

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. B-09/13-671
)
Appeal of)

INTRODUCTION

Petitioner appeals his substantiation by the Department for Children and Families, Family Services Division ("Department") for an alleged incident of sexual abuse. The following procedural history and facts are adduced from a series of telephone status conferences, a merits hearing held on July 31, and post-hearing motions filed by the parties.

PROCEDURAL BACKGROUND

This appeal was filed in September of 2013. During status conferences in November and December of 2013, the Department indicated that it would determine witness availability and whether it would seek to establish a substantial risk of trauma of the putative victim to testify

victim's hearsay statements under Rule 804a if she "is made available."

A status conference was scheduled and held on June 2. Following the status conference, the hearing officer issued a June 2 memorandum ordering the parties to disclose witness lists by June 20 and scheduling an all-day hearing on the merits for July 31. On July 28, the Department emailed the Board a "Motion to Continue" the afternoon of the hearing - beginning from 1:30 p.m. - due to a conflict with another matter in the Family Division of Superior Court, and requested a telephone status conference. The Department's motion indicated that two (2) witnesses would be called to testify, and that Department counsel "hopes" the case could be completed by 1:30 p.m. The motion did not provide any additional information about how the conflict arose, when counsel was notified of the conflict, and any attempts or possibility of mitigating the conflict.

A telephone status conference was held on the afternoon of July 28. During the status conference, the Department disclosed its intent to call the putative victim's mother and the Department investigator who interviewed the putative victim. Petitioner had no objection to the mother testifying as his counsel understood she would be a witness, but

objected to the investigator as she had never been understood or disclosed as a witness. Upon this objection, Department counsel stated the putative victim would be called as a witness, which petitioner also objected to on the ground that she had never been disclosed as a witness.

The Department acknowledges it never provided disclosure of witnesses on June 20 as ordered by the hearing officer, or thereafter. Petitioner's counsel represents, for that matter, that the investigator was never verbally disclosed as a witness and the Department had, prior to July 28, only verbally indicated two potential witnesses - the putative victim's mother and therapist.

The hearing officer deferred action on the Department's requests and petitioner's objections and the matter proceeded to hearing on July 31. At the commencement of the hearing, Department counsel indicated that another conflict had arisen for the afternoon, and he had a 1 p.m. telephone status conference in a Family Division matter. The Department then called petitioner's mother to testify. The Department sought introduction, under V.R.E. 804a, of an audio copy of the interview of the putative victim conducted by the investigator, to which petitioner objected. At the close of the mother's testimony, the Department reprised its request

to admit the investigator's interview and call the investigator and the putative victim to testify, while also indicating the intent to call petitioner to testify.

By this time, there was insufficient time to call any additional witnesses due to Department counsel's court conflicts. The hearing officer requested that the Department file a motion to, in effect, continue the proceedings for the testimony sought and for admission of the interview. The Department did not file a motion to continue but instead filed a Motion to Admit Video of Interview of Victim and Allow Testimony of Investigator,² on August 14. Petitioner filed a Motion in Opposition on August 17.

The hearing officer denied the Department's motion by memorandum dated September 5 and closed the record for subsequent recommendation to the Board.

FINDINGS OF FACT

1. Petitioner was substantiated by the Department for alleged sexual abuse of a child which was reported to the Department on September 4, 2012.

2. The Department made the determination of abuse and substantiation upon conclusion of its investigation April 12,

² The motion erroneously refers to a "video" when the recording in question is in an audio format.

2013. A Commissioner's Review meeting was held with petitioner on August 7, 2013, and following that a determination by the Registry Reviewer in support of the substantiation on September 5, 2013. Petitioner's appeal to the Board is from that determination.

3. The events at issue began when the putative victim (hereinafter "C"), five (5) years old at the time, made a statement to her mother in August of 2012. Petitioner was married to C's mother and lived in the household with C and C's younger sister, both of whom are her children from a prior marriage.³

4. Sometime in August, when C's mother was getting her out of the bathtub prior to bedtime, C stated "Daddy kissed my butt."

5. C's mother did not ask C any questions or talk with her about the statement at the time, nor did C say anything else at the time. C's mother did not believe it was an appropriate time for her to follow up on the statement, was in the midst of putting her children to bed, and wanted to be careful about how to approach the situation. C's mother

³ C's mother was pregnant at the time with petitioner's daughter. Petitioner and C's mother are now divorced and both have moved out of state.

acknowledged she did not feel prepared to "deal with" the issue.

6. C's mother waited, as she variously testified "one or two weeks" or "two weeks or so" to approach C about the statement, on Labor Day weekend of 2012. During this intervening period she did not mention the statement to petitioner, nor did she take any measures to prevent petitioner from being alone with C.

7. C's mother approached her about the statement during a time she was alone with her. She recalled it was on Sunday or Monday of the Labor Day weekend. The Saturday of that weekend she had left the children in petitioner's care.

8. C's mother approached her by asking "remember when you said to me daddy kissed your butt, what did you mean by that?" C then repeated that "Daddy kissed my butt." When C's mother asked where she had been kissed, C pointed to her vaginal area and said "Daddy kissed me there," and suggested that it was an accident and he meant to kiss her slightly lower on her thigh area. C stated that this occurred in her bedroom.

9. When she asked C "which daddy," C responded "your husband." At hearing, C's mother testified that C said petitioner's first name, but acknowledged on cross-

examination that at the time she reported the incident, she did not report that C made any reference to petitioner's first name, only referring to "your husband." She acknowledged that what she reported at the time is more likely to be accurate.

10. According to her mother, C reported the incident in a "matter of fact" manner. She expressed no fear of petitioner nor apparent distress. C's mother asked her where her younger sister was at the time. While C's mother could not recollect exactly what C said at the time, she remembered that the answer generally indicated the younger sister was somewhere nearby, indicating to her that the incident was current. C did not volunteer this information but gave it in answer to her mother's question.

11. C's mother does not recall asking her anything further. C did not appear upset and has not expressed any fear of petitioner during, before, or since that time.

12. After putting C and her other daughter to bed, C's mother confronted petitioner about what C had said. Petitioner denied that anything had happened. C was in therapy at the time and C's mother said she would report the statement to C's therapist; petitioner did not disagree with that course of action.

13. The following day C's mother reported the statement to C's therapist. A Department and police investigation followed. C's mother brought her to an interview at a police station on the Friday following Labor Day weekend. C was interviewed outside of her mother's presence.

14. C's mother acknowledged that she strongly suspected C had been sexually molested by her biological father when they lived in another state. C last saw her biological father in February or March of 2011. C's mother was concerned because C would come from visits with her biological father upset, experienced nightmares, made reference to having a "spider on my butt," and refused to use the bathroom where the father used to give her showers. C's mother reported her concerns about the father - however, her understanding is the report was never investigated by authorities in the state where they lived at the time.

15. During September of 2012, C's mother wrote a letter to the police advocating petitioner's innocence. At the time, she believed C was experiencing triggered memories of earlier abuse and was not reporting a current incident. C's mother also states that she "hoped" C was reporting an earlier memory. She acknowledged that she expected the allegations against petitioner would end their marriage and

affect her social and professional standing in her community. Despite this, she states that she truly believed in petitioner's innocence when she appealed to the police. As the investigation ensued, C's mother eventually came to believe that C was reporting a current incident and had accurately identified petitioner.

16. Just prior to these events, in June of 2012, C reported that a boy at her daycare had sexually molested her every day she had been in daycare, spanning a period from September of 2011 through June of 2012. C also reported that everyone in the daycare had molested her.

17. Upon this report, C's mother immediately took her to the hospital for an examination. C again reported that a particular boy had molested her at daycare. When asked if anyone else had touched her, she said "no." A hospital staff person reported to C's mother that it appeared her hymen was not intact.⁴

18. No further investigation occurred at this time. However, because of these concerns C's mother placed her in counselling in July of 2012. At some point while C was in daycare, C's mother also began separating C and her younger

⁴ This statement was admitted into evidence solely for the purpose of establishing the understanding of C's mother as she addressed these issues in the ensuing weeks and months.

sister during baths, because the younger sister had reported that C had touched her "privates." C's mother also acknowledged that C used the term "butt" frequently and one of the reasons for the bath separation was excessive "potty talk" by C.

19. C's mother told petitioner about her concerns that C had been molested by her biological father.

20. Petitioner was investigated and eventually substantiated by the Department for sex abuse. As part of the investigation, C was interviewed. An audio recording of the interview was made, of which the Department sought admission at hearing.

21. Petitioner lost his employment at the time due to the substantiation. He currently lives in another state.

ORDER

The Department's decision is reversed.

REASONS

The Department for Children and Families 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 pertinent sections of 33 V.S.A. § 4912 define abuse and harm 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 included but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child. . .

The Department has the burden of proving that petitioner's conduct constitutes sexual abuse as defined by the statute. See *In re R.H.* 2010 Vt. 95, ¶¶ 15-16, 189 Vt. 15, 23.

The Vermont Rules of Evidence create a hearsay exception when the putative victim of sexual abuse is twelve years old or younger; the exception also extends to putative victims who have a mental illness or development disability. The pertinent sections state:

(a) Statements by a person who is a child 12 years or under . . . at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they were offered that:

(1) the statements are offered in a civil, criminal or administrative proceeding in which the child . . . is a putative victim of . . . lewd or lascivious conduct with a child under 13 V.S.A. § 2602, . . . or wrongful sexual activity and the statements concern the alleged crime or wrongful sexual activity. . .

(2) the statements were not taken in preparation for a legal proceeding. . .

(3) the child . . . is available to testify in court or under Rule 807; and

(4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

V.R.E. 804a.

In substantiation appeals, Title 33 allows for the admission of hearsay evidence under Rule 804a even if the putative victim is not made available to testify, if it can be established that there is "a substantial risk of trauma" for the child to testify. 33 V.S.A. § 4916b. Here, the Department initially indicated it would seek an order that there would be a substantial risk of trauma, subsequently withdrew that request, and proceeded forward with making the putative victim available to testify.

With the record closed, this appeal involves the admissibility of the putative victim's statements to her

mother under the standards of V.R.E. 804a, the Department's de facto request for a continuation of the proceedings to submit additional testimony, and the Department's request to admit a recording of the putative victim's interview with or without additional testimony. These issues will be taken in turn.

Admissibility of C's Statement to Her Mother

Petitioner objects to the statements by C as testified to by her mother. Before what would otherwise be hearsay can be admitted in this case, there must be a determination that the criteria in V.R.E. 804a(a)(4) are met - that the "time, content, and circumstances" of the statements indicate that the statements are reliable.

The Vermont Supreme Court has dealt with challenges to admissibility of hearsay under V.R.E. 804a. They give latitude to the trier of fact; their decisions give guidance regarding the specificity of the evidence admitted at hearing that supports a finding of trustworthiness. See *State v. Tester*, 2006 Vt. 24, ¶17, 179 Vt. 627, 631 (disclosure made to trusted adult in a place where child felt safe and subsequent statements consistent with initial disclosure); *State v. Willis*, 2006 VT 128, ¶¶13-20, 181 Vt. 170, 176-77 (spontaneous disclosure to respite worker, consistent details

in interviews with police and DCF investigator), *In re M.B. and E.B.*, 158 Vt. 63, 68 (1992) (statements made to trusted adults in unpressured settings, statements were consistent, and were corroborated by other evidence including medical evidence).

In *State v. LaBounty*, 168 Vt. 129 (1998), the defendant was convicted of aggravated sexual assault on two preschool age children who attended his wife's day-care facility. The defendant objected to hearsay statements made to the children's parents and to hearsay statements made the following day to the SRS investigator and detective. The Court noted the statements "freshness, spontaneity, internal consistency, and accuracy with respect to surrounding detail". *Id.* at 136. The initial disclosure was spontaneous. The children gave detail regarding not only what happened to them and where in the daycare the abuse occurred but also detail regarding the defendant's appearance, his clothing, the location of other children, and the interior of the day-care. The children were interviewed the following day by investigators who did not know the details of the allegations, and, as a result, had no preconceptions about what happened. *Id.* at 137.

The statements at issue here are in contrast, significantly, to those admitted in *Labounty* and other cases. A period of approximately two weeks passed between the spontaneous statement by C and when it was followed up on by her mother. Despite the intent of C's mother to approach her carefully about the prior statement, she followed up with a question that suggested the answer. Even her question about where C's sister was at the time suggested and indeed assumed the sister was present. C provided no additional material details nor did C's mother probe for additional details which may or may not have lent more reliability to the statements.

C's mother concedes that she added a significant detail in her testimony that she did not report at the time, that C identified petitioner by name, and further acknowledged that her report at the time was more likely to be accurate. The overarching circumstances undermine C's purported identification of petitioner as the perpetrator. Not only had C recently reported sexual molestation at her daycare, C's mother believed that she had previously been sexually abused by her biological father, the mother's ex-husband. She believed that in part because of the distress C exhibited in relation to her father, distress which C never expressed

towards petitioner. The mother's concerns led her to place C in therapy before any allegation was made against petitioner.

All of these factors are relevant here. C's mother herself, at the time, did not believe C had accurately identified petitioner as the perpetrator of any sexual abuse. There was a significant delay between C's spontaneous statement and following up with her. She was asked questions which suggested the answer. For all of the above reasons, it is determined that C's statements to her mother purportedly suggesting petitioner had sexually molested her do not meet V.R.E. 804a's indicia of trustworthiness, and therefore are deemed inadmissible.

The Department's Request to Submit Additional Testimony

After a series of preliminary status conferences and the Department's rescinded 804a trauma motion, this matter was scheduled for an all-day merits hearing with approximately 60 days advance notice to the parties. A scheduling order required the parties to exchange witness lists approximately 6 weeks prior to hearing. It was only two days prior to hearing, and incidental to a status conference on a motion to continue, that the Department verbally disclosed two witnesses for the hearing. Petitioner objected to one of those witnesses - the DCF investigator - on the grounds of

surprise; the Department does not dispute that it failed to provide notice of its witnesses in the time and manner contemplated by the hearing officer's scheduling order.

In general, continuation of a hearing is at the discretion of the hearing officer and pursuant to Board rule:

The hearing officer shall rule on requests for changing the timing, manner, or location of the hearing. Such requests shall be made to the hearing officer within a reasonable time. The opposing party shall have the right to oppose such a request. In ruling on such a request the hearing officer shall include consideration of the sufficiency of the grounds for the request, the length of time appropriate for a continuance, and the degree of prejudice, if any, to the party opposing the request.

Fair Hearing Rule 1000.3.F.

Since the time petitioner was substantiated and throughout this lengthy period of appeal, petitioner has been on the child abuse registry. Delaying the appeal process without a sufficient basis prejudices the petitioner and implicates his due process rights. See Fair Hearing S-08/11-497 at 9. The law provides for a timely resolution of

appeals, in particular where "there are immediate employment consequences" for the petitioner.⁵

The delays in this appeal and the circumstances under which the Department now seeks further delay are almost exclusively of the Department's own making. The Department initially determined that C would suffer trauma if forced to testify, then after extensive discovery related to that issue, withdrew that request on the eve of hearing.

The appeal was then placed on track for a merits hearing, and the Department compounded the initial delay by failing to comply with the hearing officer's scheduling order as well as requesting a last minute continuance despite generous advance notice of the hearing and minimal requirements of witness disclosure.⁶ As much as the Department may argue petitioner was not surprised, the failure to disclose witnesses when ordered creates a

⁵ See 33 V.S.A. §§ 4916b(b)(1) and (2). The statute also provides that substantiation appeals before the Board be heard within 60 days, and that decisions be rendered within 30 days following the hearing. While it is acknowledged that these timelines are usually not met, almost always with the consent of the parties and with good cause, this does not mean the Board is precluded from determining if a delay in any given appeal is justified.

⁶ It should be recognized that a failure to strictly adhere to a deadline does not automatically result in exclusion of a witness or evidence, a measure which remains in the discretion of the hearing officer. Here, the Department's failure to adhere to the deadline was never cured or mitigated in a meaningful way, nor did the Department seek relief from the deadline or seek to extend it, for cause, in a timely manner.

presumption of surprise and supports petitioner's claim of prejudice.

There is Board precedent in other substantiation appeals which involved significant delay based largely on requests and actions by the Department. See, e.g. Fair Hearing No. 20,501 (an APS substantiation) and Fair Hearing No. R-01/12-73 (DCF substantiation for physical abuse). These cases also involve lengthy procedural histories and last-minute continuances, ultimately resulting in reversal of the substantiations. *Id.* The Board has also dismissed substantiation appeals by petitioners, where there are delays without sufficient cause and with prejudice to the Department, under a "failure to prosecute" standard. See e.g., Fair Hearing Nos. A-01-13-51 and B-12/12-795, and cases cited therein.

The Vermont Supreme Court has ruled that HSB hearing officers have the authority and discretion to make preliminary orders so that fair hearings are conducted efficiently and effectively. See *In re R.P.*, 2010 Vt. 96; ¶13, 189 Vt. 31, 37. The delay sought here is prejudicial to petitioner and further delay injurious to the efforts of the Board and hearing officer to achieve fairness and efficiency in these proceedings. There is no cause established for

further delay,⁷ and the Department's requests for additional testimony are appropriately denied.⁸

Admissibility of DCF Interview of C

Finally, the Department seeks to admit the interview of C whether or not the investigator conducting the interview is called as a witness. Petitioner does not dispute the authenticity of the audiotape of the interview. However, in order to admit C's statements during the interview, the Department must establish her statements meet the V.R.E. 804a indicia of trustworthiness through an analysis of the "time, content, and circumstances" as discussed above.

The Department cannot make such a showing here. In the first instance the interview is limited to audio, and thus it is impossible to see or understand the entirety of the circumstances, which could include the demeanor of participants, any motioning by C or the investigator, and identity of everyone present. The Department argues in

⁷ The Department, for that matter, never made any representation as to the need for a continuance for a portion of the July 31 hearing apart from the existence of a conflict with another proceeding. It is not unreasonable to expect some explanation of why the conflict was discovered at such a late date and why coverage for both hearings could not be accomplished, which explanation has never been offered.

⁸ Though it need not be reached, even if the proceedings had been delayed to allow for further testimony, it remained within the hearing officer's discretion to request a proffer from the Department as to the content of that testimony. See *In re R.P., supra*. This is especially significant in this case, given the problematic initiation of C's questioning by her mother and the circumstances of the allegations.

support of admission that the hearing officer may "view" the interview to determine reliability. This only supports denying admission of the interview given that it is an audio-only recording.

The investigator conducting the interview could have established these circumstances, but her testimony is not in the record nor, obviously, was she subject to cross-examination. Just as it would not be fair to continue the proceedings to call the investigator as a witness, it is not fair to admit C's statements during the interview without the testimony of the investigator. As discussed above, the exclusion of the investigator as a witness falls on the Department and is not a basis to further prejudice petitioner by simply admitting the audio recording of C's interview.

For all of these reasons, the Department has failed to meet its burden of proving that petitioner committed sexual abuse and therefore his substantiation is reversed. See 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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