



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL
BOARD OF REVIEW
2699 Park Avenue, Suite 100
Huntington, WV 25704

Jim Justice
Governor

Bill J. Crouch
Cabinet Secretary

August 30, 2017

[REDACTED]

RE: [REDACTED] v. WV DHHR
ACTION NO.: 17-BOR-1876

Dear Mr. [REDACTED]

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

In arriving at a decision, the State Hearing Officer 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 you may take if you disagree with the decision reached in this matter.

Sincerely,

Todd Thornton
State Hearing Officer
Member, State Board of Review

Encl: Appellant's Recourse to Hearing Decision
Form IG-BR-29

cc: Tamra Grueser, Department Representative

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

██████████,

Appellant,

v.

Action Number: 17-BOR-1876

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 July 18, 2017, on an appeal filed May 22, 2017.

The matter before the Hearing Officer arises from the May 11, 2017 decision by the Respondent to terminate participation in the Aged and Disabled Waiver (ADW) Program.

At the hearing, the Respondent appeared by Tamra Grueser. Appearing as a witness for the Department was Stephanie Butcher. The Appellant appeared *pro se*. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual, Chapter 501: Aged and Disabled Waiver (ADW), §501.29 and §501.34 (excerpts)
- D-2 Emails dated April 20, 2017, and April 21, 2017
- D-3 Request for Discontinuation of Service form, dated April 21, 2017; Notice of Decision, dated May 11, 2017 (two copies)
- D-4 Behavior Contract from ██████████, signed April 4, 2017
- D-5* RN Progress Notes, dated April 20, 2017; Nursing Notes, dated April 21, 2017; Statement from ██████████ (undated); Statement from ██████████, dated April 3, 2017; Statement from ██████████, dated April 14, 2017; Statement from ██████████ (undated); Statement from ██████████, dated April 20, 2017

* Admitted as records made in the regular course of business

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 Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) The Appellant was a participant in the Aged and Disabled Waiver (ADW) program.
- 2) As a participant in the ADW program, the Appellant received services provided at his residence by a Homemaker Nurse assigned by a Case Management Agency (CMA).
- 3) The first nurse assigned to provide ADW services to the Appellant filed a complaint alleging inappropriate sexual remarks and behavior.
- 4) This nurse documented her allegations in two written statements – one undated and the other dated April 3, 2017. (Exhibit D-5)
- 5) In response to this complaint, the CMA drafted a Behavior Contract, which the Appellant signed on April 4, 2017. (Exhibit D-4)
- 6) This contract (Exhibit D-4) reads, in pertinent part, “The member is to provide the homemakers with respect, understand that the homemakers can assist with what is only on the member’s plan of care, will not use inappropriate language toward the homemakers, will not touch the homemakers inappropriately...I, [Appellant], agree to refrain from using inappropriate language toward the homemaker while the homemaker is in my home. I will treat my homemaker with respect when speaking to them. I will not use inappropriate touch when my homemaker is in the home working...Failure to maintain a safe home while my homemaker is providing Aged and Disabled Waiver Services could result in loss of services and a request for the closure of my case.”
- 7) The second nurse assigned to provide services to the Appellant filed a complaint with the CMA, alleging sexual remarks by the Appellant.
- 8) This nurse documented her allegations in two written statements – one undated and the other dated April 14, 2017. (Exhibit D-5)
- 9) In response to the second complaint, the CMA offered a male nurse to provide ADW services to the Appellant. The Appellant refused this offer. (Exhibits D-5 and D-6)
- 10) The CMA submitted a Request for Discontinuation of Service (Exhibit D-3) to the Respondent on April 21, 2017, with the reasons for the request noted as the Appellant’s non-compliance with the program and an unsafe environment.

- 11) The Respondent issued a notice (Exhibit D-3) dated May 11, 2017, advising the Appellant that ADW services “are discontinued due to **Non-Compliance and unsafe environment.**” (emphasis in original)
- 12) The Appellant testified regarding the allegations of the first nurse. He claimed to have “patted her shoulder” and told her “thank you” as she was leaving his home, and indicated this was misconstrued by the nurse. He denied all other allegations.

APPLICABLE POLICY

The Bureau for Medical Services Provider Manual, Chapter 501: Aged and Disabled Waiver (ADW), §501.34, allows the discontinuation of ADW services when requested by the CMA and approved by the Department for reasons which include an unsafe environment (§501.34.B) and non-compliance with the service plan (§501.34.C). At §501.34.B(a), policy further details examples of circumstances which meet the “unsafe environment” designation:

The person receiving ADW services or other household members repeatedly demonstrate sexually inappropriate behavior; 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.

DISCUSSION

The Appellant has appealed the Respondent’s decision to terminate his participation in the Aged and Disabled Waiver (ADW) Program based on non-compliance with the service plan and an unsafe environment. The Respondent must show by preponderance of the evidence that the Appellant did not comply with his service plan or that his home was an unsafe environment for the provision of ADW services.

The Respondent provided evidence that the Appellant’s CMA had assigned two different nurses to provide ADW services in the Appellant’s home, and that both had filed complaints of inappropriate sexual remarks or behavior. These allegations clearly meet the “unsafe environment” description noted in ADW policy.

The Appellant did not offer any clear reason that two separate nurses would invent allegations without merit. Before discontinuing ADW services, the Appellant’s CMA made two attempts to remedy the situation – by having the Appellant sign an agreement with specific warnings regarding inappropriate language and physical contact after the first complaint, and by offering a male nurse to the Appellant after the second complaint. The Appellant testified he believed there was no problem with his ongoing participation in the ADW program through both complaints and attempted remedies, even though the CMA’s behavior contract advised the Appellant that

the failure to maintain a safe home could result in case closure. The Appellant testified that he touched a nurse on the shoulder and told her “thank you,” and that this was misconstrued as sexually inappropriate behavior – with no explanation for the significant gap between his testimony and the nurse’s statement. If the Appellant genuinely believed this exchange with the first nurse was simply misconstrued, the Appellant not only should have avoided language or behavior that could be misconstrued after his CMA had him sign this agreement, he also should have recognized that the need for such an agreement was an indication of a problem with continuing ADW program eligibility.

After this agreement, a second nurse made similar complaints of inappropriate sexual behavior and comments by the Appellant. When the Appellant’s CMA offered a male nurse to provide ADW services to the Appellant, the Appellant refused the offer and did not give a convincing reason for that refusal. If the Appellant genuinely believed that his interaction with both nurses had been misconstrued, his refusal to accept a male nurse was an abandonment of any opportunity to eliminate any future confusion while continuing equivalent ADW services with a male nurse (the Appellant’s claim that such services from a male nurse would not be equivalent is without merit).

For these reasons, the Appellant’s testimony is given little weight and the preponderance of the evidence shows the Respondent acted correctly to discontinue ADW services to the Appellant based on an unsafe environment stemming from inappropriate sexual behavior.

CONCLUSIONS OF LAW

- 1) Because the Appellant repeatedly demonstrated sexually inappropriate behavior, his home is an unsafe environment for the provision of ADW services.
- 2) Because the Appellant’s home is an unsafe environment for the provision of ADW services, the Respondent must terminate the Appellant’s participation in the ADW Program.

DECISION

It is the decision of the State Hearing Officer to **UPHOLD** the Respondent’s decision to terminate the Appellant’s participation in the ADW Program based on an unsafe environment.

ENTERED this ____ Day of August 2017.

**Todd Thornton
State Hearing Officer**