



State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
416 Adams St., Suite 307
Fairmont, WV 26554

Earl Ray Tomblin
Governor

Karen L. Bowling
Cabinet Secretary

October 27, 2015



RE: [REDACTED] v. [REDACTED]
ACTION NO.: 15-BOR-2067

Dear Mr. [REDACTED]:

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Thomas E. Arnett
State Hearing Officer
Member, State Board of Review

Encl: Resident's Recourse to Hearing Decision
Form IG-BR-29

cc: [REDACTED], Administrator, [REDACTED]
[REDACTED]

**WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW**

██████████,

Resident,

v.

Action Number: 15-BOR-2067

██████████ (Formerly ██████████),

Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████. This hearing was held in accordance with the provisions found in Chapter 700 of the West Virginia Department of Health and Human Resources' Common Chapters Manual. This fair hearing was convened on October 22, 2015, on an appeal filed September 17, 2015.

The matter before the Hearing Officer arises from the September 11, 2015 decision by the Facility to propose involuntary discharge of the Resident.

At the hearing, the Facility appeared by ██████████, Licensed Social Worker, ██████████. Appearing as witnesses for the Facility were ██████████, Administrator, ██████████, and ██████████, Licensed Social Worker, ██████████. The Resident appeared in person, and by his daughter/representative, ██████████. All witnesses were sworn and the following documents were admitted into evidence.

Facility's Exhibits:

- F-1 Physician's Determination(s) of Capacity – dated 6/17/15 & 6/20/14
- F-2 Notice of Discharge – dated 9/11/15
- F-3 Incident Report – Patient Involved – dated 9/10/15
- F-4 Incident Report – Patient Involved – dated 9/10/15
- F-5 Code of Federal Regulations 42 CFR §483.13(b)
- F-6 Code of Federal Regulations 42 CFR §483.10
- F-7 Code of Federal Regulations 42 CFR §§483.10(o) & 483.12
- F-8 Code of State Regulations 64CSR13
- F-9 W Va. State Code §§61-8B-1(6) & 61-B-2
- F-10 W Va. State Code §§61-8B-7 & 61-8B-8
- F-11 Initial Psychiatric Evaluation dated 6/5/13; Psychiatric Medication Management Progress Note dated 3/1/14; Behavioral Health Communication Form (3/28/14 thru 4/1/14); Psychiatric Medication Management Progress Note dated 12/9/14; and Behavioral Healthcare Communication Form (12/5 – 12/9)

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

FINDINGS OF FACT

- 1) [REDACTED] (Facility), notified the Resident (verbally and in writing) of its intent to initiate involuntary transfer/discharge proceedings on September 11, 2015 (F-2). The notice advised the Resident that involuntary discharge from the facility was necessary because the safety of other individuals is endangered. The notice indicates – “The Interdisciplinary Team has met in regards to the events which occurred on 9/10/15 in regards to the unsolicited touching of other residents. As this is a re-occurring event, for the safety of the remaining residents you will not be eligible to continue your residency at [REDACTED].”
- 2) Evidence proffered by Facility reveals that the Resident has a history of touching female staff and residents inappropriately (F-11), and following two documented incidents that occurred on September 10, 2015 (F-3 and F-4), the determination was made by Facility that it could no longer protect the safety of its female residents. Documentation included in Exhibit F-3 reveals that Resident was observed with his hand under a confused residents shawl touching her breast, and in Exhibit F-4, it is documented that staff was required to intervene and redirect the Resident when he was observed reaching toward the breasts of another female resident. Pursuant to the Code of Federal Regulations and West Virginia State Code, the Resident’s actions constitute sexual contact/sexual abuse.
- 3) The Resident, who has been determined to have capacity (F-1) in accordance with the Code of State Regulations (F-8), denied that he had touched anyone inappropriately.

APPLICABLE POLICY

Pursuant to the West Virginia Code of State Regulations, found at §64-13-2, a person who is able to comprehend and retain information which is material to a decision, especially as to the likely consequences; the person is able to use the information and weigh it in the balance as part of the process of arriving at a decision and is able to communicate the decision in an unambiguous manner, has capacity to make decisions.

The Code of Federal Regulations 42 CFR §483.13(b) and (c) indicates that sexual abuse includes, but is not limited to, sexual harassment, sexual coercion, or sexual assault.

West Virginia Code §61-8B-1(6) indicates that “sexual contact” means any intentional touching, either directly or through clothing, of the breasts, buttocks, anus or any part of the sex organs of another person, or intentional touching of any part of another person’s body by the actor’s sex organs, where the victim is not married to the actor and the touching is done for the purpose of gratifying the sexual desire of either party.

West Virginia Code §61-8B-2(a) provides that whether or not specifically stated, it is an element of every offense defined in this article that the sexual act was committed without the consent of the victim when the victim has incapacity to consent - mental incapacity or physically helpless.

Sexual abuse in the second degree is defined in West Virginia State Code §61-8B-8(a) and provides that a person is guilty of sexual abuse in the second degree when such person subjects another person to sexual contact who is mentally defective or mentally incapacitated.

Medicaid regulations, found in the West Virginia Bureau for Medical Services Provider Manual at §514.9.2, Code of State Regulations 64CSR13, and the Code of Federal Regulations (42 CFR §483.12), provide that transfer and discharge of an individual includes movement of a resident to a bed outside of the Medicaid-certified portion of the facility, whether that bed is in the same physical plant. Transfer and discharge does not refer to movement of a resident to a bed within the Medicaid-certified portion of the facility.

The administrator or designee must permit each resident to remain in the facility, and not be transferred or discharged from the facility unless one of the following conditions is met:

- The transfer or discharge is necessary for the resident’s welfare when the needs of the resident cannot be met in the facility; or
- The transfer or discharge is appropriate because the health of the resident has improved sufficiently that the individual no longer meets the medical criteria for nursing facility services; or
- The safety of individuals in the facility is endangered; or
- The health of individuals in the nursing facility would otherwise be endangered; or
- The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicaid) a stay at the nursing facility, including but not limited to, the amount of money determined by the financial eligibility evaluation as co-payment for the provision of nursing facility services; or
- The facility ceases to operate; or

- The resident is identified by the State and/or Federal certification agency to be in immediate and serious danger.

Documentation must be recorded in the resident's medical record by a physician of the specific reason requiring the transfer or discharge. Discharge documentation is required regardless of the reason for discharge.

Before the nursing facility transfers or discharges a resident, the administrator or designee must notify the resident and/or the responsible party verbally and in writing, in a language that is understandable to the parties, of the intent and reason for transfer or discharge. The same information must be recorded in the resident's medical record and a copy of this written notice must be sent to the State Long-Term Care Ombudsman or his/her designee. Except in the case of immediate danger to the resident and/or others as documented, the notice of transfer or discharge must be provided at least 30 days prior to the anticipated move to ensure a safe and orderly discharge to a setting appropriate to the individual's needs.

Waiver of this 30-day requirement may be appropriate if the safety of individuals in the facility would be endangered, the immediate transfer is required by the resident's urgent medical needs, or a resident has not resided in the nursing facility for 30 days.

The written notice must include the following:

- The effective date of the transfer or discharge;
- Reason for the discharge;
- The location or person(s) to whom the resident is transferred or discharged;
- A statement that the resident has the right to appeal the action to the State Board of Review, during this time of appeal, the resident/member may choose to stay in the facility;
- The name, address and telephone number of the State long term care ombudsman;
- The mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled and mentally ill individuals.

West Virginia Department of Health and Human Resources, Common Chapters Manual §710.20 directs that the Hearing Officer shall weigh the evidence and testimony presented and render a decision based solely on proper evidence given at the hearing. In rendering a decision, the Hearing Officer shall consider all applicable policies of the Department, state and federal statutes, rules or regulations, and court orders. The decision shall include reference to all pertinent law or policy.

DISCUSSION

The regulations that govern the Medicaid Long-Term Care Program provide that a nursing facility can involuntarily transfer/discharge a resident if the safety of individuals in the facility is endangered. Evidence submitted at the hearing demonstrates that Resident has capacity, and that he has a documented history of engaging in sexual contact/sexual abuse by touching female staff and residents inappropriately. The most recent documented episodes include a report wherein the Resident was observed with his hand under a confused female resident's shawl touching her breast. In accordance with State and Federal regulatory guidelines, these documented incidents constitute sexual contact/sexual abuse. Whereas the Facility, by law, is required to protect the safety of all residents, its decision to initiate involuntary transfer/discharge proceedings against the Resident is affirmed.

CONCLUSION OF LAW

Facility's action to initiate discharge/transfer proceedings against the Resident based on his documented history, as well as recent episodes of sexual contact/sexual abuse of incapacitated female residents, is supported by the regulations. Resident's behaviors clearly jeopardize the safety of Facility's female residents.

DECISION

It is the decision of the State Hearing Officer to UPHOLD the Facility's proposal to discharge the Resident.

ENTERED this _____ Day of October 2015.

**Thomas E. Arnett
State Hearing Officer**