



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

Bill J. Crouch
Cabinet Secretary

**Board of Review
416 Adams Street Suite 307
Fairmont, WV 26554
304-368-4420 ext. 79326**

M. Katherine Lawson
Inspector General

August 28, 2018

[REDACTED]

RE: [REDACTED] v. WVDHHR
ACTION NO.: 18-BOR-1927

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
State Hearing Officer
State Board of Review

Enclosure: Appellant's Recourse
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 NO.: 18-BOR-1927

**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' (DHHR) Common Chapters Manual. This fair hearing was convened on August 7, 2018, on an appeal filed June 29, 2018.

The matter before the Hearing Officer arises from the May 23, 2018 determination by the Respondent to terminate the Appellant's Medicaid Aged and Disabled Waiver (ADW) services.

At the hearing, the Respondent appeared by Tamra Grueser, Bureau of Senior Services (BOSS). The Appellant appeared *pro se*. Appearing as witness for the Appellant was ██████████, In-Home Health Care. All witnesses were sworn and the following documents were admitted into evidence.

Department's Exhibits:

- D-1 Bureau for Medical Services (BMS) §501.34
- D-2 Facsimile Report, dated May 22, 2018 ; BOSS Notice, dated May 23, 2018
- D-3 Behavior Contract, dated April 24, 2018; Support Ticket Documentation, dated December 2017 through May 2018
- D-4 West Virginia Incident Management System (WV IMS) reports dated November 2016 through May 2018.

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 ADW Personal Options services. (Exhibit D-2 through D-4)
- 2) On May 23, 2018, the Respondent issued a notice advising that the Appellant's ADW services would be discontinued due to persistent non-compliance with the Service Plan. (Exhibit D-2)
- 3) On November 2, 2016, a WV IMS simple incident report was completed alleging the Appellant bought alcohol on service time. (Exhibit D-4)
- 4) On November 28, 2017, the Appellant informed her Resource Consultant (RC) that she had moved to [REDACTED] WV. (Exhibit D-3)
- 5) The Appellant refused to provide the RC with her new address on November 28, 2017 because she was concerned that her former Personal Attendant (PA) would be advised of her new address. (Exhibit D-3)
- 6) On December 13, 2017, the Appellant provided the RC with her new address. (Exhibit D-3)
- 7) On December 22, 2017, a WV IMS simple incident report was completed alleging the Appellant stole money from individuals she lived with prior to moving to [REDACTED] WV. (Exhibit D-4)
- 8) On December 28, 2017, the Appellant's new RC, [REDACTED], completed a home visit and updated the Appellant's phone number. The Appellant advised the RC that she may change her telephone number. (Exhibit D-3)
- 9) On December 28, 2017, the Appellant advised [REDACTED] that she needed assistance with bathing, dressing, and grocery shopping. (Exhibit D-3)
- 10) During the December 28, 2017 meeting, [REDACTED] advised the Appellant that the RC must be informed when the Appellant changed her telephone number, that the program required the RC to make monthly calls to the Appellant, and that state and other agencies must be able to contact the Appellant if needed. (Exhibit D-3)
- 11) The Appellant was hospitalized from January 2 through January 8, 2018 and March 16 through March 19, 2018. (Exhibit D-3)
- 12) On January 10, 2018, [REDACTED] documented that the Appellant's phone was out of service. (Exhibit D-3)
- 13) On January 11, 2018, [REDACTED] left a voicemail for the Appellant. (Exhibit D-3)
- 14) On January 12, 2018, the Appellant left a voicemail for [REDACTED] confirming her hospitalization. (Exhibit D-3)
- 15) On January 16, 2018, the Appellant left a voicemail for [REDACTED] advising that her phone may not be working soon. (Exhibit D-3)
- 16) On January 16, 2018, [REDACTED] left a voicemail for the Appellant's son requesting he contact the RC. (Exhibit D-3)

- 17) On January 18, 2018, the Appellant and her son left a voicemail for [REDACTED]. (Exhibit D-3)
- 18) On January 18, 2018, [REDACTED] mailed the Appellant contact information for a potential PA and requested the Appellant get a cell phone or landline by the end of January to stay compliant with program requirements. (Exhibit D-3)
- 19) On April 5, 2018, a critical incident report was completed alleging the Appellant had mixed, snorted, and taken her medications with alcohol. (Exhibit D-4)
- 20) On April 24, 2018, [REDACTED], RC, conducted an unannounced home visit with the Appellant, reviewed a behavior contract, and advised the Appellant if she violated the contract she would be involuntarily transferred to a traditional agency. (Exhibit D-3)
- 21) The behavior contract provided that if the Appellant did not abide by the contract, BOSS would close her waiver services due to noncompliance and unsafe environment. (Exhibit D-3)
- 22) The Appellant refused to sign the behavior contract because she believed signing would be an admission of having engaged in the behaviors listed on the contract. (Exhibit D-3)

APPLICABLE POLICY

Bureau for Medical Services (BMS) Manual §501.4 Incident Management provided in part:

ADW providers shall investigate all incidents involving the risk or potential risk to the health and safety of the people they serve

All incident details must be objectively and factually documented (what, when, where, how). [emphasis added] All inconsistencies must be explored

Medication errors by a person or his/her family caregiver that comprises the health or safety of the person, such as medication taken that was not prescribed or ordered for the person, and failure to follow directions for prescribed medications, including inappropriate dosages, missed doses, or doses administered at the wrong time is considered a Critical Incident. [emphasis added]

BMS Manual §501.4.1 Reporting Requirements, Incident Management Documentation and Investigation Procedures provides in part:

All Critical Incidents must be investigated [emphasis added]

An Incident Report documenting the outcomes of the investigation must be completed and entered into the WV IMS within 14 calendar days of learning of the incident.

The criteria utilized for a thorough investigation include:

- Report was fully documented to include the date of the incident, date the agency learned of the incident, facts of the incident [emphasis added], type of incident, initial determination of the incident, and verification that an approved professional conducted the investigation
- Determination of the cause of the incident [emphasis added]

BMS Manual §501.34 Discontinuation of Services provides in part:

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

- C. The person is persistently [emphasis added] non-compliant with the Service Plan [emphasis added]

BMS Manual §501.11.2 Participant-Directed Service Option, Personal Options Model provides in part:

Under Personal Options, the person is the Common Law Employer of the Personal Attendants (PA) they hire directly...

The Common Law Employer is responsible to:

- Determine PA's work schedule and how and when the PA should perform the required tasks.
- Discharge their PA, when necessary
- Notify their Resource Consultant (RC) of any changes in service need
- Maintain a safe environment for all employees.

BMS Manual §501.13 Service Plan Development provides in part:

The Case Manager is responsible for development of the Service Plan in collaboration with the participant. For those choosing Personal Options, if they do not have a Case Manager, the Resource Consultant (RC) is responsible for all duties related to the Service Plan. [emphasis added]

The Service Plan must detail all services (service type, provider of service, amount, frequency and duration) the person is receiving. It is the RC's responsibility to ensure that all assessments are reviewed with the person and considered in the development of the Service Plan.

Service Plan Disagreement: The person may disagree with the Service Plan. Resolution of Service Plan disagreements occur within the Service Plan meeting. The RC must document the disagreement on the Service Plan and the resolution when the person disagrees with the Service Plan. Disagreements not resolved in the planning meeting must be referred to the agency's grievance process.

BMS Manual §501.29 Rights and Responsibilities provides in part:

Resource Consultants must communicate in writing to each person receiving ADW services, upon agency transfer and annually, the participant's responsibility to:

- A. Notify the ADW Personal Attendant Agency within 24 hours prior to the day services are to be provided if services are needed.
- B. Notify providers or RC promptly of changes in Medicaid coverage.
- C. Comply with the agreed upon Person-Centered Service Plan. [emphasis added]
- D. Cooperate with all scheduled in-home visits.
- E. Notify the ADW providers or RC of a change in residence or an admission to a hospital, nursing home, or other facility.

- F. Notify the ADW providers or RC of any change of medical status or direct care need.
- G. Maintain a safe home environment for all service providers.
- H. Verify services were provided by initialing and signing the Personal Attendant Log.
- I. Communicate any problems with services to the provider agency or RC for Personal Options.
- J. Report any suspected fraud to the provider agency, RC, or Medicaid Fraud Unit.
- K. Report any incidents of abuse, neglect, or exploitation to the provider agency, the RC, or WV Centralized Intake hotline.
- L. Report any suspected illegal activity of staff to their local police department or appropriate authority as well as the provider agency or RC.
- M. Notify RC of any changes in their legal representation and provide copies of the appropriate documentation.
- N. Utilize Non-Medical Transportation support from family, friends, neighbors, and community agencies that can provide transportation.
- O. Not ask Personal Attendants to provide services that are excluded by policy or not on the Service Plan.
- P. Notify the RC within 24 hours when they terminate an employee.

DISCUSSION

The Appellant was a recipient of ADW Personal Options services. On May 23, 2018, the Respondent issued a notice advising that the Appellant's ADW services would be discontinued due to persistent non-compliance with the Service Plan. The Appellant disagreed with the Respondent's decision to discontinue her ADW services and argued that she was compliant with program requirements.

At the onset of the hearing, the parties agreed that the issue of the hearing was the discontinuation of the Appellant's ADW services due to persistent non-compliance with the Service Plan. During the hearing, testimony and documentation were provided alleging the Appellant's alcohol use, mismanagement of medication, and unsafe environment, however, the Appellant was not noticed of substance abuse and unsafe environment as a reason for discontinuation of ADW services. The evidence regarding the Appellant's substance abuse contained references to "EE," who was not identified in the documentation by [REDACTED]. As neither [REDACTED] or the "EE" were available for cross-examination during the hearing, this Hearing Officer was unable to ascertain the truth of the statements. Critical Incident reports regarding the Appellant's use of alcohol and medication mismanagement reported by the "EE" did not reflect the facts of the incident or determination of the cause of the incident as required by policy. Therefore, testimony and evidence regarding the Appellant's substance use and unsafe environment were not considered.

The Respondent bears the burden of proof and had to demonstrate that the Appellant was persistently non-compliant with the Service Plan. The Respondent argued that the Appellant was non-compliant when she refused to provide her new address to the RC. The Appellant testified that she was in fear of her former PA and that she was initially concerned that reporting her new address to her former RC would result in her former PA finding out her new address. Evidence demonstrated that upon the RC's next documented contact with the Appellant, she provided her new address to the RC. Policy provides that the Appellant is responsible for notifying the RC when she has relocated. One documented refusal by the Appellant to provide her new address to her former RC does not establish that the Appellant persistently failed to provide her address to the RC. The Appellant's Service Plan was not provided for review; therefore, this Hearing Officer could not corroborate that providing her address to the RC was a part of the Appellant's Service Plan.

The Respondent argued that the Appellant refused to divulge information regarding her care needs to the RC for the development of the Service Plan. Documentation of the December 28, 2017 RC meeting with

the Appellant reflected that the Appellant communicated requiring assistance with bathing, dressing, and grocery shopping. During the hearing, the Appellant testified that she does require physical assistance but tries to retain as much independence as possible when performing self-care tasks. The documentation reflected that the Appellant requested that staff “not be there for a small block of time.” As [REDACTED] was not available for cross examination, clarification of her statement could not be discerned. Policy provides that the Appellant is responsible for determining the PA’s work schedule, how, and when the PA should perform the required tasks. Pursuant to policy, it is the responsibility of the RC, not the Appellant, to develop the Service Plan based on consideration of the applicable assessments, not the Appellant’s verbal disclosure of care needs. Policy outlines procedure for situations in which the participant disagrees with the Service Plan developed by the RC. The RC’s opinion that the Appellant did not disclose all her care needs is not a demonstration of persistent non-compliance with the Service Plan.

The Respondent argued that the Appellant was non-compliant in her refusal to sign the behavior contract. The Respondent’s documentation that the RC advised the Appellant that if she did not comply with the behavior contract, she would be involuntarily transferred to a Traditional Options agency conflicted with the content of the behavior contract that advises the Appellant that failure to comply with the contract would result in termination of her waiver services for unsafe environment and non-compliance. Evidence did not demonstrate that the Appellant was advised that her ADW services would be terminated if she refused to sign the behavior contract. As the evidence did not establish that the content of the behavior contract was justified or included in the Appellant’s Service Plan, little weight was given to the behavior contract.

Although the Service Plan was not provided as evidence, this Hearing Officer reviewed the evidence and policy to determine whether the Appellant had failed to comply with any of her responsibilities to the ADW Personal Options program. No evidence was entered to verify that the Appellant’s responsibilities had been communicated to her by the RC as required by policy. The Respondent’s evidence reflected that [REDACTED] had advised the Appellant on more than one occasion that she was required to obtain a telephone to comply with program requirements. Policy does not require the participant to have a telephone for participation in the ADW program. No evidence was provided to verify that the Appellant had persistently failed to comply with any participant responsibilities outlined in policy.

No credible evidence was entered to refute the Appellant’s denial of allegations of non-compliance with the Service Plan; therefore, the Respondent failed to prove by a preponderance of evidence that the Appellant was persistently non-compliant with the Service Plan.

CONCLUSIONS OF LAW

- 1) A request for discontinuation of ADW services may be completed when the participant is persistently non-compliant with the Service Plan.
- 2) The Appellant’s Service Plan was not submitted as evidence.
- 3) The Respondent failed to prove that the Appellant was persistently non-compliant with her Service Plan.
- 4) The Respondent incorrectly terminated the Appellant’s ADW services due to persistent non-compliance with the Service Plan.

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 due to persistent non-compliance with the Service Plan.

ENTERED this 28th day of August 2018.

Tara B. Thompson
State Hearing Officer