



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

Jim Justice
Governor

BOARD OF REVIEW
416 Adams St.
Suite 307
Fairmont, WV 26554
304-368-4420 ext. 79326

Bill J. Crouch
Cabinet Secretary

November 29, 2017

[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NOS.: 17-BOR-2436 and 17-BOR-2610

Dear Ms. [REDACTED]

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the Board of Review is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources (DHHR). These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions that may be taken if you disagree with the decision reached in this matter.

Sincerely,

Tara B. Thompson
State Hearing Officer
State Board of Review

Enclosure: Claimant's Recourse to Hearing Decision
Form IG-BR-29
cc: Tamra Grueser, Bureau of Senior Services

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

████████████████████,

Appellant,

v.

**ACTION NOS.: 17-BOR-2436 and
17-BOR-2610**

**WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,**

Respondent.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on November 15, 2017, on an appeal filed September 7, 2017.

The matter before the Hearing Officer arises from the August 23, 2017 decision by the Department to terminate participation in the Medicaid Aged and Disabled Waiver (ADW) program and the Personal Care Services (PCS) program.

At the hearing, the Respondent appeared by Tamra Grueser, RN, Bureau of Senior Services. Appearing as witnesses for the Respondent was ██████████, RN Supervisor, ██████████, ██████████, and ██████████, RN, Bureau of Senior Services. The Appellant appeared in person and was represented by ██████████, attorney with ██████████, and ██████████, attorney with ██████████. Appearing as witnesses for the Appellant were ██████████, the Appellant's mother and former employee of ██████████, ██████████ and ██████████, the Appellant's brother. All witnesses were sworn and the following documents were admitted into evidence.

EXHIBITS

Department's Exhibits:

D-1 Bureau for Medical Services (BMS) Policy Manual sections including §501.29, §501.34, §517.16, and §517.19

D-2 Personal Care (PC) Request for Discontinuation of Services, dated August 22, 2017; ADW Request for Discontinuation of Service, dated August 22, 2017; Discontinuation of Personal Care Services Notice, dated August 23, 2017; Discontinuation of ADW Program Services Notice, dated August 23, 2017; and two facsimile transmission reports

D-3 [REDACTED] documentation including Behavioral Contract, dated August 17, 2017; Notes on [REDACTED] and redacted individual by [REDACTED], dated August 22, 2017; Notes by [REDACTED], dated August 22, 2017; Text Message Screenshot, received August 12, 2017, signed by [REDACTED]; Handwritten Note by redacted individual, dated August 21, 2017; Typewritten Note by redacted individual, dated August 22, 2017; Handwritten note on [REDACTED], by redacted individual, dated September 8, 2017

Appellant's Exhibits:

None

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the following Findings of Fact are set forth.

FINDINGS OF FACT

- 1) The Appellant was a participant in the Aged and Disabled Waiver (ADW) program and the Personal Care Services (PCS) program.
- 2) As a participant in the ADW program, the Appellant received services provided at his residence by PCS staff assigned by [REDACTED].
- 3) The Appellant's brother, [REDACTED], resided in the Appellant's home.
- 4) On August 12, 2017, one written complaint regarding the Appellant's home was sent via text message by an unknown staff person to [REDACTED], [REDACTED] office staff. This document is hearsay and unreliable. (Exhibit D-3)
- 5) No written complaints regarding an Unsafe Environment were made to [REDACTED] prior to August 12, 2017. (Exhibit D-3)
- 6) On August 15, 2017, the Appellant's mother requested agency transfer forms on behalf of the Appellant because the Appellant wished to transfer service agencies. (Exhibit D-3)
- 7) The Respondent's witness, [REDACTED], had no direct knowledge of verbal allegations made by PCS staff alleging the Appellant's home was an Unsafe Environment.

- 8) [REDACTED] did not follow procedural guidelines as required in policy, and did not complete an incident report or contact law enforcement because she believed a behavior contract would address staff allegations.
- 9) On August 17, 2017, [REDACTED] requested that the Appellant sign a behavior contract agreeing not to use illegal drugs, buy or sell illegal drugs, or engage in loud verbal outbursts and foul language while PCS staff was present in the home. The Appellant refused to sign until he consulted with an attorney and provided a written statement to attach to the behavior contract. (Exhibit D-3)
- 10) [REDACTED] had not advised the Appellant of staff complaints regarding Unsafe Environment until [REDACTED] request for the Appellant to sign the behavior contract on August 17, 2017.
- 11) Due to the Appellant's physical illness, it took several days to write a statement; the Appellant did not submit his statement prior to his services being terminated.
- 12) On August 18, 2017, the Appellant submitted a transfer notice for waiver services and refused to sign the behavior contract until an attorney reviewed it. (Exhibit D-3)
- 13) On August 18, 2017, an unknown staff member of [REDACTED] advised the Appellant that if he did not sign the behavior contract, discontinuation of services for non-compliance would be pursued. No deadline to sign the behavior contract was reflected in the documentation. (Exhibit D-3)
- 14) On August 22, 2017, the Appellant contacted [REDACTED] by telephone. During the call with [REDACTED], the Appellant refused to sign the behavior contract, called the PCS staff names, threatened to sue [REDACTED], and told [REDACTED] to "go fuck" herself. (Exhibit D-3)
- 15) On August 23, 2017, the Respondent issued a notice advising the Appellant that his ADW and PCS services were being terminated due to Non-Compliance and Unsafe Environment. (Exhibit D-2)
- 16) During the period of August 21, 2017 through September 8, 2017, [REDACTED] obtained two hand-written statements and one typed statement alleging that the Appellant used illegal drugs in the presence of PCS staff, made racist and sexist statements in the presence of PCS staff, called a PCS staff's personal telephone and made rude and nasty comments to staff, and that marijuana could be smelled by PCS staff after the Appellant went to his room. (Exhibit D-3)
- 17) Staff names were redacted from written statements. The Respondent testified that staff lived in a small community and feared retaliation from the Appellant, his brother, and his family. (Exhibit D-3)

- 18) The August 22, 2017 call to [REDACTED] from the Appellant is credible documentation of one incident of verbal outburst; however, the totality of the evidence does not demonstrate repeated documented occurrences of threats of harm, threatening language, or derogatory comments toward [REDACTED] staff by the Appellant or his brother. (Exhibit D-3)
- 19) Justification for redaction of staff names from statements submitted into evidence was not established. Written statements obtained August 21, 2017 through September 8, 2017, are hearsay and unreliable. (Exhibit D-3)
- 20) Evidence does not support policy guidelines for Unsafe Environment requiring demonstration that [REDACTED] staff were threatened or abused and that staff's welfare was in jeopardy. Evidence does not support policy guidelines for Unsafe Environment requiring demonstration that the Appellant or his brother displayed an abusive use of illegal drugs or engaged in buying or selling of illegal substances in the presence of PCS staff. (Exhibits D-1 and D-3)
- 21) The Appellant's failure to sign the behavior contract is the only instance of non-compliance provided by [REDACTED].
- 22) Evidence does not support policy guidelines for Non-Compliance requiring demonstration that the Appellant was persistently non-compliant with the Personal Care Nursing Plan of Care and creating a risk to the Appellant's health and safety. (Exhibits D-1 and D-3)

APPLICABLE POLICY

Bureau for Medical Services (BMS) Provider Manual (ADW) §501.34 provides in part:

The following require a request for a Request for Discontinuation of Services Form: ...

- B. Unsafe Environment- an unsafe environment is one in which the Personal Attendant and/or other agency staff are threatened or abused and the staff's welfare is in jeopardy. [emphasis added] This may include, but is not limited to, the following circumstances:
 - a. The person receiving ADW services or other household members repeatedly [emphasis added] ...display verbally and/or physically abusive behavior; and/or threaten a Personal Attendant or other agency staff with guns, knives, or other potentially dangerous weapons, including menacing animals or verbal threats to harm the Personal Attendant and/or other agency staff.
 - b. The person or other household members display an abusive use of alcohol and/or drugs and/or illegal activities in the home...
- C. The person is persistently [emphasis added] non-compliant with the Service Plan...

Documentation to support the unsafe environment should come from multiple sources if possible, i.e., the Personal Attendant Agency and the Case Management Agency...

BMS Provider Manual (PCS) §517.19 provides in part:

The following require a Request for Discontinuation of Services Form be submitted and approved by the Operating Agency (OA):

- A. Unsafe Environment- an unsafe environment is one in which the Direct Care Worker and/or other agency staff are threatened or abused and the staff's welfare is in jeopardy. [emphasis added] The provider must follow the steps in the PC Procedural Guidelines for non-compliance and safety closures. This may include, but is not limited to, the following circumstances:
 - 1) The member or other household members repeatedly [emphasis added] ...display verbally and/or physically abusive behavior; and/or threaten a Direct Care Worker or other agency staff with guns, knives, or other potentially dangerous weapons, including menacing animals.
 - 2) The member or other household members display an abusive use of alcohol and/or drugs or engages in the manufacture, buying and/or selling of illegal substances.
 - 3) The physical environment is either hazardous or unsafe.
- B. The member is persistently [emphasis added] non-compliant with the Personal Care Nursing Plan of Care creating a risk to their health and safety.

West Virginia Common Chapters §710.22 provides in part:

- (H) Cross Examination: Both parties shall have the right to cross-examine witnesses who testify...
- (I) Admissibility of Evidence: The Hearing Officer shall rule on the admissibility of any evidence presented by either party at a hearing. In ruling on the admissibility of evidence, the Hearing Officer shall consider the factors of relevancy, reliability, and repetitiveness.
- (J) Rules of Evidence: The West Virginia Rules of Evidence do not apply in these hearings, but may be considered when determining admissibility of evidence so that the truth may be ascertained and the proceedings justly determined. Both parties shall have the right to submit rebuttal evidence.

DISCUSSION

The Respondent terminated the Appellant's participation in the Aged and Disabled Waiver (ADW) program and the Personal Care Services (PCS) program based on Non-Compliance and Unsafe Environment related to the Appellant's drug use, illegal activities in the home, verbal abuse, and the Appellant's refusal to sign a [REDACTED] behavior contract. The Appellant contended that he did not use drugs, had never been verbally abusive, and refused to sign the contract until he could provide a written statement and consult with an attorney. The Appellant requested that his ADW and PCS services be restored and that he be allowed to complete a transfer to a new service provider.

The Respondent has the burden of proof. To prove Non-Compliance, the Respondent had to demonstrate by a preponderance of evidence that the Appellant was persistently non-compliant with his Service Plan or Personal Care Nursing Plan of Care creating risk to his health and safety. To prove an Unsafe Environment, the Respondent had to demonstrate by a preponderance of evidence that the Appellant or a member of his household displayed an abusive use of drugs or participated in illegal activities in the home and that agency staff were repeatedly verbally or physically threatened or abused jeopardizing their welfare.

The Respondent had received one written complaint via text message prior to the attempted implementation of the behavior plan by [REDACTED]. The Respondent's witness had no direct knowledge of complaints against the Appellant. The Appellant contended that the Respondent did not follow procedural guidelines as indicated in policy when an Operating Agency (OA) receives a complaint of Non-Compliance or Unsafe Environment. The Appellant contended that because guidelines were not followed, allegations were not properly investigated, and Non-Compliance and Unsafe Environment were not established. The Respondent argued that although policy states specifically that procedural guidelines must be followed, the guidelines are recommendations and not policy. Regardless of [REDACTED] completion of the steps in the procedural guidelines, the basis for implementing the behavior plan was not supported by the evidence available to [REDACTED] when she attempted to implement the behavior plan with the Appellant. The Appellant requested time to review the behavior contract and consult with an attorney. On August 18, 2017, [REDACTED] received a transfer request from the Appellant. An unknown staff member contacted the Appellant by telephone advised that his services would be terminated if he did not sign the behavior contract; the Appellant continued to request time for an attorney to review the behavior contract. [REDACTED] did not provide the Appellant with a date by which he had to sign the behavior contract. The Respondent only provided the Appellant with three (3) business days to review the behavior contract with an attorney and write his statement before [REDACTED] submitted a Request for Discontinuation of Services. On August 22, 2017, the Appellant contacted administrative staff via telephone and refused to sign the behavior contract. The Appellant testified that he refused because he believed that his transfer request had been processed and that he would be receiving care from another agency. The Appellant's failure to sign the behavior contract is the only instance of non-compliance provided by [REDACTED]; the threshold of persistent non-compliance was not met.

██████████ did not obtain additional written statements alleging concern of Unsafe Environment until after ██████████ had developed the behavior contract and the Appellant had submitted a request for transfer of waiver services. Written ██████████ staff statements were the basis for ██████████ request for discontinuation of services. Prior to being submitted into evidence for the fair hearing, the names of the persons making the statements had been redacted. The Respondent argued that redaction was necessary because staff and the Appellants reside in a small town and staff were afraid of retaliation from the Appellant, his brother, or his family. The Respondent presented no evidence that ██████████ had direct knowledge beyond the August 22, 2017 telephone call with ██████████, of threats of harm or derogatory statements ever being made to staff by the Appellant or a member of his family. Written statements did not demonstrate any content that would indicate that fear for staff welfare was justified. The Respondent's witness statements are hearsay and the redaction of witness statements was not justified. The Respondent's unjustified redaction of witness statements violates the Appellant's right to cross examine witnesses pursuant to the West Virginia Common Chapters. While the Hearing Officer is not bound by state rules of evidence, the Hearing Officer may consider them when determining admissibility of evidence. Although the Hearing Officer has the capacity to review written hearsay, without the knowledge of statement authors there is no way for this Hearing Officer to gain needed information regarding the believability and reliability of the witness statements. Witness statements were unreliable due to redaction and were given little weight in the decision of this Hearing Officer. Evidence did not support that the Appellant or a member of his household repeatedly displayed verbally or physically abusive behavior toward agency staff, threatened agency staff with potentially dangerous weapons, or made verbal threats to harm agency staff. Evidence did not demonstrate that the Appellant displayed an abusive use of drugs or engaged in illegal activities in the home. The Respondent failed to present evidence of Unsafe Environment that demonstrated the agency staff were repeatedly threatened or abused and that staff's welfare was in jeopardy.

After a review of the facts, the Respondent failed to demonstrate by a preponderance of evidence that it acted in accordance with policy in terminating the Appellant's participation in the Aged and Disabled Waiver program and the Personal Care Services program.

CONCLUSIONS OF LAW

- 1) Written witness statements entered into evidence by the Respondent are hearsay and unreliable due to redaction.
- 2) The Respondent did not demonstrate by a preponderance of evidence that the Appellant or a member of his household repeatedly displayed verbally or physically abusive or threatening behavior that jeopardize the welfare of ██████████ Staff.
- 3) The Respondent did not demonstrate by a preponderance of evidence that the Appellant or a member of his household displayed an abusive use of drugs or participated in illegal activities in the presence of ██████████ staff.

- 4) The Respondent did not demonstrate by a preponderance of evidence that the Appellant was persistently non-compliant with his Service Plan or Personal Care Nursing Plan of Care creating risk to his health and safety.
- 5) The Respondent incorrectly terminated the Appellant's participation in the Aged and Disabled Waiver program and Personal Care Services program based on Non-Compliance and Unsafe Environment.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Department's decision to terminate the Appellant's participation in the Aged and Disabled Waiver program and the Personal Care Services program based on Non-Compliance and Unsafe Environment.

ENTERED this 29th day of November 2017.

Tara B. Thompson
State Hearing Officer