

was some roughhousing as the children jumped on his back while he was giving them piggyback rides. Otherwise, the evening passed without incident before bedtime.

4. The petitioner stated that he had some trouble getting the youngest boy to settle down at bedtime. The two boys slept in one room and V. in another. The petitioner stated that V. wanted to read to him, so he stood at the end of her bed for a few minutes while she did so. The petitioner stated that the youngest boy came into V.'s room at this time and that he had to send him back to his own room. The petitioner was watching TV when the parents returned at about 10:00 p.m., and the children's father drove him home.

5. The petitioner testified that a few minutes after he returned home the children's father called him on the phone and told him that V. had accused him of inappropriately touching her. The petitioner immediately told his parents and older sister about the call. The next day, while he was at school, he was interviewed by SRS about the incident.

6. The petitioner's mother testified that the petitioner was "in shock" after the children's father called him. At all times, the petitioner has denied the allegations. At the hearing (held on July 24, 2002), he struck the hearing officer as truthful and sincere.

7. The Department did not summon V. to testify at the hearing. The only evidence it offered was the testimony of V.'s mother.

8. The mother stated that when she returned home that night she heard V. crying in her room. She stated that V. told her she had fallen asleep but had awoken because her "bug hurt". "Bug" was the word V. used for her vagina. The mother stated that V. told her that when she awoke the petitioner was at the side of her bed and that "his hand was under the covers". The mother gave no other testimony or elaboration of the incident.

9. The mother admitted that she examined V. at the time and did not see anything abnormal. She also said that a doctor examined V. the next day and nothing was discovered.

10. While V.'s mother certainly seemed sincere and credible, it must be concluded that her brief testimony alone is too vague and inconclusive to find that the petitioner actually touched V. on her vagina.

ORDER

The Department's decision is reversed. The petitioner's name shall be expunged from the Department's child abuse registry.

REASONS

The Department of Social and Rehabilitation Services is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are "unsubstantiated". 33 V.S.A. §§ 4914, 4915 and 4916.

The statute further provides:

A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is not substantiated 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.

33 V.S.A. § 4916(h)

In order to sustain its burden, SRS is required to show that the registry report is based upon accurate and reliable information that would lead a reasonable person to believe that a child is abused. . ." See 33 V.S.A. § 4912(10). The standard of proof is a preponderance of evidence.

In this case, the Department offered only the brief hearsay testimony of the child's mother, to which the petitioner objected, that V. told her that her "bug hurt" and that she had awoken to find the petitioner's "hand under her

covers". Even if this testimony is admissible¹ it is deemed to be too inconclusive to support a finding that the petitioner actually touched V. as alleged. As noted above, there is credible and unrebutted testimony by the petitioner that V. had engaged in some what-could-be-considered sexualized behavior with her brothers earlier that evening and that all the children had been roughhousing. There are also the facts that V. told her mother that this had happened after she had fallen asleep and that no physical evidence was found to explain why V.'s vagina hurt. Enhancing the petitioner's credibility are the facts that he immediately told his family of the allegation and was shocked when confronted by it.

For all of the above reasons, it must be concluded that the report in question cannot be substantiated within the meaning of the above statute.

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¹ It would appear that this hearsay testimony would fall under the exception of an "excited utterance" under V.R.E. 803(2). See State v. Ives, 162 Vt. 131, 142-143 (1994).