



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
OFFICE OF INSPECTOR GENERAL

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
Berkeley County DHHR
PO Box 1247
Martinsburg, WV 25402

Jolynn Marra
Interim Inspector General

March 3, 2020

[REDACTED]

RE: [REDACTED], A PROTECTED INDIVIDUAL v. [REDACTED]
ACTION NO.: 20-BOR-1052

Dear [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,

Lori Woodward
State Hearing Officer
Member, State Board of Review

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

cc: [REDACTED], Administrator, [REDACTED]

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

IN RE: [REDACTED], A PROTECTED INDIVIDUAL,

Resident,

v.

Action Number: 20-BOR-1052

[REDACTED],

Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [REDACTED], A PROTECTED INDIVIDUAL. 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 February 6, 2020, on an appeal filed January 13, 2020.

The matter before the Hearing Officer arises from the January 3, 2020 proposed involuntary discharge of the Resident and subsequent transfer for acute care treatment on January 8, 2020.

At the hearing, the Facility appeared by [REDACTED], Administrator. Appearing as witnesses for the Facility were [REDACTED], Director of Nursing, [REDACTED], LSW, and [REDACTED], Assistant Director of the Skilled Nursing Unit. The Resident [REDACTED] appeared by her daughter, [REDACTED]. All witnesses were sworn, and the following documents were admitted into evidence.

Facility's Exhibits:

None*

*Upon agreement of the parties, this hearing was held open for five days to allow submission of exhibits. No exhibits were submitted.

Resident's Exhibits:

None

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) On December 4, 2019, Resident [REDACTED] was admitted to the Facility for short term rehabilitative care.
- 2) Resident [REDACTED] has a diagnosis of dementia.
- 3) On the night of admission to the Facility, Resident [REDACTED] exhibited issues of wandering, aggressive behavior, and self-endangerment requiring one-on-one care.
- 4) Because the Facility was unable to provide the care necessary to ensure the Resident's welfare, the Facility's staff and [REDACTED] (the Resident's daughter and medical attorney-in-fact) had several discussions regarding facilities with lock-down units suitable for the level of care the Resident required.
- 5) On January 3, 2020, the Facility issued a transfer/discharge notice citing it could not meet the needs of Resident [REDACTED] for her continued welfare. The transfer/discharge notice indicated the location of discharge as SNF (Skilled Nursing Facility) effective 30 days from January 3, 2020. This notice was signed by Ms. [REDACTED] and [REDACTED].
- 6) On January 8, 2020, Ms. [REDACTED] noted Resident [REDACTED] had facial drooping with other signs of having a medical emergency which prompted the Facility's physician to order Resident [REDACTED] be transferred to [REDACTED] ([REDACTED]) for acute care treatment.
- 7) As of the date of the hearing, Resident [REDACTED] remains at the [REDACTED].
- 8) A fair hearing request was filed on January 13, 2020, contesting the proposed involuntary discharge of Resident [REDACTED] from the Facility.
- 9) Jurisdiction of the Board of Review to hear this matter was established due to questions of fact to be deduced from the transfer/discharge of Resident [REDACTED] to [REDACTED].
- 10) Ms. [REDACTED] expected Resident [REDACTED] would return to the Facility after her acute care treatment at [REDACTED].
- 11) Because the Facility determined that Resident [REDACTED] could not return to the Facility, involuntary transfer/discharge statutory requirements must be followed.
- 12) The Facility provided no exhibits or testimony showing it followed statutory documentation requirements in Resident [REDACTED] medical records for her proposed involuntary transfer/discharge.

APPLICABLE POLICY

Code of Federal Regulation Title 42 §483.15, in pertinent part, mandates the nursing facility administrator or designee to 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:

(c) *Transfer and discharge*

(1) *Facility requirements*

(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless-

(A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(ii) The facility may not transfer or discharge the resident while the appeal is pending, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(2) *Documentation.* When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by-

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the resident's discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) *Notice before transfer.* Before a facility transfers or discharges a resident, the facility must -

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The

facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) *Timing of the notice.*

(i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when -

(A) The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or

(E) A resident has not resided in the facility for 30 days.

(5) *Contents of the notice.* The written notice specified in paragraph (c)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

(e)(1) *Permitting residents to return to the facility.* A facility must establish and follow a written policy on permitting residents to return to the facility after they are hospitalized or placed on therapeutic leave. The policy must provide for the following.

(i) A resident, whose hospitalization or therapeutic leave exceeds the bed-hold period under the State plan, returns to the facility to their previous room if available or immediately upon the first availability of a bed in a semi-private room if the resident

(A) Requires the services provided by the facility; and

(B) Is eligible for Medicare skilled nursing facility services or Medicaid nursing facility services.

(ii) If the facility that determines that a resident who was transferred with an expectation of returning to the facility cannot return to the facility, the facility must comply with the requirements of paragraph (c) as they apply to discharges.

DISCUSSION

Federal regulations allow a facility to involuntarily discharge an individual if the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility. The Facility must show by a preponderance of evidence that it followed all statutory regulations in its proposed transfer/discharge of Resident [REDACTED]

On January 3, 2020, the Facility issued a 30-Day discharge notice stating the reason as “necessary for the resident’s welfare and the resident’s needs cannot be met in the center.” However, on January 8, 2020 (prior to the expiration of the 30 days), the Resident was transferred to the [REDACTED] for acute care treatment. On January 13, 2020, [REDACTED] requested a fair hearing on the January 3, 2020 proposed discharge.

Because the Resident is no longer in the Facility, there was a question as to whether the Hearing Officer had jurisdiction to issue a decision in the matter. Because there were questions of fact to be determined regarding the discharge, jurisdiction was established.

The Facility did not show by a preponderance of evidence that Ms. [REDACTED] signed a waiver of bed-hold or voluntary transfer. The Facility contended that because Ms. [REDACTED] had signed this paperwork on January 8, 2020 when Resident [REDACTED] was transferred to [REDACTED], she had no reasonable expectation for returning Resident [REDACTED] to the Facility. Although the testimony provided by the Facility’s witnesses was credible, the exact content of what was signed needed to be produced for examination as the content was contested by Ms. [REDACTED]. The parties agreed to allow the hearing to be held open for five days to allow submission of these documents to the Hearing Officer. However, no paperwork was received by the Hearing Officer after the expiration of the five days. As the January 8, 2020 disputed paperwork was not produced, the Facility failed to show that Ms. [REDACTED] had no expectation of returning Resident [REDACTED] to the Facility after her acute care treatment.

Statutory regulations mandate that if a facility determines that a resident cannot return after being transferred with an expectation of returning to the facility, it must comply with involuntary transfer/discharge requirements. The Facility did not establish that Resident [REDACTED] had no expectation of returning to the Facility after her transfer for acute care treatment at [REDACTED]. As the Facility had issued a proposed transfer/discharge notice on January 3, 2020, it must show that it complied with the statutory requirements for the transfer/discharge. Specifically, statutory regulations require documentation in a resident’s medical record regarding the reason for

discharge/transfer. Because no documents were introduced or testimony provided at the hearing to show that the Facility met these statutory requirements, it did not meet its burden of proof.

The Facility did not show by a preponderance of evidence that it followed statutory requirements for the involuntary transfer/discharge of Resident [REDACTED]

CONCLUSIONS OF LAW

- 1) A facility is permitted by state and federal regulations to initiate involuntary transfer/discharge proceedings against a resident if the transfer/discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility.
- 2) A facility must follow all of the statutory notice and documentation requirements prior to the involuntary transfer/discharge of a resident.
- 3) The Facility failed to establish that it complied with the documentation requirement in the proposed transfer of Resident [REDACTED]

DECISION

For the reasons heretofore stated, the Facility's decision to transfer/discharge Resident [REDACTED] cannot be affirmed.

ENTERED this 3rd day of March 2020.

Lori Woodward, State Hearing Officer