



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

Bill J. Crouch
Cabinet Secretary

Board of Review
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Jolynn Marra
Inspector General

March 30, 2022

[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NO.: 22-BOR-1118

Dear [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. 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, MLS
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
Form IG-BR-29

CC: Brittany Lucci, Child Care Resource Center
Kelly Coen, Child Care Resource Center

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

████████████████████,

Appellant,

v.

ACTION NO.: 22-BOR-1118

**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 of Chapter 700 of the West Virginia Department of Health and Human Resources' (DHHR) Common Chapters Manual. This fair hearing was convened on March 10, 2022 on an appeal filed with the Board of Review on January 21, 2022.

The matter before the Hearing Officer arises from the Respondent's December 20, 2021 decision to deny the Appellant eligibility for child care benefits.

At the hearing, the Respondent appeared by Kelly Coen, Child Care Resource Center. Appearing as witnesses on behalf of the Respondent were Brittany Lucci, Child Care Resource Center, and Denise Richmond, Department of Early Care and Education. The Appellant appeared *pro se*. All witnesses were sworn in and the following exhibits were entered as evidence.

Department's Exhibits:

- D-1 DHHR New Employment Verification Form
- D-2 Income Calculator; ██████████ Pay Stubs
- D-3 Child Care Policy Excerpts
- D-4 Child Care Policy Sliding Fee Scale for Child Day Care Services
- D-5 Child Care Parent Notification Letter Notice of Denial or Closure
- D-5 Child Care Program Instruction
- D-7 Respondent Email Correspondence

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 applied for child care benefits.
- 2) The Appellant's household's income exceeds child care benefit eligibility (Exhibits D-1 and D-2).
- 3) On December 20, 2021, the Respondent issued a notice advising the Appellant was ineligible because the household's income exceeded child care eligibility guidelines (Exhibit D-5).
- 4) The Respondent determined that because the Appellant's husband, [REDACTED] (hereafter, [REDACTED]), was not an essential worker, child care benefits granted to income-ineligible essential workers, during the response to coronavirus, could not be approved.
- 5) The Respondent did not issue a notice denying the Appellant child care benefits because [REDACTED] was not an essential worker (Exhibit D-5).
- 6) At the time of the Respondent's child care benefit denial, the Appellant's husband was employed by [REDACTED] a retail business engaged in the sale of food, first aid, safety products, over-the-counter medications, pet supplies, energy sources, and other non-grocery products (Exhibit D-2).

APPLICABLE POLICY

American Rescue Plan Act of 2021 (Public Law 117-2-Mar. 11, 2021) § 2201(a) provides in pertinent part:

Child Care and Development Block Grant Funding: Payments made to states from funds made available under this subsection shall be obligated in fiscal year 2021 or the succeeding 2 fiscal years. States are authorized to use such funds to provide child care assistance to workers deemed essential during the response to coronavirus by public health officials, without regard to the income eligibility requirements.

State of West Virginia Executive Order No. 9-20 (March 20, 2022) §§ (3)(b), (3)(c), (3)(f), and (3)(h) provide in pertinent parts:

Essential Businesses and Operations are defined by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency's March 19,

2020, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response.

Essential Businesses and Operations are establishments engaged in the retail sale of dry goods, prepared food, any other household consumer products (such as cleaning and personal care products), over-the-counter medication, non-grocery products, and products necessary to maintaining safety, sanitation, and essential operation of residences and Essential Businesses. Pursuant to the Executive Order, Essential Businesses and Operations consist of agriculture related businesses — including fishing, distribution of goods for consumption, and businesses that provide food and other necessities of life for animals. The Executive Order stipulates that businesses engaged in distribution and sale of energy sources, including power generation, oil, and propane, constitute essential infrastructure Essential Businesses and Operations. The Executive Order specifies that essential infrastructure shall be construed broadly.

DISCUSSION

The Respondent denied the Appellant eligibility for child care benefits because the Appellant's household income exceeded child care eligibility guidelines. The Appellant did not contest that the household's income exceeded child care eligibility guidelines. Household income eligibility guidelines may be waived when parents are engaged in essential work during the response to coronavirus. The Respondent testified that the Appellant was determined to be ineligible for child care benefits because [REDACTED] was not an essential worker. Although the Respondent failed to notify the Appellant of child care benefit denial based on [REDACTED] not meeting essential worker requirements, the Appellant was granted a fair hearing to contest the Respondent's denial. The Appellant argued that her husband's employer, [REDACTED] was an Essential Business.

The policies on which the Respondent's actions are based are required to be publically available. The Respondent's witness' testimonies indicate that the Respondent relied on verbal and written procedural agency instructions and internal agency email guidance when making a determination regarding [REDACTED] essential worker status. The Respondent's witness's testimony indicated that instructions are issued to staff as a guideline to facilitate the discernment of essential work. However, additional Respondent witness testimony established that the Respondent's controlling basis for identifying essential work is the March 20, 2020 State of West Virginia Executive Order No. 9-20 (hereafter, Executive Order).

To support the Respondent's determination that [REDACTED] was not an essential worker, the Respondent cited Child Care Policy sections stipulating that two-parent households are required to participate in qualifying activities. The Respondent further referenced an incomplete citation of federal regulations stipulating the Respondent has the authority to determine which essential workers are eligible for American Rescue Plan Act of 2021 (hereafter, Rescue Plan Act) child care benefits. While the Respondent has the authority to determine which essential workers are eligible for Rescue Plan Act child care benefits, the Respondent must prove how their determination is based on the policy and regulations.

Agency instructions are not established as policy. As the Respondent didn't provide a sufficient regulatory basis for their decision to deny the Appellant essential worker child care benefits and no publicly available agency policy exists specifying which essential workers are eligible for Rescue Plan Act child care benefits, the Hearing Officer deferred to the Rescue Plan Act and the Executive Order when reviewing the Appellant's eligibility for child care benefits.

The Respondent had to prove by a preponderance of the evidence that the Appellant's husband was not employed by an Essential Business as declared in the Executive Order. To prove that [REDACTED] employer was not an Essential Business, the Respondent had to demonstrate by a preponderance of the evidence that [REDACTED] did not sell items consistent with the Executive Order's declaration of Essential Businesses and Operations.

The Appellant argued that her husband's employer sells food and goods comparable to convenience stores that are recognized essential businesses. During the hearing, the Appellant testified that [REDACTED] sells temporary structure supplies, fire arms, ammunition, freeze-dried food, dog food, pet supplies, survival equipment, and other goods listed in the Executive Order. The Respondent did not contest that these items are available for purchase at [REDACTED] and only argued that to be consistent with the Executive Order, firearms had to be distributed to first responders. The Respondent's argument is not supported by available regulations.

Pursuant to the Executive Order, Essential Businesses and Operations are defined by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency's March 19, 2020, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response* — including retail businesses that sell food and beverage products, household consumer products, personal care products, over-the-counter medication, non-grocery products, products necessary to maintaining safety, sanitation, and essential operation of residences, food for animals, and energy resources. Because [REDACTED] employer sells items consistent with the Executive Order declaration of Essential Businesses and Operations, the Respondent incorrectly determined that [REDACTED] was not an essential worker.

CONCLUSIONS OF LAW

- 1) The Respondent is authorized to use Child Care and Development Block Grant Funding to provide child care assistance to workers deemed essential during the response to coronavirus by public health officials, without regard to the income eligibility requirements.
- 2) The preponderance of evidence verified that the Appellant and [REDACTED] were essential workers at the time of the Respondent's essential worker child care benefit eligibility denial.
- 3) The Respondent incorrectly denied the Appellant eligibility for child care benefits.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Respondent's decision to deny the Appellant eligibility for Child Care and Development Block Grant funded child care assistance for essential workers during the response to coronavirus. It is hereby **ORDERED** that the Appellant's child care benefit eligibility be retroactive to the date of application.

ENTERED this 30th day of March 2022.

Tara B. Thompson, MLS
State Hearing Officer