STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing Nos. R-10/17-574
	)	& R-10/17-575[1]
Appeal of	)	
	)	

INTRODUCTION

Petitioner's appeal revolves around issues related to personal care services he receives through the Choices for Care program, as administered by the Department of Disabilities, Aging and Independent Living ("Department" or "DAIL"). The following is based upon the filings of the parties and several telephone status conferences. The proceedings were continued for a significant period of time at petitioner's request, for medical reasons, as well as to ensure that petitioner received various documents which he asserted he had not received (these documents were sent by email at petitioner's request).

The primary issue is whether petitioner's appeal should be dismissed for lack of jurisdiction.

[1] These two dockets are referred to as a single "appeal" herein, as they concern the same decision under appeal.

FINDINGS OF FACT

1. The issues raised by petitioner stem from his receipt of home-based personal care services from a home health agency in 2017. Petitioner's services are authorized and available through the Choices for Care ("CFC") program, a program administered by DAIL and falling under Vermont's "Global Commitment to Health" Section 1115 federal Medicaid waiver.

2. In 2017, petitioner had been awarded 70.5 personal care hours per week (as well as 1440 in "companionship hours" per year). This reflected 2-1 staffing that had been requested by the home health agency to serve petitioner – meaning the hours of actual services covered by this staffing was half of the above numbers – 35.25 personal care hours per week and 720 hours per year in companionship hours. The request for 2-1 staffing was initiated solely by the home health agency and has not been specifically raised here as an issue, nor is there any evidence that petitioner was aggrieved by this decision, as it allowed the home health agency to provide a certain level of services.

3. At some point in 2017, petitioner became dissatisfied with the home health agency and its provision of services. He then fired the agency and began "self-managing"

his services. This led to a change in petitioner's plan of care on or around September 29, 2017, ending the provision of hours based upon 2-1 staffing (which staffing had been arranged solely at the home health agency's request); meaning petitioner would receive half of the previous number of hours but the *same level* of service with respect to hours of actual direct services, under self-management.

4. Petitioner appealed this change and also made a request for a Commissioner's Review. The Commissioner's Review decision, dated January 18, 2018, upheld the decision, based upon petitioner's decision to fire the agency and self-manage his personal care.

5. Petitioner's chief and only grievance in response to the Department's decision has been that the home health agency did not provide him with the level of services to which he was entitled. However, he does not dispute that he terminated these services and is now self-managing his care. He further indicates that he has not been able to fill all the hours that he receives, due to difficulty hiring care workers. There is no evidence in the record that petitioner was compelled to fire the home health agency due to some immediate or urgent need, and if anything, it appears this has resulted in his receipt of *less* actual services, due to

his difficulty hiring his own workers. Furthermore, there is no reason in the record – outside of petitioner's stated dispute with the home health agency – that he cannot attempt to reestablish agency-based services.[2]

6. During the pendency of this appeal, petitioner requested that his level of need for services be reassessed by the local area agency on aging (under the auspices of DAIL). When he became dissatisfied with timeliness and nature of the response to this request, he filed another appeal (distinct from the instant appeal) with the Board. He subsequently decided to withdraw this later-filed appeal.[3]

7. The results of any reassessment are unknown; however, it is clear that petitioner has had, and continues to have, ample opportunity to address any issues with his current level of services, and to appeal any reassessment as to that level of services.

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[2] In response to a request from the hearing officer, the Department produced written documentation from the home health agency facially establishing that the agency had provided or attempted to provide the services petitioner was entitled to – the main dispute appears to have been situations when petitioner cancelled or declined visits due to scheduling conflicts.

[3] During the short period that this other (now withdrawn) appeal was filed, the Department produced *prima facie* evidence that petitioner had been offered an opportunity for reassessment, both in-person and (alternatively) by phone.

ORDER

Petitioner's appeal is dismissed.

REASONS

Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing benefits; otherwise the petitioner bears the burden. *See* Fair Hearing Rule 1000.3.O.4.

The Choices for Care ("CFC") program provides long-term care services to eligible elderly and disabled Vermonters under the auspices of Vermont's "Global Commitment" Medicaid waiver. *See* CFC Regulations § I.A. (Purpose and Scope).[4] The purpose of the program is to ensure equal access to nursing home care and community-based care. *See id.* Eligible participants may opt to "self-manage" their care, meaning they are responsible for hiring and managing care workers, which in turn may provide a participant with increased flexibility in finding care providers.

[4] The CFC Regulations may be found at: asd.vermont.gov/sites/asd/files/documents/Choices_for_Care_Regulations_0.pdf. Vermont's Medicaid waiver, authorized pursuant to Section 1115 of the Social Security Act, may be found at: dvha.vermont.gov/global-commitment-to-health/global-commitment-to-health-1115-waiver-2018-documents.

Petitioner's eligibility for services and his level of need for such services (based on the record here) is not reasonably in dispute. Petitioner's grievance with the home health agency that had been providing him with services extends back to circumstances which ended approximately 16 months ago, due to petitioner's decision to fire that agency. While there may be limited situations where such action may be necessary while simultaneously maintaining a grievance regarding the provision of services, in the instant case petitioner has not established that firing the home health agency was an immediate necessity at the time, nor – for that matter, has he taken any steps to reestablish a care relationship with that agency. Any dispute between petitioner and DAIL related to services provided by the home health agency is moot.[5]

As such, there is no meaningful relief that the Board could grant petitioner vis-à-vis his complaints, and

[5] This assumes that the Board had jurisdiction over this dispute when it was filed i.e. that petitioner had "standing" to file the appeal. However, whether a matter of standing or mootness, the outcome is the same, because his services through the home health agency are no longer an issue within the Board's jurisdiction. Petitioner has made no claim or showing of "retroactive" relief that may be applicable (and such relief would be remote in general), but merely asserts a bare "right" to call and cross-examine witnesses as to his complaint against the home health agency. Finally, it is well-established that the Board has no jurisdiction over any damages claim that petitioner may be asserting here. *See, e.g.*, Fair Hearing No. B-03/08-104, *citing Scherer v. DSW*, Unreported, (Dkt. No. 94-206, Mar. 24, 1999) and *In re Buttolph*, 147 Vt. 641 (1987).

therefore his appeal is dismissed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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