

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. B-03/12-185  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) approving his involuntary discharge from PMN, a residential care facility providing Enhanced Residential Care (ERC) to petitioner through a Level of Care Variance from DAIL.

Procedural History

The petitioner received a letter dated February 28, 2012 from PMN notifying petitioner that PMN was providing thirty days notice for an involuntary discharge. PMN included petitioner's appeal rights in its notice.

Petitioner requested review from the Division of Licensing and Protection at DAIL. On March 7, 2012, the Division of Licensing and Protection notified petitioner in writing that it was allowing PMN to proceed with the involuntary discharge.

Petitioner timely appealed the decision to the Human Services Board on March 20, 2012.

A series of telephone status conferences were held. The first status conference was held on April 3, 2012. During the May 1, 2012 telephone status conference, the Board was notified that petitioner was accessing additional services from the Program for All-Inclusive Care for the Elderly (PACE). Additional telephone status conferences were held on June 5, July 2 and July 31, 2012 in part to give the parties time to determine whether the additional services would reverse PMN's decision.

The case was scheduled for hearing on September 24, 2012 and a prehearing status conference was held on September 4, 2012.

At hearing, DAIL presented testimony from (1) DL, a registered nurse, who is the administrator at PMN, and (2) FK, Assistant Director of the Division of Licensing and Protection. The petitioner testified on his behalf and presented testimony from SA, regional Long Term Care ombudsman.

The following exhibits were admitted at hearing upon the stipulation of the parties:

Department's No. 1, March 7, 2012 letter from FK, Assistant Director of the Division of Licensing and Protection

Department's No. 2, February 28, 2012 e-mail with letter to FK from TB, petitioner's brother and Power of Attorney

Department's No. 3, February 28, 2012 letter from petitioner to FK and SL

Department's No. 4, February 24, 2012 discharge letter from PMN to petitioner

Department's No. 5, (a) Resident Assessment dated January 16, 2012, (b) materials from petitioner's resident care plan, (c) functional profile, and (d) copy of PMN's PACE Agreement or contract between PMN and petitioner dated January 3, 2011.

At hearing, the record was kept open for the following documents that have been admitted into evidence including:

Department's No. 6, Level of Care Variance Request approved at the time of petitioner's admission to PMN

Department's No. 7, Resident Assessment completed on January 17, 2011

Petitioner's A, March 9, 2012 letter from Dr. JE, petitioner's treating doctor

The record was held open for post-hearing briefing by the parties.

Issue

The issue is whether the petitioner's discharge is in compliance with the underlying Statute and the Department's regulations.

The decision is based upon the evidence adduced through hearing and the arguments of the parties.

FINDINGS OF FACT

1. The petitioner is a sixty-year-old man with multiple physical and emotional problems. The petitioner had a stroke several years ago and has left hemi paresis and visual field deficit. He has short-term memory issues. Petitioner also experiences anxiety and depression. He uses a wheelchair.

2. Over three years ago, petitioner was admitted to a nursing home. He was found eligible for the Choices for Care (CFC) program. During that time, petitioner's goal was to live independently with CFC assistance, and he managed to do so for about one year until he was hospitalized.

3. Petitioner was admitted to PMN on January 3, 2011 from the hospital. He lives with a cat at PMN.

4. PMN is a Level III residential care home and is licensed by DAIL. PMN needed a waiver from DAIL in order to admit petitioner because petitioner needed and needs nursing home level of care.

5. PMN obtained a Level of Care Variance allowing PMN to house and care for petitioner. The Variance is for Enhanced Residential Care (ERC). PACE provides services

directly to petitioner and pays for the enhanced services PMN provides petitioner.

6. PACE is a Medicare program and a Medicaid program by State option. PACE helps individuals who need nursing home level services remain in the community through services developed in a care plan devised by an interdisciplinary team including input from the recipient and caregivers.

Petitioner's services include a day program at PACE, occupational and physical therapy, and help with bathing. PACE provides petitioner with some staffing on weekends (one hour on Saturdays and Sundays) and provides equipment as needed. During the course of this appeal, petitioner increased his day program from three days to five days per week.

7. When petitioner entered PMN, he signed a contract with PMN that includes termination provisions. Under the contract, PMN can terminate the agreement with thirty days notice if PMN believes it cannot provide the services needed for petitioner. The contract includes that any notice will set out applicable appeal rights.

8. DL is an administrator at PMN. PMN is part of a larger entity, PM. DL has been a registered nurse for

thirty-nine years. She has worked for PM for over nineteen years including as an administrator for the past ten years.

DL supervises the staff at PMN. During the evenings, PMN uses three staff members. During the nights, PMN uses two staff members. The staff members are responsible for the thirty-one residents in the facility.

DL wrote petitioner the February 14, 2012 letter of discharge documenting that due to petitioner's increased level of care needs with his ADLs and his cognitive deficits, the facility was unable to meet petitioner's needs.

9. SA is a regional Long-Term Care Ombudsman who works with petitioner. She is in regular contact with petitioner and has worked with petitioner regarding services at PACE and regarding the involuntary discharge.

10. SA obtained a letter from Dr. JE, petitioner's treating psychiatrist, dated March 9, 2012 that was shared with PACE and PMN. Dr. JE treated petitioner for many years. Dr. JE subsequently became ill and was unable to continue as petitioner's treating psychiatrist causing additional stress for petitioner. Dr. JE believes the solution for petitioner is a caregiver assigned to petitioner at PMN during the evenings and on the weekends.

11. FK is a registered nurse. She is with the Division of Licensing and Protection with DAHL. She reviewed the discharge notice in petitioner's case.

Her review is two-fold. She looks at the form of the discharge notice to determine whether it complies with the regulations. She looks at the rationale in the discharge notice and any supporting materials from the facility or from the resident to see whether the rationale allowed under the regulations is met. FK does not independently contact a resident's doctor or look at a resident's medical notes.

FK upheld PMN's decision to discharge petitioner and notified petitioner of her decision in a letter dated March 7, 2012.

12. The petitioner's needs have changed since he was first admitted to PMN.

13. At the time petitioner was admitted to PMN on January 3, 2011, petitioner's ADLs were rated as independent with bed mobility and eating; needing supervision with transfers, locomotion, dressing and personal hygiene; and needing limited assistance with toilet use and bathing.

Over the course of the past year, petitioner gained fifty pounds and the facility now uses two people to assist petitioner with transfers into and out of bed and any other

transfers; these transfers are done with a mechanical lift. At times, staff need to transfer petitioner to change bedding when there is spillage from his urinal. PACE provided the lift to deal with changes to petitioner's needs around transferring.

Petitioner's assessment dated January 16, 2012 shows petitioner as independent with eating; needing supervision with mobility; needing limited assistance with bed mobility and personal hygiene; and needing extensive assistance with transfers, dressing and toilet use. Bathing is not rated as petitioner is bathed at PACE.

14. The major change has been petitioner's increased anxiety and depression that combined with his memory problems led to a change in his behavior. Petitioner uses the call button an excessive number of times including the evening and night hours. Staff must respond to petitioner's call button to ensure his safety. Petitioner will use the call button to ask about medication, for the telephone, to empty his urinal, because he feels he may have a seizure or he is lonely. The problem is that he does not recall using the call button or what happened when staff came to see him, and he will then use the call button again. Although there is a dispute between the parties whether sufficient problem solving was



used to address these behaviors, the petitioner was unable to deal with the parties' attempts because his anxiety fed his memory problems.<sup>1</sup>

The call button behaviors started to escalate during the end of 2011 when petitioner's brother was away. Petitioner's brother has since moved away from the area causing stress for petitioner. The discharge notice also caused stress. The increased stress and anxiety worsen petitioner's memory problems and feed into a loop of increased call button use.

The increased call button use places a burden on staff members who are also trying to meet the needs of the other thirty-one residents in petitioner's building. The burden is particularly acute during the nights when only two staff members are available to the residents.

15. Petitioner's care needs exceed the level of care allowed under PMN's variance.

16. Petitioner's care needs are more than PMN can meet.

ORDER

The Department's decision is affirmed.

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<sup>1</sup>The parties also disagreed whether PACE supported their respective positions. In the absence of any testimony from a PACE representative, no weight is given the conflicting allegations from the parties as to PACE's positions in this case.

REASONS

Residential care homes are regulated by the Department of Disabilities, Aging and Independent Living through its Division of Licensing and Protection. The policy behind the regulation of both residential care homes and nursing homes is found at 33 V.S.A. § 7101 that states:

The purpose of this chapter is to provide for the development, establishment and enforcement of standards for the construction, maintenance, operation, provision of receivership, and dissolution of long-term care facilities in which medical, nursing, or other care is rendered, which will promote safe surroundings, adequate care, and humane treatment, safeguard the health of, safety of, and continuity of care to residents, and protect residents from the adverse health effects caused by abrupt or unsuitable transfer of such persons cared for in these facilities.

PMN is licensed by DAAIL as a Level III residential care home. Level III residential care homes are defined at 33 V.S.A. § 7102(10)(A) as a facility that:

provides personal care, defined as assistance with meals, dressing, movement, bathing, grooming, or other personal needs, or general supervision of physical or mental well-being, including nursing overview and medication management as defined by the licensing agency by rule, but not full-time nursing care. . .

PMN is not licensed to care for individuals who need nursing home level of care such as petitioner. To admit petitioner, PMN needed a variance from DAAIL. 33 V.S.A. §

7106, Residential Care Home Licensing Regulation § 3.5.

Petitioner was admitted to PMN under an ERC/PACE variance.

The Residential Care Home Licensing Regulations (RCH Reg.) set out the following at § 5.3.a, in part:

- (1) . . .An involuntary transfer or discharge may occur only when:
  - i. The resident's care needs exceed those for 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;

A resident can appeal an involuntary discharge to the Division of Licensing and Protection. If the Division of Licensing and Protection upholds the involuntary discharge, the resident may appeal the Division's decision to the Human Services Board through a de novo evidentiary hearing. 33 V.S.A. § 7118(a), RCH Reg. § 5.3.a.3.vi.

If the involuntary discharge is upheld, the residential care home cannot discharge the resident until there is a suitable alternative placement for the resident.

There have been few involuntary discharge cases before the Board. The Board first addressed the issue of involuntary discharge from a residential care home in Fair Hearing No. 16,035 by framing the issue whether the discharge was in compliance with the Department's regulations.

In Fair Hearing No. 16,035, the Board found that the evidence at hearing supported the requirements of RCH Reg. 5.3.a.iii that the resident's behavior was a threat to his safety as well as to the safety and well being of other residents and staff.

The Board next looked at an appeal of an involuntary discharge from a nursing home.<sup>2</sup> Fair Hearing No. 17,220. The Board found that the Department acted in accordance with its regulations and affirmed the Department.<sup>3</sup>

In Fair Hearing No. 19,040, the Board upheld the transfer of a resident from a sub-acute unit to a long-term care unit within a nursing home based on an allegation that the resident's condition had improved; the Board based its decision upon the documentary materials relied upon by the Department. An evidentiary hearing was not held. In an unpublished Entry Order, the Vermont Supreme Court reversed the Board finding that the record did not support the finding

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<sup>2</sup> The discharge procedures and rationales are similar for residential care homes and nursing homes. The major difference is that nursing homes are subject to federal statutory and regulatory requirements governing the discharge procedures. See 42 U.S.C. § 1396r(c)(2), 42 C.F.R. § 483.12

<sup>3</sup> Referring to Fair Hearing No. 16,035 on page 5 of the decision, the Board stated "as a general matter, the Board has no jurisdiction over any licensee of the Department involving a dispute with a resident". However, the Department has authority over a licensee. If the Board were to find that the Department's decision regarding an involuntary discharge was not supported by the regulations, the Department, in turn, would have the authority to stop the involuntary discharge.

that the resident's medical condition had improved sufficiently to warrant a transfer. Van Orman v. Department of Aging and Independent Living, 2005 WL 615237 (Vt. 2005).

The crux is whether the evidence admitted through the hearing process support the Department's contention that there is a regulatory basis to uphold the involuntary discharge. Here, the evidence supports the Department's argument.

PMN was granted a variance when the petitioner was first admitted because petitioner did not fit the admission criteria for residential care homes. Petitioner needed nursing home level care, but an assessment during January 2011 indicated that petitioner's placement was appropriate with the supports of PACE and the ERC variance.

Since petitioner's admission, petitioner's needs and behaviors have changed. Petitioner needs far greater assistance with his ADLs, in particular with transfers, toilet use and dressing. Petitioner's memory issues, anxiety and depression have deteriorated leading to excessive use of the call button and the need for greater care and interaction by PMN staff with petitioner.

The grounds for an involuntary discharge are set out in RCH 5.3.a.i. The grounds at subsections i and ii are

interrelated. PMN was granted a variance for a certain level of care needs; these care needs now exceed the basis for the variance. In addition, the most recent assessment of petitioner during January 2012 indicates greater needs than PMN is able to meet.

The evidence supports the conclusion that the bases for an involuntary discharge have been met.

Petitioner, in his post-hearing brief, raises the question of an accommodation under the various federal and state statutes proscribing discrimination in housing and public accommodations as grounds for remaining at PMN. This issue was not raised at hearing nor is there any indication or evidence that petitioner has sought any such accommodation. This issue is not properly before the Board.

Accordingly, the Department's decision is affirmed. 3 V.S.A. § 3091(d), Fair Hearing Rule No. 1000.4D.

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