



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

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
Raleigh County District
407 Neville Street
Beckley, WV 25801

Jolynn Marra
Interim Inspector General

February 13, 2020

[REDACTED]

RE: [REDACTED] v. WV DHHR
ACTION NO.: 19-BOR-2916

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 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,

Kristi Logan
State Hearing Officer
Member, State Board of Review

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

cc: Tamra Grueser, Bureau for Senior Services

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

██████████,

Appellant,

v.

Action Number: 19-BOR-2916

**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 January 30, 2020, on an appeal filed December 20, 2019.

The matter before the Hearing Officer arises from the December 5, 2019 decision by the Respondent to discontinue the Appellant's services under the Aged/Disabled Waiver Program due to an unsafe environment.

At the hearing, the Respondent appeared by Tamra Grueser, RN for the Bureau for Senior Services. Appearing as witnesses for the Respondent were ██████████, Nurse Manager for ██████████ and ██████████, Direct Care Worker, ██████████. The Appellant appeared *pro se*. Appearing as a witness was ██████████, the Appellant's sister and Attorney-in-Fact. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services Provider Manual §501.34
- D-2 Request for Discontinuation of Services dated October 25, 2019, Incident Report dated October 21, 2019, Notice of Discontinuation of Services dated December 5, 2019, Aged and Disabled Waiver Procedural Guidelines and Timeline of Events
- D-3 Participant Behavior Contract (unsigned copy), Receipt of ██████████ Member Handbook Acknowledgement Form signed May 21, 2019, and Aged and Disabled Waiver Recipient User Guide Receipt

- D-4 Service Recipient Rights and Responsibilities Form signed September 4, 2019, Personal Conduct Policy Form signed September 4, 2019 and Aged and Disabled Waiver Recipient User Guide
- D-5 Statement from [REDACTED] signed October 25, 2019 and Nurse Notes from October 21 through November 15, 2019
- D-6 Transcript of October 25, 2019 Phone Call with Appellant and [REDACTED]
- D-7 Aged and Disabled Waiver Service Plan signed May 21, 2019
- D-8 Aged and Disabled Waiver Person-Centered Assessment signed May 21, 2019, Case Management Monthly Contacts dated May 21, October 25, and November 1, 2019
- D-9 Personal Attendant Log and Service Plan dated May 21, 2019
- D-10 Aged and Disabled Waiver Person Centered Assessment signed September 4, 2019
- D-11 Aged and Disabled Waiver RN Contact Form dated September 4, 2019 and Nurse Notes dated September 4 through September 25, 2019
- D-12 Participant Request to Transfer dated November 8, 2019
- D-13 Aged and Disabled Waiver Log dated May 21 through November 15, 2019

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 Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) The Appellant was a recipient of Aged and Disabled Waiver services.
- 2) On October 21, 2019, the Appellant began receiving personal attendant services from [REDACTED].
- 3) The Appellant's direct care worker, [REDACTED], reported to [REDACTED] on October 22, 2019, that she was uncomfortable with the Appellant's behavior on the previous day and would not return to his home (Exhibit D-5).
- 4) Ms. [REDACTED] reported that the Appellant had a gun - which he stated was a toy - on the kitchen table when she arrived (Exhibit D-5).
- 5) Ms. [REDACTED] reported that while in the kitchen preparing the Appellant's lunch, he brushed against her, grabbed her shoulders and said, "I find big women attractive too" (Exhibit D-5).
- 6) Ms. [REDACTED] reported the Appellant made comments about partying and using marijuana and used sexual innuendo throughout her shift (Exhibit D-5).

- 7) ██████ contacted the Respondent's Bureau of Senior Services on October 22, 2019 and was advised to have the Appellant sign a behavior contract and to send a male direct care worker to provide services to the Appellant (Exhibit D-5).
- 8) On October 23, 2019, the Appellant was verbally notified that he would not have a direct care worker (Exhibit D-5).
- 9) On October 25, 2019, ██████ and the Appellant's case manager from ██████ advised the Bureau of Senior Services that staff did not feel comfortable returning to the Appellant's home to have the behavior contract signed by the Appellant and that the agency did not have any male workers (Exhibit D-5).
- 10) The Appellant's personal attendant services were placed on hold pending an investigation into Ms. ██████ allegations.
- 11) In a phone conversation with the Appellant and staff from ██████ on October 25, 2019, the Appellant denied Ms. ██████ allegations (Exhibit D-6).
- 12) ██████ requested a discontinuation of services for the Appellant due to an unsafe environment (Exhibit D-2).
- 13) On December 5, 2019, the Respondent notified the Appellant that his Aged and Disabled Waiver services would be discontinued due to an unsafe environment (Exhibit D-2).

APPLICABLE POLICY

Bureau for Medical Services Policy Manual §501.34 states the following situations require a Request for Discontinuation Services form:

- No personal attendant services have been provided for 180 continuous days – example, an extended placement in long-term care or rehabilitation facility.
- 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. This may include, but is not limited to, the following circumstances:
 - 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.
 - The person or other household members display an abusive use of alcohol and/or drugs and/or illegal activities in the home.
- The person is persistently non-compliant with the Service Plan.
- The person no longer desires services.
- The person no longer requires services.
- The person can no longer be safely maintained in the community.

The Request for Discontinuation of Services form must be uploaded into the Utilization Management Contractor's (UMC's) web portal and a notification is sent to the OA that it has been uploaded. The Operating Agency (OA) will review all requests for a discontinuation of services. If it is an appropriate request, and the OA approves the discontinuation, the OA will send notification of discontinuation of services to the person (or legal representative) with a copy to the case management agency or Fiscal/Employer Agent (FE/A). Fair hearing rights will also be provided except if the person (or legal representative) no longer desire services. The effective date for the discontinuation of services is thirteen calendar days after the date of the OA notification letter if the person (or legal representative) does not request a hearing.

If it is an unsafe environment, services may be discontinued immediately upon approval of the OA, and all applicable entities are notified, i.e. police, Adult Protective Services.

When the OA receives an unsafe closure request, they will review and make a recommendation to BMS based upon the evidence submitted. Documentation to support the unsafe environment should come from multiple sources if possible, i.e., the personal attendant agency and the case management agency. Recommendations include:

- Suspend services for up to ninety days to allow the person receiving ADW services time to remedy the situation. The case manager will reassess at 30, 60 and 90 days and make a recommendation to the OA at any time during the 90 days suspension to reinstate services.
- Immediate closure.

It is the case management agency's responsibility to monitor the health and safety of the person receiving services during any time that services are suspended. In all cases, the person receiving services must be provided their right to a Fair Hearing by the OA. However, due to the nature of unsafe environment closure, the person is not eligible for the option to continue existing services during the fair hearing process.

DISCUSSION

Pursuant to policy, Aged and Disabled Waiver services may be discontinued if the member presents an unsafe environment in which the health and safety of the direct care worker and/or other agency staff is in jeopardy, including repeated sexually inappropriate behavior.

The Appellant's personal attendant agency requested a discontinuation of services for the Appellant based upon his direct care worker's report of sexually inappropriate comments, her belief that the Appellant had a gun in his home and an allegation that he had inappropriate physical contact with her. When questioned about Ms. [REDACTED] statement by the agency, the Appellant denied the allegations.

The Appellant denied making sexually inappropriate comments to Ms. [REDACTED] during her shift on October 21, 2019. The Appellant admitted that he accidentally bumped into Ms. [REDACTED] while she was preparing his lunch and may have grabbed her for balance to keep from falling. The

Appellant stated he has not had guns in his home for several years and the gun Ms. [REDACTED] saw that date was a toy that was left out from a previous visit with his grandchildren.

According to the Appellant's Person-Centered Assessment completed on September 4, 2019, he has problems with orientation and memory, has an unsteady gait and experiences vertigo. The Appellant's explanation that his physical contact with Ms. [REDACTED] was entirely accidentally is plausible. The Appellant denied having guns in his home as documented in the September 4, 2019 assessment (Exhibit D-10). In her statement of the events of October 21, 2019, Ms. [REDACTED] reported she was unsure if the gun she initially saw real or a toy, but later noted seeing a toy gun on the Appellant's kitchen table. The Appellant's assertion that he did not have guns in his home is credible, and Ms. [REDACTED] testified that the Appellant did not brandish the gun towards her.

The Appellant may have made comments to Ms. [REDACTED] that made her uncomfortable. While the Appellant denied making any inappropriate comments, it is entirely possible that due to his documented problems with orientation and memory loss, he did not remember comments made throughout the day, or was aware that the comments were offensive.

The Respondent did not allow the Appellant an opportunity to amend his behaviors by signing a behavior contract to ensure that he was aware of what type of conduct was acceptable or inappropriate. There is no question that Ms. [REDACTED] felt uncomfortable in the Appellant's home, however, there is no evidence that her safety was at risk.

Whereas one complaint from one member of the agency does not constitute repeated sexually inappropriate behavior, the Respondent's decision to discontinue the Appellant's Aged and Disabled Waiver services due to an unsafe environment cannot be affirmed.

CONCLUSIONS OF LAW

- 1) Policy allows for the discontinuation of Aged and Disabled Waiver services if the member demonstrates repeated sexually inappropriate behavior.
- 2) There is no evidence that the Appellant repeatedly demonstrated sexually inappropriate behavior to agency staff.
- 3) The Respondent's discontinuation of the Appellant's Aged and Disabled Waiver services cannot be upheld.

DECISION

It is the decision of the State Hearing Officer to **reverse** the decision of the Respondent to discontinue the Appellant's Aged and Disabled Waiver services due to an unsafe environment.

ENTERED this 13th day of February 2020.

**Kristi Logan
State Hearing Officer**