265.

The findings which the Department would have the Board adopt were part of a proceeding to terminate the parental rights of the petitioner's girlfriend and the father of her children. The petitioner was not a party to the proceeding because he was not the parent of the children at issue. Therefore, he had no right to appear at the hearing to confront the accusations which were being made against him by the children and no opportunity to defend against those allegations.

In addition, it cannot be found that the issues were the same in the former hearing as in this one. The issue in the former hearing was whether the mother and father had treated the children in such a way as to justify a termination of their parental rights. The question for the court was not whether the petitioner had actually abused the children but

whether the mother acted appropriately to protect the children when the allegations were made. The focus was on the actions taken by the mother, not on the veracity of the children's statements. The findings of fact made by the court recite the allegations of the children but do not indicate that the court found these allegations to be true. Clearly, it was enough for the court that the allegations had been made and that they were ignored by the mother.

Given these facts, it would be unfair to conclude that the issue of the petitioner's abuse had been squarely on the table in the prior family court proceeding and that the petitioner had an opportunity to be present and to defend himself against allegations. Therefore, the Board is not bound by anything that could be construed as a fact finding on the abuse issue with regard to the petitioner from that hearing.

Without usable prior fact findings, the Department must make its case through the litigation of this abuse issue. As discussed above, the Department has no admissible evidence to prove that the abuse occurred. Without the evidence, the Department cannot meet its burden of proof and the case must be dismissed. 33 V.S.A. § 6906. This ruling is, no doubt, frustrating for the Department as it has offered that many

professionals would testify that they believed the children to be credible witnesses. However, without the production of the children at the hearing, the Supreme Court has made it clear that the Board may not make fact findings of sexual abuse based on this kind of hearsay testimony. The Board is constrained to grant the petitioner's request for expungement.

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