

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. H-09/21-533
)
Appeal of)
)
)

INTRODUCTION

The petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living (DAIL) denying a variance to allow her son to be employed as her personal care giver to provide in-home personal care services under the Choices for Care (CFC) program. The issue is whether the Department abused its discretion in denying the variance.

The following findings are based on evidence submitted by the parties during a video hearing held on November 19, 2021, and documents submitted by the Department.

FINDINGS OF FACT

1. The petitioner is an adult woman who is disabled and who is eligible for funding for personal care services through Choices for Care (CFC). Petitioner's diagnoses include Multiple Sclerosis, Parkinson's, Osteoarthritis, and she is a cancer survivor. Petitioner serves as the employer for her own care services. She lives in a rural area in a

home that she owns in Rochester, Vermont. She has had paid caregivers in the past who cared for her and made her meals, but they were no longer able to work for her. Petitioner has had a difficult time finding people in more recent years. Her brother and sister-in-law and her nephew live on a farm down the road a half-hour away and have been helpful to her, and her nephew works for her part-time as a driver to bring her to appointments. In addition, petitioner has a woman who comes in three times per week for two hours a day to do housework. However, petitioner lives alone and that is a source of great uneasiness for her given her complex medical conditions. Petitioner has several sons, but one recently died, and E.F. is the only one who lives in the area.

2. Petitioner's son E.F. has served as her de facto but unpaid personal care attendant since he moved into her home in May 2021.

3. Petitioner filed a request to have E.F. approved as a personal care attendant so he could be paid by CFC. As required by DAIL procedures, ARIS, the private company that provides payroll services and administrative support to individuals who receive CFC, performed a pre-employment investigation to include a criminal background check. The

background check revealed the following history of convictions for E.F.:

18 convictions on July 2, 2019, as follows:

- Fentanyl - Selling or Dispensing (Felony) (2 counts)
- Forgery (F)
- Buy/Receive/Sell Stolen Property (F)
- Petit Larceny
- Burglary (F)
- Grand Larceny (F)
- Simple Assault
- Violation of conditions of release (4 counts)
- False Information to Police
- Possession of Narcotics
- DWI3 (F) (2 counts)
- DLS (2 counts)

In addition, E.F. had the following previous convictions:

11/29/2012 Driving with suspended license (DWI)
12/07/2011 DLS conviction (DWI)
11/17/2010 DWI 2
11/17/2010 Possession of Marijuana
3/20/2019 Careless & Negligent Operation
5/29/2008 DLS

4/25/2006 Cocaine Possession, Disorderly
4/25/2006 Disorderly Conduct,
4/25/2006 Forgery (F) (two counts)
2/25/2006 Burglary (F)
10/31/2005 False Information to Police
12/23/2003 Possession of Marijuana
9/19/2000 Escape/Furlough
9/13/1999 Disorderly Conduct
1/25/1999 DLS
5/26/1997 Careless Operation
11/22/1994 Violation of Conditions
11/22/1994 Escape
11/22/1994 Assault and Robbery (F)
11/22/1994 Buying/Receiving Stolen Property
11/22/1994 Petit Larceny
11/22/1994 Burglary (F)
2/15/1994 Unlawful Mischief
2/15/1994 Grand Larceny (F)
2/15/1994 Grand Larceny (F)
2/15/1993 Burglary (F).

4. By letter dated June 29, 2021, petitioner requested a variance to the DAILE Background Check Policy to allow her son E.F. to become her paid caregiver. By letter dated July 6, 2021, the Department denied the request for variance based on E.F.'s criminal conviction history. Petitioner appeals.

5. By way of background, E.F. moved back into his mother's home in May 2021 after he was released from serving the sentences related to the 2019 convictions. E.F. is on parole, has a parole sentence of 5-20 years, and expects to remain on parole for some time, although he could be subject to early release after 5-10 years.

6. During his 49-month incarceration, E.F. took nine courses including construction, a first-aid course, a CPR course, and an EMT course for which he obtained a certificate. While drug and alcohol counseling were not available in prison (due in part to COVID), E.F. is currently enrolled in Intensive Outpatient Programming; he participates in three meetings a week and does regular urinalysis testing. When this program is completed, E.F. will engage in either or both individual or group counseling. He takes suboxone to treat his addiction and sees a physician for this medication. E.F. reports that while he understands and concedes that his criminal record is very serious, his problems stemmed from addiction that he fell victim to when he was a teenager. In the meantime, he was married twice (for 10 years each time) and raised five daughters. The most recent convictions in 2019 all stem from a spiral that occurred during a nine-month period after some bad things happened in his life. And he notes that the crimes did not occur in 2019, but in 2016 - he was in prison for two to three years pending the outcome of the cases. E.F. states that he had not committed a crime since 2016. E.F. also notes that he did not engage in crimes of violence and argues that the simple assault convictions

were for minor incidents involving alcohol use by all parties.

7. It was undisputed by the Department that E.F. is currently engaged in active treatment and is committed to his continued sobriety.

8. It is also undisputed by the Department that E.F. has taken very good care of his mother during the months that he has spent living with her. He cooks meals for her every day. He fixes things around the house to include doing all the heavy lifting, insulating all the windows, bringing in wood for the furnace and running the furnace in the basement. This summer he fixed a broken drainpipe on the property. He monitors the sump pump. He mows the lawn and put in a vegetable garden. He estimates that he spends at least 20 hours/week taking care of things for his mother and the house. Further, and critically, he is there for his mother at night if she needs him. Petitioner stated that she has needed E.F. to get to the bathroom at night, and she can call him and, as has been necessary, he can lift her and bring her to the bathroom and get her back into bed when she is unable to walk. Petitioner stated that her son keeps his cellphone by his bed, and promptly responds if she needs him during the night. Petitioner stated that absent E.F. being in the

house, she would otherwise have to request emergency help from 911 and would have to wait at least a half hour or more for an ambulance to come. Further, petitioner testified that E.F. is a strong emotional support for her and was able to help her deal with arrangements when she was devastated due to the recent death of one of her sons who died out-of-state. Petitioner stated that E.F. supports her emotionally, that she can talk to him, and that he is a very good companion. A related complication and one of the reasons that petitioner seeks to have E.F. become a paid caregiver is that he needs a source of income to pay his bills. He currently works about 20 hours/week for her brother on the farm but needs additional income to pay his expenses and has had to seek additional employment, which means he is not available to care for his mother as much as either of them would like.

9. According to the DAIL background check policy, if a record exists for any of a list of enumerated offenses, to include larcenies and fraud, ARIS is prohibited from paying that individual as a care giver. Therefore, as noted above, ARIS denied petitioner's request to hire E.F. but advised her that she could apply to the Department for a variance of the background check policy.

10. The variance provision of the background check policy outlines several factors that may be considered by the Department in its review. The Department's July 6, 2021, denial letter stated that the variance was denied based on E.F.'s criminal background check.

11. At hearing, the Department's Quality Assurance and Provider Relations Program Director testified. She was the supervisor of the person who issued the denial letter on the variance. She indicated that, consistent with the variance provision requirements, the petitioner and her son had both submitted letters explaining the basis for petitioner's request. The Director acknowledged that (1) it is currently very difficult to find providers, and (2) that E.F. has taken very good care of his mother while he has lived with her the past several months, and (3) that petitioner reports that she feels safe and comfortable having E.F. live with her. However, the Director stated that the nature and seriousness of E.F.'s convictions, particularly the 18 convictions that are from 2019, outweighs the other factors at this time. The Director stated that, except for certain aggravated offenses, the Department generally uses a five-year mark as a guideline in considering convictions as a basis for denial of a variance, meaning that convictions within the last five years

are typically of the greatest concern. The Department's general concern in hiring people with recent criminal convictions, particularly if the proposed employee is a family member, is that it can be very hard for the employer to issue corrections to someone that they live with or to speak out if there is wrongdoing going on. The Director stated that while the Department does not like to limit caregivers, because CFC funds are paid by Medicaid, they have the legal obligation to ensure that the disabled adult receiving services will be safe and that the care provider will behave responsibly.

12. It is commendable that E.F. had turned his life around and further that he has made the choice to be of service to his mother when she needs his help. Further, E.F.'s testimony at hearing about his dedication to his continued recovery was entirely credible. Petitioner also testified at hearing and her testimony about her current need for care and her comfort with having E.F. provide that care was heartfelt and very compelling.

13. However, the Department's concern about E.F.'s criminal record is also compelling and prudent. Obviously, E.F. may continue to provide care for petitioner as she wishes, however, it is acknowledged that he may also have to

work elsewhere. In any event, the Department does not support paying E.F. through CFC. Because of the evidence discussed above, it cannot be found that DAIL abused its discretion when it concluded that the variance should be denied at this time.

ORDER

The Department's decision denying the variance is affirmed.

REASONS

The Board has repeatedly held that the granting and denial of variances are matters of Department discretion and cannot be overturned unless that decision is found to be not supported by any reasonable view of the evidence upon which it was based, even if the Board may have reached a different conclusion based on the evidence at hand. See e.g., Fair Hearing No. A-10/09-599.

Section III(B) of DAIL's Background Check Policy (Policy) provides: "Background checks are required for all prospective workers who are paid with funds administered by DAIL." (Original emphasis.) The policy prohibits the use of Medicaid funds to pay for any services to be performed by an individual who has a criminal conviction for multiple listed offenses (absent a waiver) to include assaults, fraud,

forgery, larceny, burglary, and DUI. There is no dispute that E.F. has multiple convictions in many of the listed areas.

The Policy provides for a process whereby a "prospective worker" may request a "variance" from the Department allowing him or her to receive DAIL funds to provide care for a vulnerable person. Policy Sec. VI. (C) (1) (a). The Policy lists the following factors that will be considered in its consideration of requests for variances:

- nature of the position
- nature and seriousness of the offense(s)
- time elapsed since the offense(s)
- number or repeated offenses
- age at the time of the offense(s)
- involvement, since the date of the criminal offense, with the criminal justice system and/or child or adult protective services
- disclosure of the criminal conviction(s) by the prospective worker or volunteer to the person receiving services, the surrogate, and the legal guardian, if any
- prospective worker's unique caregiving relationship with the person receiving services
- unavailability of other workers or volunteers who could reasonably be expected to perform the care required.

Policy Sec. VI.B.

The Department's variance review process considered that petitioner's most recent 18 convictions were from 2019. E.F. concedes that he has been an addict for many years and that his addiction fueled his criminal history. While E.F. is now actively engaged in counseling for his addiction, given E.F.'s very lengthy and very serious criminal record, it cannot be concluded that the Department abused its discretion when it determined that the seriousness, recentness, and nature of E.F.'s convictions currently outweigh the other information presented. See Fair Hearing No. T-06/13-464 (denial of variance based on convictions for Burglary, stolen property and assault); Fair Hearing No. R-11/14-1192 (denial of variance based on convictions for negligent operation of vehicle, DUI, and stolen property within last 15 years); Fair Hearing No. B-09/14-877.

This determination is without prejudice to any request for variance in the future.

For the reasons outlined above, the Department's decision denying petitioner a variance to hire E.F. at this time must be affirmed. 3 V.S.A. § 3091(d) and Fair Hearing Rule No. 1000.4D.