



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

June 15, 2022

[REDACTED]
[REDACTED]
[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NO.: 22-BOR-1460

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: Kimberly Perrine, Mountain Heart

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

██████████,

Appellant,

v.

ACTION NO.: 22-BOR-1460

**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 May 11, 2022 on an appeal filed with the Board of Review on March 31, 2022.

The matter before the Hearing Officer arises from the Respondent's March 31, 2022 decision to terminate the Appellant's eligibility for child care services.

At the hearing, the Respondent appeared by Kimberly Perrine, Mountain Heart. Appearing as witnesses on behalf of the Respondent was 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:

None

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 recipient of essential worker child care services.
- 2) On March 31, 2022, the Respondent issued a notice advising the Appellant was ineligible for child care services because "WV DHHR Early Care and Education did not approve child care for you teleworking position."
- 3) The March 31, 2022 notice advised that the Appellant would be responsible for child care payments after March 31, 2022.
- 4) The March 31, 2022 notice did not provide any citations of the policy on which the termination of eligibility was based.
- 5) On March 7, 2022, the Appellant reported new telework employment with [REDACTED]
- 6) The Appellant's position with [REDACTED] constituted essential work.
- 7) The Appellant submitted verification of income and telework position details.
- 8) The Appellant spends 95% of her work time on the telephone with medical providers.
- 9) The Appellant is unable to perform dependent care during work hours.
- 10) The Appellant is required to comply with Health Insurance Portability and Accountability Act (HIPAA) confidentiality guidelines.

APPLICABLE POLICY

Child Care Subsidy Policy (CCS) § 4.0 through 4.1 provide in pertinent parts:

To be eligible for child care assistance, families must demonstrate a need for care. In general, that means the head of household must be involved in a qualifying activity that prevents the parent from providing care and supervision of the children in the household during the time the parent is participating in the activity. Income-eligible parents who are working in the private or public sector and who have children who need care are considered to need child care.

CCS Policy §§ 4.1.4 through 4.1.4.2 provide in pertinent part:

Teleworking is defined as work that occurs at home during scheduled business hours rather than commuting to an office or employer location on a daily basis These parents may receive Child Care services provided the employer has approved teleworking. The parent must provide a written statement from the employer indicating the days and hours approved by teleworking or the parent must provide

a copy of a telework contract signed by the employer indicating the days and hours telework is approved.

Code of Federal Regulations § 45 CFR 98.20(a)(3)(i) - 98.20(a)(3)(ii) provide in pertinent part:

To be eligible for services, a child shall, at the time of eligibility determination or redetermination:

- Reside with a parent or parents who are working or attending a job training or educational program; or
- Receive, or need to receive, protective services, which may include specific populations of vulnerable children as identified by the Lead Agency, and reside with a parent other than parents who are working or attending a job training or educational program.

DISCUSSION

The Respondent terminated the Appellant's child care services on the basis that essential workers may not telework unless participating in telehealth as a component of telework employment. The Appellant contested the termination and argued that child care services for telework is approvable pursuant to the Respondent's policies.

To prove that the Respondent correctly terminated the Appellant's child care benefits, the Respondent had to demonstrate by a preponderance of the evidence that the Appellant was ineligible for child care services because the policy precluded her from teleworking. The policy stipulates that child care services may be approved when the employer has approved teleworking.

The Respondent's representative testified that the Appellant has a telework position that constitutes essential work. The Respondent's representative testified that the Appellant's employment with ██████ constituted essential work because of her interaction with medical staff providers. Pursuant to the Respondent's representative's testimony, the Appellant spends 95% of her work time on the telephone with medical providers. The Appellant testified that she was unable to provide child care while working. Pursuant to the Appellant's testimony, she is required to comply with HIPAA guidelines and having her child in the residence while she is working would be a violation of HIPAA compliance. Because of the demands of her employment, the Appellant is unable to perform dependent care during work hours.

During the hearing, the Respondent's representative testified that the denial of the Appellant's child care services eligibility was based on 45 CFR § 98.20(a)(3)(ii) and various unspecified regulatory and policy guidance. Agency and regulatory guidance do not constitute controlling policy and regulations. The Respondent's witness asserted that pursuant to 45 CFR § 98.20(a)(3)(ii), essential employees cannot work from home during the public health emergency. This particular section is not consistent with the Respondent's representative's testimony. Conversely, this section stipulates that to be eligible for services, the child must reside with a parent who is working. Further, neither the public health emergency or essential work is mentioned in any subsection of 45 CFR § 98.20.

The Respondent's witness testified that pursuant to federal regulations, child care centers operate at limited capacity during the public health emergency; therefore, if a parent is working from home, children should be home with the parent. The Respondent's witness testified that this guideline is designed to limit children at child care sites to increase child care availability for parents required to go on-site to work. During the hearing, the Respondent's witness testified that the only telework employment approved are positions participating in telehealth.

The Appellant argued that before changing employers, she reviewed the policies and regulations and believed that telework was eligible for child care services. The Appellant argued that if the Respondent is going to enforce the regulations referenced that they should be reflected on the Respondent's policies and procedures. During the hearing, the Appellant argued that the circumstances described by the Respondent are not reflected in the child care subsidy policies.

The Respondent is required to cite relevant policy and regulation sections in the denial notice. The denial notice did not contain any relevant policy or regulation sections. Omitting relevant policy and regulation sections in a notice of adverse action prejudices the Appellant's right to due process. Further, no applicable policy or regulations were referenced during the hearing. Although the Respondent's witness gave vague reference to federal regulations, no evidence verifying the existence of a policy or regulation excluding essential worker telework was submitted. The Respondent failed to meet its requirement to prove their action to terminate the Appellant's child care services eligibility based on relevant policy and regulations. Because the Respondent failed to prove their termination of the Appellant's child care services was correct, the issue of inadequate notice is moot.

CONCLUSIONS OF LAW

- 1) To be eligible for child care services, the parent must be participating in work that prevents the parent from providing care and supervision of the children in the household during the time the parent is working.
- 2) The preponderance of evidence verified that the Appellant is prohibited from performing dependent care while working.
- 3) The Appellant's need for child care is established.
- 4) Child care services may be approved when the employer has approved the parent for teleworking.
- 5) The preponderance of evidence verified that the Appellant's employer approved the Appellant for teleworking.
- 6) The Respondent incorrectly denied the Appellant's eligibility for child care because the Appellant's employment is a work from home position.

DECISION

It is the decision of the State Hearing Officer to **REVERSE** the Respondent's decision to deny the Appellant eligibility for child care services. It is **ORDERED** that the Appellant's child care benefit eligibility be reinstated and made retroactive to the date of termination.

ENTERED this 15th day of June 2022.

Tara B. Thompson, MLS
State Hearing Officer