

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIAM SPAULDING,)
)
 Petitioner,)
)
 vs.) Case No. 00-3302
)
 DEPARTMENT OF LABOR AND)
 EMPLOYMENT SECURITY, DIVISION OF)
 WORKERS' COMPENSATION, BUREAU OF)
 REHABILITATION AND MEDICAL)
 SERVICES,)
)
 Respondent.)
 _____)

AMENDED RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal hearing in the above-styled case on October 25, 2000, in Tampa, Florida.

APPEARANCES

For Petitioner: Leslie C. Riviere, Esquire
Harris & Riviere
304 South Fielding Avenue
Tampa, Florida 33606

For Respondent: Elana Jones, Esquire
Department of Labor and
Employment Security
Hartman Building, Suite 107
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

STATEMENT OF THE ISSUE

Whether the conduct of the Petitioner breached the terms of the Agency and Student Agreement for Sponsorship of Retraining and its amendment to the extent that Respondent was justified in terminating retraining benefits authorized by Section 440.491, Florida Statutes.

PRELIMINARY STATEMENT

On January 10, 2000, the Bureau of Rehabilitation and Medical Services, Division of Workers' Compensation, Florida Department of Labor and Employment Security, notified New Horizons Computer Learning Center (New Horizons) by letter that Petitioner, William Spaulding, would "no longer be approved . . . in the Microsoft Certified Systems Engineer Program." Petitioner was mailed a copy of the letter to New Horizons. On February 8, 2000, Petitioner was notified by Respondent that he was "no longer eligible for training and education as you did not maintain minimum standards of progress, including full-time attendance." This letter further advises Petitioner of his right to request a hearing.

On July 7, 2000, Petitioner filed his amended request for hearing which was forwarded to the Division of Administrative Hearings by letter from Respondent dated August 9, 2000.

An Initial Order was mailed to the parties on August 10, 2000. Petitioner responded to the Initial Order on

August 16, 2000, and moved for summary hearing on the same date. Respondent responded to the Initial Order on August 17, 2000, and objected to the Motion for Summary Hearing. The Motion for Summary Hearing was denied by Order dated August 23, 2000.

A Notice for Hearing and an Order for Pre-hearing Instructions were mailed to the parties on August 23, 2000. On the motion of Respondent the final hearing was rescheduled from November 15, 2000, to October 25, 2000. A Joint Prehearing Stipulation was filed on October 17, 2000.

At the final hearing Petitioner testified in his own behalf and submitted Petitioner's Exhibits numbered 1-2 into evidence. Respondent's witnesses were George Kaye, senior vocational rehabilitation counselor, employed by Respondent, and Soovje Windeish, accounts executive and counselor for New Horizons. Respondent entered Exhibits numbered 1-7 into evidence.

At the close of the presentation of evidence Respondent ordered the preparation of the Transcript, and the parties, upon mutual agreement, were given 14 working days from the filing of the Transcript in which to file their Proposed Recommended Orders. The court reporter filed the Transcript on November 6, 2000. Petitioner filed a Recommended Final Order on November 17, 2000. Respondent filed a Proposed Recommended Order on November 20, 2000.

The Administrative Law Judge forwarded a Recommended Order to the parties on December 12, 2000.

On February 6, 2000, Respondent filed an Order Relinquishing Jurisdiction to the Administrative Law Judge for Clarification. The Order stated that an Administrative Law Judge had inappropriately cited Rule 38J-1.005(1)(a), Florida Administrative Code, instead of Rule 38F-55.012, Florida Administrative Code.

On February 13, 2001, the Division of Administrative Hearings accepted jurisdiction and an Order to Reopen File was entered.

FINDINGS OF FACT

1. Petitioner is a 46-year-old male who has had varied employment, approximately three years in college-level credit courses, four years in the United States Marine Corps, and was employed as an automobile mechanic at the time of his industrial accident on June 11, 1997.

2. Petitioner, who walks with the aid of a cane, suffers from pain and swelling in the right knee and pain in both hips and the left knee. Petitioner had arthroscopic surgery on his right knee in July 1997.

3. On January 7, 1998, Petitioner underwent a functional capacity evaluation which concluded that he could "perform light to medium physical demand level for eight hours a day." On

July 25, 1998, he reached maximum medical improvement and was given a five-percent permanent impairment rating. Petitioner has not been employed since the accident.

4. Petitioner received approximately \$300 per week in workers' compensation benefits. When workers' compensation benefits terminated in late 1998 he was "living on the streets"; he had no car.

5. Section 440.491, Florida Statutes, creates the unemployment services program and authorizes all recommended programs and expenditures to injured employees.

6. Chapter 38F-55.012, Florida Administrative Code, states:

Employee Responsibilities.

(1) Upon approval of Division sponsored reemployment services, the injured employee and Division staff shall sign and date an agency and student agreement for sponsorship of retraining form DWC-24, which is incorporated by reference in rule 38F-55.014, Florida Administrative Code.

(2) The Division shall permanently withdraw sponsorship of any reemployment service plan if:

(a) the injured employee is able and fails to attend the program on a full-time, continuous basis, or

(b) the injured employee's participation is interrupted for reasons other than a medical exacerbation documented according to the terms agreed upon in form DWC-24, or

(c) the injured employee fails to maintain the minimum standards of the program, or

(d) the injured employee fails to abide by the terms agreed upon in form DWC-24.

7. Petitioner was approved for retraining by Respondent in September 1999. On September 8, 1999, Petitioner and Respondent entered into an "Agency and Student Agreement for Sponsorship of Retraining."

8. This agreement states, in part:

The student shall:

* * *

4. Be responsible for transportation arrangements and costs associated with any Division-sponsored retraining program unless such travel expenses are authorized and approved by the Division in advance of the travel pursuant to Rule Chapter 38F-55.015, F.A.C.

5. Attend the approved program as structured in the course curriculum on a full-time, continuous (year-round) basis until the completion of the program unless,

a. written approval to deviate from the approved program is received from the Division, and

b. an exacerbation of a medical condition precludes full-time attendance or participation in the approved program and the student notifies the division staff within two business days of the knowledge and provides medical documentation from the treating physician within 14 days of initial treatment. In such an event, continuation or readmission

into the approved program shall be contingent upon the established policy of the training or education program.

* * *

The division shall:

* * *

6. permanently withdraw sponsorship of training when

a. The student is able and fails to attend training on a full-time, year-round basis, or

b. There are more than three instances of failure by the student to meet their responsibilities above, or

c. The student fails to maintain the performance standards of the program, or

d. The student's participation is interrupted for a period greater than 90 days for reasons other than a medical exacerbation.

Dates of Training: 9/20/99 - 6/20/2000

9. Respondent's representative, George Kaye, testified that he fully discussed "student responsibilities" with Petitioner and believed that Petitioner was fully capable of successfully completing the training.

10. Petitioner started receiving workers' compensation benefits after the retraining began; he reported that he "got

his own place to live" and "bought a car with his next workers' compensation payment."

11. Although Petitioner was to have started the curriculum on September 20, 1999, he did not attend his first class until September 27, 1999. Thereafter, he attended only three classes during the months of September and October. In November, he attended six laboratories.

12. At the time Petitioner was disenrolled, he had completed three courses, Windows 98 (Beg), Windows 98 (Int), Beg. DOS 6.2 and was retaking A+ Certification; these courses were preparations for the Microsoft Certified Systems Engineer course and should have been completed in the first four weeks. The A+ Certification course should have been completed in the second month. It would have been possible, but very difficult for Petitioner to complete the curriculum, given his progress at the time he was disenrolled.

13. A personal computer was not required for the course. Having one would have been helpful, but there were computers readily available to be used at New Horizons.

14. On December 3, 1999, Petitioner and Respondent's representative, George Kaye, met and agreed that from December 3, 1999, to June 20, 2000, Petitioner would "attend school three days a week. If he does not, case will be closed after payment for school attended." This agreement was

memorialized by an amendment to the Agency and Student Agreement for Sponsorship of Retraining.

15. Petitioner offered a myriad of reasons for his failure to attend class: transportation problems, the distance from his home in Seffner to New Horizons in Tampa, his lack of a computer, and his studying at home. George Kaye attempted to help Petitioner by having his automobile repaired, obtaining bus passes, getting Petitioner suitable clothing, suggesting that Petitioner move closer to New Horizons, and giving Petitioner the "benefit of the doubt" regarding class attendance.

16. Respondent attended school nine days out of a possible 18 days in December and did not attend school the first week of January 2000.

17. Petitioner offered into evidence a letter from the Veteran's Administration stating that Petitioner had been approved for a non-service connected disability providing Petitioner \$749.00 per month. This entitlement was effective April 1, 2000, after Petitioner had been disenrolled from retraining.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and a 120.57(1), Florida Statutes.

19. As the party seeking relief, Petitioner has the burden of proving by a preponderance of the evidence that Respondent inappropriately disenrolled him from the retraining program made available to him through Section 440.491, Florida Statutes.

20. In accordance with Section 440.491, Florida Statutes, Petitioner was enrolled in an appropriate rehabilitation training program. Section 440.491(6)(a), Florida Statutes, authorizes Respondent to "establish training and education standards pertaining to employee eligibility, course curricula and duration, and associated costs."

21. Petitioner and Respondent entered into an Agency and Student Agreement for Sponsorship of Retraining which established Petitioner's responsibilities for continued sponsorship by Respondent in the training program; this agreement required "full-time" attendance in the training program.

22. Petitioner and Respondent modified the Agency and Student Agreement for Sponsorship of Retraining by specifically delineating minimum attendance requirements and indicating that failure to maintain the minimum attendance requirements would result in disenrollment.

23. Petitioner failed to meet minimum attendance requirements without reasonable excuses.

24. Respondent appropriately disenrolled Petitioner from rehabilitation training.

RECOMMENDATION

It is hereby

RECOMMENDED that Respondent enter a final order denying the relief requested by Petitioner.

DONE AND ENTERED this 19th day of February, 2001, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of February, 2001.

COPIES FURNISHED:

Leslie C. Riviere, Esquire
Harris & Riviere
304 South Fielding Avenue
Tampa, Florida 33606

Elana Jones, Esquire
Department of Labor and
Employment Security
Hartman Building, Suite 107
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

Mary B. Hooks, Secretary
Department of Labor and Employment Security
The Hartman Building, Suite 303
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

Sherri Wilkes-Cape, General Counsel
Department of Labor and Employment Security
The Hartman Building, Suite 307
2012 Capital Circle, Southeast
Tallahassee, Florida 32399-2189

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order must be filed with the agency that will issue the Final Order in this case.