

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. A-06/20-422
)
Appeal of)
)

INTRODUCTION

The petitioner appeals the decision by the Department for Disabilities, Aging, and Independent Living (DAIL or Department) approving her discharge from a Residential Care Home (RCH).

The following findings are based on the representations of counsel at monthly conferences beginning in June 2020, testimony, oral arguments and written memoranda submitted by the parties.

FINDINGS OF FACT

1. Until May 19, 2020, petitioner resided at a Level III¹ Residential Care Home (RCH) in Swanton, Vermont licensed by the Department.

2. On May 19, 2020, petitioner fell at the RCH and the RCH manager made the decision to call an ambulance and have petitioner transported to the hospital. At the time,

¹Level III homes provide nursing overview in addition to room and board and assistance with personal care needs and medication management.

petitioner was 69 years old (she has since turned 70). On May 20th, the manager of the RCH issued a Discharge Notice to petitioner. The issue in this case is the sufficiency of the Discharge Notice and the Department's subsequent approval of the discharge.

3. To put the issue in context, any discharge from an RCH is governed by the Department's Residential Care Home Licensing Regulations (Regulations) § 5.3, Discharge and Transfer Requirements. The Department's Regulations provide for two discharge procedures: (1) an involuntary discharge and (2) an emergency discharge. An involuntary discharge can occur, among other reasons, if the RCH can no longer meet the resident's care needs **or** the person has become a threat to self or others. In an involuntary discharge process the RCH resident has the protections of 30-days advance notice of discharge, mandatory notice to advocacy agencies, and the right to remain in the RCH during the appeal if the discharge is contested. This involuntary discharge procedure is designed to provide an orderly transition when the resident is no longer appropriate for an RCH standard of care. Alternatively, if an emergency occurs, to include a situation in which the resident presents an "immediate threat to the health or safety of self or others," then an emergency

discharge may occur. An emergency discharge requires no advance notice to the resident and the resident is not afforded the right to remain in the RCH pending the appeal process. However, the RCH is required to request advance permission from the licensing agency for the emergency discharge, unless a police officer, emergency medical services provider or mental health crisis provider states that the discharge must occur immediately. If that circumstance is present, the RCH must notify the Department on the next business day that the discharge occurred. The emergency discharge provision of the Regulations does not mention any specific right to appeal or period for taking the appeal and would therefore be covered by the Regulations' general appeal provision in Regulation § 1.7 which refers to the Board's default appeal period of 30 days.

4. The dispute in this case arises because both the RCH and the Department have indicated that the discharge at issue was intended as an emergency discharge. However, both the Discharge Notice issued by the RCH and the Department's notice of approval of that discharge were insufficient to support an emergency discharge.

5. The Discharge Notice stated:

We are unable to meet your assessed needs. We also feel that you are a threat to yourself as well to the staff, as evidenced by your recent 3 falls (May 12, 17 and 19). You are unable to get yourself out of your chair, on or off the toilet, or dress yourself without the staff physically assisting you. We feel that, in case of fire, you would have difficulty getting yourself out safely or in the allotted time.

It appears that you have increased degeneration and arthritis in the knees, as shown on recent x-rays at Northwest Medical Center Monday. We feel, at this time, that if you do not seek rehabilitation - you will continue to fall until either yourself, staff, or both are seriously injured. We do not want this outcome for you or staff.

Because of your weight, we do not have a wheelchair into which you could fit. We could not get it through our doorways if we did have one thing we might ordinarily try to do while people are trying to recover, we cannot do for you. You need a place to rehab and recover - one that has equipment to help you recover- especially is that involves surgery, injections, or whatever they decide you need while at rehab.

In addition to the goals for you to be able to get up out of your chair, on and off the toilet, and be able to dress yourself, other goals include being able to walk from your bedroom to the bathroom every two hours or 8 times a day... (emphasis added).

The Notice continued to describe that petitioner should be able to walk up to 70 feet on her own to safely get to the bath, and lesser lengths to her living room and the dining room. The manager stated that petitioner would need to meet these goals for a few weeks at rehab without falling. The Notice then continued:

You have the right to appeal the decision of the discharge. **You have the right to remain in the home until there is a final decision on your appeal. (emphasis added.)**

The Discharge Notice stated that if petitioner wished to appeal the discharge, she must do so within ten business days from the date she received the Notice. In its filings, the Department did not present evidence as to what date the letter was received by petitioner, but petitioner reported at a conference in June 2020 that the RCH manager came to the hospital and delivered the Discharge Notice to her on May 20th.

6. The RCH's Discharge Notice issued on Wednesday, May 20, 2020, cited a discharge standard (petitioner's care exceeding the level that RCH can provide and/or petitioner being a threat to herself or staff) for an involuntary discharge and informed petitioner that she had a right to remain in the RCH during the appeal process - a right that is only available during an involuntary discharge process and is not available when an emergency discharge occurs. Further, the appeal period provided in the Notice - 10 business days from the day the Notice was received - is the appeal period for an involuntary discharge (to the licensing agency). Based on the information provided in this Notice, the RCH

issued a notice of involuntary discharge and did not issue a notice of an emergency discharge. However, the procedural requirements for an involuntary discharge were not met and petitioner was not afforded the protections of an involuntary discharge.

7. The Department's representative stated that the RCH manager contacted her the next business day after the Discharge Notice had been issued.

8. Petitioner objected to the discharge. However, the RCH refused to allow petitioner to return to the RCH (despite the language in the Discharge Notice saying she had the right to do so). The Department was notified of her objection. As a result, the Department reviewed the discharge and issued a letter to petitioner dated June 4, 2020, upholding the discharge. The letter stated as follows:

The home is unable to meet the resident's assessed needs.

I reviewed the materials submitted to determine if **this involuntary discharge** meets the regulatory intent of the The Residential Care Home Regulations at 5.3 Based on a review of the information provided, I find that the **requirements for an involuntary discharge at 5.3a(1) have been met.** (emphasis added).

The Letter noted that "[T]his decision may be appealed by requesting a review by the Human Services Board. You must

request this appeal in writing within 10 days of this decision.”

9. The Department’s letter approving the discharge refers to the RCH being unable to meet petitioner’s needs - which is a standard under the involuntary discharge process. Critically, the letter also did not speak in any way to petitioner being a “threat” under the alternate involuntary discharge standard let alone an “immediate threat” under the emergency discharge standard. Further, the letter cites **to** the involuntary discharge process (Regulation § 5.3.a) and not the emergency discharge process (Regulation § 5.3.b.). Finally, the Department’s letter upholding the discharge cited an incorrect period for the appeal - the letter noted a 10-day appeal period from the date of the letter. That is not the correct appeal period for either an involuntary discharge or an emergency discharge. The appeal period for an involuntary discharge to the Board is 10 business days from the date the licensing agency delivers the discharge notice to the resident. Again, the appeal period for an emergency discharge notice is 30 days from the decision. Based on this letter from the licensing agency, it would be reasonable for petitioner to be completely misled about the discharge procedure that was being approved. There is no

question that the RCH's Discharge Notice and the Department's approval of that discharge were deficient and invalid notices for an emergency discharge. Rather, on its face, the Department approved an involuntary discharge, even though the procedural requirements (30 days advance notice, notice to advocacy agencies, and right to remain in the home) for an involuntary discharge (based in Department Regulations) had not been met. Because the RCH's Discharge Notice and the Department's approval of same failed to follow the procedural requirements for an involuntary discharge, they are also deficient notice of an involuntary discharge. The Department has subsequently conceded that the Discharge Notice and the Department's notice letter were deficient.

10. With respect to petitioner's fair hearing request, while still in the hospital petitioner wrote a three-page letter noting her continued opposition to the discharge. The letter was date stamped received by the Department on June 19th. The appeal was received at the Human Services Board office on June 23, 2020. Given the deficiencies in the information provided to petitioner about the type of discharge procedure being pursued and the applicable appeal period, and the fact that the RCH and the Department both assert that this was an emergency discharge, the general

appeal procedure in Regulation § 1.7 should be applied, with a resulting 30-day appeal period. The Petitioner's appeal was thus timely under the Regulations.

11. As noted above, the RCH manager refused to allow the petitioner to return back to the RCH from the Emergency Room on May 20th. Because she was not allowed to return to the RCH, petitioner remained in the hospital until sometime in early June 2020, when the hospital released and transported petitioner to an area motel. Petitioner initially received some home health care rehabilitation services at the motel but has since been discharged from that program. Petitioner continues to reside in a motel, unsupervised, to date.

12. A related dispute between the parties is whether the Department has the authority to order petitioner returned to the RCH based on the defective notices. The Department has argued that it cannot do so because after her placement at the motel, petitioner (with assistance from the area home health agency), seeking alternatives to her current situation, applied for Choices for Care (CFC). Petitioner was clinically approved by the Department for CFC in July or August for a six-month period; this was done without completion of the typical in-person assessment by the

Department due to COVID-19. Individuals approved for CFC are by definition, deemed to need a nursing home level of care. Therefore, the Department argues it cannot approve petitioner for return to the RCH. However, the CFC approval ended some time in December 2020 and is no longer in effect. Rather, currently petitioner reportedly receives no services at the motel.

ORDER

The Department's decision is reversed and remanded to the Department.

REASONS

As noted above, the Regulations provide two discharge procedures from an RCH: (1) an involuntary discharge and, (2) an emergency discharge. A resident may be involuntarily discharged on the following grounds:

. . . An involuntary discharge or transfer may occur only when:

i. The resident's care needs exceed those which the home is licensed or approved through a variance to provide; or

ii. The home is unable to meet the resident's assessed needs; or

iii. The resident presents a threat to the resident's self or the welfare of other residents or staff; or

iv. The discharge or transfer is ordered by a court; or

v. The resident has failed to pay monthly charges for room, board and care in accordance with the admission agreement.

RCH Regulation § 5.3a(1) (emphasis added).

The Regulations provide that the resident is entitled to 30-days' notice of an involuntary discharge. Regulations § 5.3.a.(2)(i). The appeal acts as a stay of the involuntary discharge; in other words, pending that appeal, the resident has the right to remain in the RCH. Regulations § 5.3.a(2)(iii).

At least in the case of an involuntary discharge, if the Department's approval of a discharge is not supported by the Regulations, the resident has the right to remain at the RCH. *See Fair Hearing No. N-11/12-702* (Where evidence does not support that resident meets the standard for discharge provided by the Regulations, the Department's approval of a discharge will be reversed.)

In contrast, an emergency discharge does not provide the same level of protection to the resident. An emergency discharge can only occur² if:

²An emergency discharge can also occur for other reasons, such as natural disaster or if ordered by a physician, but those factors are not present in this case.

The resident presents **an immediate threat** to the health or safety of self or others. In that case, the licensee shall request permission from the licensing agency to discharge ...the resident immediately. Permission from the licensing agency is not necessary when the immediate threat requires intervention of the police, mental health crisis personnel, or emergency medical services personnel who render the professional judgment that discharge, or transfer must occur immediately. In such cases, the licensing agency shall be notified on the next business day . . .

Regulations § 5.3.b.(1)(iii) (emphasis added).

The Department has represented that it understood this to be an emergency discharge by the RCH. However, the Regulations provide that if an RCH believes that a resident poses "an immediate threat" to the health or safety of herself or others, it must follow the following procedure:

An emergency discharge or transfer may be made with less than thirty (30) days' notice under the following circumstances:

. . .

The resident presents an immediate threat to the health or safety of self or others. In that case, the licensee **shall request permission from the licensing agency to discharge** or transfer the resident **immediately**. Permission from the licensing agency is not necessary when the immediate threat requires intervention of the police, mental health crisis personnel, or emergency medical services personnel who render the professional judgment that discharge or transfer must occur immediately. In such cases, the licensing agency shall be notified on the next business day. . .

Regulations § 5.c.b(1)iii (emphasis added).

As outlined above, both the Discharge Notice issued by the RCH and the approval letter issued by the Department were replete with errors. While the RCH may have intended to issue an emergency Discharge Notice, it did not do so. Rather, the Notice gave petitioner notice of an involuntary discharge. Likewise, the Department's letter upholding the discharge notified petitioner only of an involuntary discharge. Further, the RCH did not obtain the Department's advance authorization to issue an emergency discharge. Therefore, based on the Discharge Notice and the Department's letter of approval, the standard for an emergency discharge was not met and the procedural requirements for an involuntary discharge were not provided.

The Residents' Rights provision of the Regulations provides that:

Residents subject to transfer or discharge from the home, under Section 5.3 of these regulations, shall:

Be allowed to participate in the decision-making process of the home concerning the selection of an alternative placement;

. . .

Be allowed to contest their transfer or discharge by filing a request for a fair hearing before the Human Services Board in accordance with the procedures in 3 V.S.A. § 3091.

Because of the errors in both the Discharge Notice and the Department's approval of the discharge, petitioner was unfairly deprived of adequate notice regarding the discharge process. As noted in the Introduction to the Regulations, "[T]he State regulates residential care homes for the dual purposes of protecting the welfare and rights of residents and assuring they receive an appropriate quality of care." Regulations § 1.1.

Even if, on May 20th, petitioner's needs did in fact exceed the care that the RCH was able to provide and even if she did in fact present a threat to herself or staff, that would have properly been the basis for an involuntary discharge and there could have been an orderly transition of petitioner's care. Ironically, given that the assertion is that petitioner's needs were such that the RCH staff could no longer handle those needs, because of the process that occurred, petitioner is now living unsupervised and unaided in a motel with no care. This process utterly failed to protect petitioner's welfare and rights.

The Department has the responsibility to enforce the Regulations. "The purpose of enforcement actions is to protect residents." Regulations § 4.16. The Department's enforcement powers include the "[S]uspension of ...transfers

of residents from a home to an alternative placement, for a violation which may directly impair the health, safety or right of residents..." Regulations § 4.16.c.

The record establishes that petitioner's discharge failed to meet significant elements of the notice requirements of the Regulations and, in the absence of a showing that petitioner met the standard for emergency discharge, this materially affected petitioner's rights under the rules. *See Paschall v. District of Columbia Department of Health*, 871 A. 2nd 463 (2005) (Court of Appeals noting the decision of an Administrative Law Judge that a nursing home could not discharge a resident based upon a defective notice of discharge and that it would be required to initiate a new discharge procedure that complied with the applicable law if it wished to continue with its effort to discharge the resident.)

As petitioner's discharge from the RCH was inconsistent with the Regulations, it must be reversed and remanded to the Department to ensure that petitioner's discharge from the RCH, should one be pursued, is conducted in a manner that protects the rights, health and safety of petitioner and is consistent with the Regulations. See 3 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.