



FH
[REDACTED]

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FCP/156856

PRELIMINARY RECITALS

Pursuant to a petition filed April 11, 2014, under Wis. Admin. Code § DHS 10.55, to review a decision by the Continuum in regard to Medical Assistance, a hearing was held on May 14, 2014, at Chippewa Falls, Wisconsin.

The issue for determination is whether the termination of the petitioner's caregiver violated her right to choose her own worker under the self-directed supports portion of the Family Care Program.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: T.J. Atkins
Continuum
28526 US Hwy 14
Lone Rock, WI 53556

ADMINISTRATIVE LAW JUDGE:

Michael D. O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The petitioner (CARES # [REDACTED]) is a resident of Chippewa County.
2. The petitioner participates in the Family Care program through her care management organization, Continuum. She receives self-directed supports.

3. [REDACTED] has cared for the petitioner for about five years. The petitioner and [REDACTED] signed a self-directed supports employer and employee agreement on March 15, 2013.
4. On March 15, 2013, [REDACTED] signed an employment agreement with [REDACTED] to provide support services to the petitioner on behalf of Southwest Family Care Alliance, which is the previous name of Continuus. That contract stated that either SWFCA or the petitioner could terminate the “service relationship” with the petitioner with 15 days’ notice. Although SWFCA and the petitioner could terminate the service relationship, the contract stated that “the employment relationship is strictly between [REDACTED] and [REDACTED].”
5. The petitioner signed a self-directed supports option agreement with Continuus on October 8, 2013. That agreement allowed Continuus to restrict the petitioner’s self-directed supports if, among other things, the following occurred:
 - a. The care management team determines that my health and safety...is threatened or that I am in high risk situations related to my health, safety or well being.
 - b. Conflicting interests of another person are taking precedence over my desires and interests.
6. On March 18, 2014, after receiving reports from other workers that [REDACTED] was providing inadequate care, Continuus notified the petitioner that, because her health and safety was threatened, it was restricting [REDACTED] from providing supportive home care to her. [REDACTED] had already fired [REDACTED] by then.
7. The petitioner is satisfied with her current supportive home care workers and does not seek to have them replaced by [REDACTED].

DISCUSSION

The Family Care Program provides appropriate long-term care services for elderly or disabled adults. It is supervised by the Department of Health and Family Services, authorized by Wis. Stat. § 46.286, and comprehensively described in Chapter DHS 10 of the Wisconsin Administrative Code. The process contemplated for an applicant is to test functional eligibility, then financial eligibility, and if both standards are met, to certify eligibility. The applicant is then referred for enrollment in a care management organization (CMO), which drafts a service plan that meets her needs. Wis. Admin. Code, § DHS 10.44.

Wisconsin law and a CMO’s contract with the Department of Health Services requires it to allow capable enrollees who wish to manage their own services and support funds an opportunity to do so. Continuus’s contract the Department states that through self-directed supports, members may purchase certain long-term care benefits if they are identified as consistent with her outcomes. *2014 Family Contract Between Department of Health Services and Continuus*, § VI.A. The level of control the enrollee has is negotiated with the case management team and depends upon her need and desire for assistance. Wis. Admin. Code, § 10.44(2)(d). At minimum, the case management team’s role includes the following:

1. An initial assessment sufficient to provide information necessary to establish an individual budget amount and to identify health and safety issues.
2. Monitoring the enrollee's use of the individual budget amount for purchase of services or support items.
3. Monitoring the health and safety of the enrollee.
4. Monitoring to ensure the enrollee reports service utilization adequately to allow the CMO to meet federal and state reporting requirements.

Id.

In addition, all self-direct support plans must specify the limits on the level of control the enrollee can exercise because, among other things, the health and safety of the enrollee is threatened or the conflicting interests of another person are taking precedence over the desires and interests of the enrollee. Wis. Admin. Code, § DHS 10.44(6)(c)2.a. and 13.

The petitioner receives Family Care Services, including self-directed supports, through Continuum. [REDACTED] has provided much of the petitioner's supportive home care for several years. Although [REDACTED] provided services to the petitioner, and Continuum is the petitioner's CMO, [REDACTED] signed an employment contract with [REDACTED], [REDACTED], who worked for Interim and provided care to the petitioner, reported to Interim that [REDACTED] was providing inadequate care. She alleged that [REDACTED] left dishes in the sink, billed for time not spent caring for the petitioner when she left early, did not use soap when giving the petitioner a sponge bath, did not wash under the petitioner's arms or legs, did not wash her own hands after changing gloves, did not properly clean the petitioner's catheter equipment, and did not properly care for the petitioner's wounds, which led to pressure sores on her backside, on her coccyx bone, and on the fold of each leg where it met the buttocks. [REDACTED] fired [REDACTED]. Later, on March 18, 2014, Continuum notified the petitioner that, because her health and safety was threatened, it was restricting [REDACTED] from providing supportive home care to her.

Continuum contends that the petitioner has no standing to challenge [REDACTED]'s dismissal because [REDACTED] rather than Continuum fired [REDACTED]. Continuum seemed to be arguing at the hearing that the petitioner has the right to choose the company that provides her care but not the individual worker. This is too narrow of a reading of self-directed supports. The purpose of the program is to allow a recipient as much autonomy as is consistent with her mental capacity and health and safety to pick who she wants to care for her. This allows her to pick a friend, relative, or neighbor, as long as that person is qualified. Restricting the choice to a particular company is often meaningless because there may only be one or two qualified companies in the recipient's area. In addition, a disabled person is less likely to have the knowledge needed to make an informed decision about a company than she would about a particular person. Continuum's documentation, as opposed to its testimony, seemed to acknowledge that the petitioner can choose a particular worker. That documentation indicated that it was working with the petitioner to find her a new self-directed support worker.

Moreover, Continuum's apparent assertion that the firing cannot be challenged because it was not the entity that took that action ignores two contracts and their contents that [REDACTED] signed on March 15, 2013. One was an employment agreement with [REDACTED] and the other was a self-directed supports employer and employee agreement with the petitioner. The agreement with [REDACTED] gave both the petitioner and Continuum the right to terminate [REDACTED]'s employment with 15 days' notice, but said nothing about [REDACTED]'s right to do so. Thus, these contracts do not seem to give anyone other than Continuum or the petitioner the right to fire [REDACTED]. Furthermore, Continuum and not [REDACTED] is ultimately responsible for enforcing the program's requirements, including that the petitioner be allowed to choose her own worker within the parameters set by the program.

None of this means that the CMO cannot remove a worker who poses a threat to a recipient. Continuum's contract with the petitioner allows it to restrict her self-directed supports if it determines that her health and safety is threatened or that she is in high-risk situations related to her health, safety or well-being. Its duty to protect her health and safety sometimes requires it to quickly remove a worker who poses a threat to her health and safety.

But terminating the worker she chose amounts to terminating a benefit she is granted by the self-directed supports provisions in the Family Care rules. Because Wis. Admin. Code, § DHS 10.55 allows her to appeal a CMO's termination of a family care benefit, she can appeal the decision to dismiss her chosen worker unless a limitation found in Wis. Admin. Code, §§ 10.55(1m) and (2), prevents her from doing so. Neither of those subsections, which apply to changes in benefits that occur because of changes in state or

federal law or to situations where the recipient must first appeal to the CMO, apply to the petitioner's appeal. Once the petitioner appeals, in order for Continuus to permanently remove her chosen worker, it must establish by the preponderance of the credible evidence that it correctly determined that the worker poses a threat to her health and safety and thus allows Continuus to restrict her choice of workers—or that the worker is not really her chosen worker. In this case, Continuus should have had ██████ testify. She, unlike the employees of Continuus who testified, had direct knowledge of the situation. Because she did not testify, the testimony used against ██████ was almost all hearsay. Although the rules of evidence generally do not apply to administrative hearings, administrative decisions cannot be based solely upon uncorroborated hearsay. Wis. Stat. § 227.45; *Village of Menomonee Falls v. DNR*, 140 Wis. 2d 579 (Ct. App. 1987).

That said, I am skeptical of this appeal. The hearing was dominated by ██████'s testimony asserting in great detail that she provided wonderful care to the petitioner and that everyone else provided terrible care. She answered each of ██████'s allegations in great detail and called her statements "slanderous, libelous and defamation of character." What makes me suspicious is that although the petitioner signed the three-page, single-spaced typewritten letter accompanying the appeal, its language mirrored the detailed, hyperbolic outrage ██████ used throughout her testimony. The letter allegedly written by the petitioner stated:

Why is this being allowed to be done to my SDS worker, ██████, trying to ruin her name? What is wrong with these people? I have known ██████ a lot longer than ██████. I trust ██████ with my life. I don't trust ██████ with my life...[W]hat ██████ is writing about my SDS worker, ██████, is very wrong. Now I am going to tell you the way that it really happened.

Exhibit 1.

The letter went onto say that ██████ always went room to room to get the dishes while the Interim workers, including ██████, would say they did not have time to do the dishes. In response to an allegation that ██████ misappropriated another person's property, the letter responded:

My response to misappropriation of another client's property? ██████ was moving another client's property from nursing home to her house while she was in nursing home. ██████' bag was in the back seat along with a lot of her client's boxes of stuff. The boxes tipped over and spilled some stuff in her bag. ██████ brought her bag to my house not knowing stuff was in her bag and while ██████ was in the kitchen making my supper, my cat, ██████, was climbing into ██████' bag. I tried to get after him, but he spilled over bag. We both were picking stuff up, but ██████ was being a beast and lifting stuff around playing with it. There were baby wipes, bottles of mouth wash, teeth containers, shampoo, and some bottles of perfume. We thought we got all of it picked up, but he next day ██████ found a bottle of solution and asked where it came from. I didn't think it was any of her business of where it came from so I didn't answer her. I wasn't hesitant, it wasn't any of her business. ██████ kept questioning me about the bottle of solution several times. I still didn't respond, I didn't ever say it was from ██████. ██████ is lying, she did ask if she could take it, which she did.

Id.

The letter then denied in detail that ██████ told ██████ to claim two hours even if she worked less and again accused ██████ of lying. Similar detail was used to describe how ██████ cleaned her and provided proper wound care, pointing out that ██████ does not use wash cloths "over and over again like Interium [sic] does." It accused ██████ of lying about the wound care. The letter then comments on catheter care:

As for catheter care? [REDACTED] was in the bathroom cleaning out the cath bag while [REDACTED] was working on getting me dressed for bed. [REDACTED] is guessing [REDACTED] didn't clean my bag. But she did because I smelled the vinegar and alcohol. [REDACTED] even told [REDACTED] where the alcohol was in the kitchen.

Id.

[REDACTED] had stated that since [REDACTED] was fired, the petitioner's condition had improved. The letter contends that she lacked the medical expertise to make this statement:

As for what [REDACTED] says about [REDACTED]' involvement isn't the only factor that has changed, it is [REDACTED]'s belief that she was a contributing factor to the continued deterioration of my wounds. This is [REDACTED]'s opinion, her personal opinion, she isn't a doctor or a nurse. She doesn't have the rights to make any personal opinion about me or my body or my SDS worker from a doctor's perspective.

Id.

The letter then claims that the petitioner is "very angry" that [REDACTED] claims that her condition has improved since [REDACTED] stopped providing care. The letter also claims that [REDACTED]'s assertion that she had to clean up after [REDACTED] "is such a big lie." Then it states: "As for [REDACTED] saying that saying that she has witnessed the general disregard for patient safety and well-being either first hand, example failure to follow standard precautions and encourage me to commit fraud, and leaving dirty dishes in the sink, as also soaker pads and wound care treatment which none of this is true or fact even though [REDACTED] says it is." It concludes by admitting that she help from [REDACTED] making the statement. *Id.*

(All quotations are taken verbatim from the letter.)

The petitioner can speak without difficulty. When she did, her testimony was brief and somewhat reticent, lacking any of the outrage expressed by [REDACTED]. She said that her care since [REDACTED] left is fine and that her wounds are better. Her testimony is consistent with case notes in which she indicated that she understood why her self-directed supports were being restricted and that she did not oppose it. Her testimony that she is satisfied with her current care is completely inconsistent with the statements in the three-page letter questioning [REDACTED]'s judgment, competence, and veracity. Although the petitioner signed the statement submitted with her request for a hearing, it reflects only [REDACTED]'s and not her views. In particular, in light of the petitioner's testimony that she was receiving good care, I do not believe that she would repeatedly accuse [REDACTED] of being a liar. The difference in content and tone between the statement accompanying the request for a hearing and her testimony is too great to reflect a mere change of heart. Rather it represents [REDACTED]'s manipulation of her in an attempt by [REDACTED] to retain her employment to the detriment of the petitioner. I find by the preponderance of the credible evidence that [REDACTED] is not the petitioner's choice for a caregiver. This means that she has not suffered any harm as a result of [REDACTED] being fired. Under these circumstances, if [REDACTED] were to continue as the caretaker, her conflicting interests would take precedence over the desires and interests of the petitioner. Based upon this, I will dismiss the appeal.

I am aware that [REDACTED] will oppose this result. However, this is the petitioner's and not her appeal. She has no legal standing in this matter, which means she has no legal right to challenge the result.

CONCLUSIONS OF LAW

The petitioner's appeal can be dismissed because the agency has not denied her choice of caregivers.

THEREFORE, it is

ORDERED

The petitioner's appeal is dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 23rd day of May, 2014

\sMichael D. O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on May 23, 2014.

Continuus
Office of Family Care Expansion