

STATE OF VERMONT

HUMAN SERVICES BOARD

In re) Fair Hearing No. B-01/16-65
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Appeal of)
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INTRODUCTION

Petitioner appeals the decision by the Department of Disabilities, Aging and Independent Living ("DAIL" or "Department") affirming the discontinuation of her services by a home health agency. Petitioner has been assisted by her mother during this appeal. The following is based on several telephone status conferences and a hearing held July 28, 2016.¹

FINDINGS OF FACT

1. Petitioner is 28 years old and eligible for Choices for Care ("CFC") services, which is a Medicaid-funded program. In connection with her eligibility, petitioner receives caregiver services in her home from the Visiting Nurse Association ("VNA"). She lives in an apartment (with her mother) that is part of a development housing other CFC beneficiaries living independently but receiving home

¹ A hearing scheduled for June 20, 2016 was continued over the Department's objection when petitioner failed to appear due to a transportation issue.

services, so that their CFC homecare hours can be pooled to provide 24-hour coverage. Thus, while petitioner receives homecare on a scheduled basis, there is always nursing services available on-site to provide care or support on an as-needed basis.

2. Petitioner ambulates using a wheelchair and has severely limited fine and gross motor skills, as well as respiratory problems. She has significant needs with respect to caring for herself. This includes the areas of bathing, dressing and personal grooming. Petitioner does not suffer from any cognitive impairments.

3. In October of 2015, the VNA made the determination to discontinue petitioner's services, effective November 11, 2015. A notice was issued to petitioner of the proposed discontinuation, on two grounds: "1) behavior that is a safety risk to agency staff such as verbal abuse, threatening behavior, [or] sexual harassment, 2) your needs cannot be adequately met in the home."

4. Petitioner appealed this decision to the DAIL Commissioner, as permitted under the rules regulating home health agencies. In a determination rendered December 17, 2015, the Commissioner's review concluded that "the actions of you [petitioner] and your mother in making repeated

unfounded allegations of maltreatment against your VNA caregivers, including claims of sexual assault, as well as occasional verbal abuse of VNA staff, are sufficient to justify discontinuation of services under the above standard."²

5. Petitioner appealed the Commissioner's decision to the Board, which is the present appeal.

6. At hearing, DAIL presented the testimony of VNA's vice-president of clinical services as well as the testimony of a nurse who had provided services to petitioner.

Petitioner and her mother presented testimony on her behalf.

7. The VNA's determination to discharge petitioner from care followed from a series of events, the first occurring in January of 2013. At the time, petitioner was receiving care from a male caregiver, and she alleged that he had sexually abused or assaulted her (the specifics of the allegation were not described at hearing), while providing care. This allegation generated investigations and related processes on several levels - a VNA internal review, APS (Adult Protective Services) investigation, criminal

²The referenced standard is that "[t]he patient, primary caregiver or other person in the home has exhibited behavior that is a safety risk to agency staff such as physical abuse, sexual harassment, threatening behavior or verbal abuse." *Vermont Regulations for the Designation and Operations of Home Health Agencies*, § 7.2(e).

investigation, and civil court temporary restraining order against the care provider.

8. Ultimately, petitioner's allegation was not substantiated or carried forward to prosecution on any of these levels.³ The caregiver left the employment of the VNA, of his own volition and despite the VNA's wish to retain him. Following this incident, the VNA implemented a requirement that petitioner's care always be provided with two workers - although she only needs one caregiver in most situations - so there would be a witness in case of additional allegations.

9. In February of 2015, petitioner was receiving VNA care and a worker accidentally rolled her onto a box of tissue paper while she was being moved on her bed. At the time, petitioner expressed that she had been injured. The VNA reviewed the matter and determined it did not rise to the level of an APS referral. Several days later, petitioner went to the emergency room due to pain she alleged was the result of being intentionally rolled on to the tissue box several times. No visible sign of injury was found at the emergency room. Petitioner alleged at the hospital that she had been violently pushed on to the tissue box by the nurse,

³ The caregiver did agree to not contact or come within a certain distance of petitioner, but the agreement specifically provided that there was no finding of abuse or assault.

as well as against the railings of her bed, and an APS investigation was initiated. Ultimately, the allegation was not substantiated. After the incident and the investigation, petitioner continued to tell workers and others that she had been assaulted. The nurse involved left the employment of the VNA, despite the VNA's desire to keep her as an employee.

10. In October of 2015, petitioner made another serious allegation against one of her caregivers, a male nurse who was present while another caregiver was assisting petitioner. The allegation was raised the day after it had allegedly occurred. Petitioner initially stated that the male nurse had "hands in his pants" and appeared to be fondling himself while standing nearby. The VNA began an investigation and interviewed both petitioner and her mother. Petitioner's mother stated that the nurse was staring at her (the mother's) buttocks and then made masturbatory motions with his hands in his pants, and that this went on for two to three minutes while she was present. In addition to her initial allegation, petitioner stated that the nurse had exposed his genitalia to her.

11. The nurse was interviewed and expressed distress and "shock" at the allegations, which he completely denied.

The other nurse was interviewed and denied seeing anything that petitioner and her mother alleged.

12. The allegations were wholly unsubstantiated by the VNA. A referral was made to APS, which declined to investigate. The male nurse remained with the VNA but does not enter petitioner's apartment. After this incident, petitioner has reportedly (a report that petitioner did not dispute) referred to this nurse as a "pervert" to other nurses.

13. In addition to the allegations described above, during the hearing petitioner recounted another allegation of sexual assault that she states occurred in December of 2015, overnight in her apartment. She suspects it was another VNA staff person but states she may have been drugged, it was dark, and could not clearly identify the alleged perpetrator. She reported the alleged incident to the police and went to the emergency room for an examination. According to petitioner and her mother, they were never informed of the results of the police investigation or hospital examination. There was no further evidence submitted regarding this alleged incident.

14. Over the period of time at issue, the VNA also asserts that petitioner and her mother have regularly made a

variety of less significant complaints as well as engaged in verbal derogation of staff (similar to that described above in paragraph 12 with respect to the male nurse).

15. Because VNA staff have experienced petitioner's mother becoming involved in her care while it is occurring, the VNA has also instructed caregivers to leave petitioner's apartment if her mother interferes or interjects herself into the caregiving, absent an emergency. The VNA has requested that any complaints about the quality of care be raised afterwards. Petitioner's mother has refused to do this, stating that she feels compelled to intervene when her daughter is receiving what she perceives as problematic care.

16. During the hearing, petitioner alleged that nurses have at times neglected her care needs - such as when she has an asthma attack - and are often poorly trained.

17. While there was no direct evidence of every single complaint about care raised by petitioner and/or her mother, the VNA's characterization of being subject to regular interference and complaints about care from petitioner's mother (primarily), as well as verbal derogation of staff, is determined credible and admissible.

18. While the VNA has other clients who might raise at any one time challenging issues such as unfounded complaints,

the credible evidence establishes that petitioner has engaged in a sustained pattern of making serious and unfounded allegations, that she has no cognitive or related challenges which might otherwise be mitigating or require an accommodation, and that these allegations have been the genesis of several investigations (although unsubstantiated) with potentially drastic consequences for those involved.

19. The VNA nurse who testified provided care to petitioner for approximately a year. She was not one of the nurses accused of a serious allegation of abuse or mistreatment. She credibly testified to a high level of stress providing care to petitioner, not knowing whether or when a serious allegation would be made that could jeopardize her license, career and livelihood, as well as generating potential criminal allegations. In providing routine care, nurses felt subject to intense scrutiny in ensuring every detail was attended to, as any mistake, however small, could be magnified.

20. Petitioner and her mother disagree with the determinations that failed to substantiate the above-described serious allegations (while not disputing that these determinations were made), and continue to maintain that petitioner has been subject to sexual and physical abuse and

assaults. Alternatively, neither party raises any prior history of abuse, or any medical reason, as to why petitioner may have made these allegations.

21. During the time period at issue, VNA management has fielded ongoing complaints from staff about these circumstances, to the point that staff were threatening to "strike" from continuing to provide care to petitioner. Staff have expressed concern about losing their job and licenses, as well as facing unfounded criminal investigations. The VNA has made referrals to their Employee Assistance Program so staff could receive advice and counsel regarding the circumstances.

22. It is specifically found that petitioner's conduct (including that of her mother, which conduct petitioner has supported), places significant strain and stress on staff, is an employment and personal risk to staff and the VNA's retention of staff, and risks the effective provision of care to petitioner as well as other clients.

23. To the extent it is at issue, the numerous investigations which have failed to substantiate the above allegations are accepted as a credible basis for the VNA's determination that petitioner has a pattern of making

unfounded and serious allegations, leading to their decision to discharge her from care.

24. The VNA has offered to continue providing care to petitioner if her mother were to step out of the apartment while care is being provided. Petitioner has declined this offer. The VNA also indicates that if their discharge is affirmed it will continue working to identify another service provider or plan, to the extent possible, as an element of their obligation to provide transition planning. For their part, petitioner and her mother are exploring alternative living arrangements, which thus far have been unsuccessful.

ORDER

DAIL's decision upholding the VNA's discharge of petitioner is affirmed.

REASONS

Appeals from a reduction or termination of home health agency services are governed by specific regulations pertaining to such services. *See Vermont Regulations for the Designation and Operation of Home Health Agencies*, promulgated pursuant to 33 V.S.A. Chapter 63, Subchapter 1A, and 18 V.S.A. Chapter 221 (effective July 1, 2007). Under these rules, a home health agency may discharge a client,

subject to appeal and review by DAIL, a decision in turn that is subject to appeal to the Board. Review of the Department's determination is de novo. The Department has the burden of proof at hearing if terminating or reducing existing services; otherwise the petitioner bears the burden. See Fair Hearing Rule 1000.3.0.4.

The only basis for discharge at issue is where "[t]he patient, primary caregiver or other person in the home has exhibited behavior that is a safety risk to agency staff such as physical abuse, sexual harassment, threatening behavior or verbal abuse." *Vermont Regulations for the Designation and Operation of Home Health Agencies*, § 7.2(e).⁴ DAIL and the VNA view petitioner's conduct as a form of threatening behavior and sexual harassment, as well as verbal abuse. The evidence clearly establishes that VNA staff involved in petitioner's care are under considerable and disproportionate stress, due to the risk of unfounded allegations leading to various investigations, which also jeopardizes the VNA's overall retention of adequate staffing (above and beyond the

⁴ As DAIL's review decision did not address the VNA's second assertion, that petitioner's "needs cannot be adequately met in the home," that issue will not be addressed here, nor - based on the outcome - does it need to be addressed.

additional pull on resources resulting from - otherwise unnecessary - double-staffing of petitioner).

DAIL is entitled to a degree of deference in interpreting its own regulations. The above regulation equates behavior such as threatening behavior, sexual harassment, and verbal abuse with a potential "safety risk." While neither the VNA nor DAIL asserts that caregiving staff or petitioner have been placed at any pressing risk to their physical safety, it is reasonable to conclude that petitioner's repeated, serious and unfounded allegations pose a risk to individual staff as well as the VNA's staffing in general, have had a detrimental effect on health of staff, and can reasonably be construed - under these facts - as a safety risk to caregivers and petitioner alike.

As such, DAIL's decision is consistent with the applicable rules and must be affirmed by the Board. See 33 V.S.A. § 3091(d); Fair Hearing Rule No. 1000.4D.

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