



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

**Bill J. Crouch  
Cabinet Secretary**

**BOARD OF REVIEW  
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Charleston, West Virginia 25313  
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**Jolynn Marra  
Interim Inspector General**

December 14, 2018

[REDACTED]

RE: [REDACTED] v. [REDACTED]  
ACTION NO.:18-BOR-2433

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,

Danielle C. Jarrett  
State Hearing Officer  
Member, State Board of Review

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

cc: [REDACTED], Executive Director, [REDACTED]

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

████████████████████,

**Resident,**

v.

**Action Number: 18-BOR-2433**

██,

**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' (DHHR) Common Chapters Manual. This fair hearing was convened on December 3, 2018, on an appeal filed September 26, 2018.

The matter before the Hearing Officer arises from the September 24, 2018 determination by the Facility to discharge the Resident from ██████████.

At the hearing, the Facility appeared by ██████████, Executive Director, and ██████████, Assistant Director of Nursing. The Appellant appeared *pro se*. All witnesses were sworn and the following documents were admitted into evidence.

**Facility's Exhibits:**

- F-1      Activities of Daily Living (ADL) Record, dated September 1, 2018 through October 31, 2018
- F-2      ██████████ Progress Notes, dated September 1, 2018 through November 6, 2018
- F-3      Two (2) printed photo copied pictures
- F-4      Physical Therapy (PT) Treatment Encounter Notes (TEN), dated September 4, 2018 through October 18, 2018; PT Progress Report, dated October 1, 2018 through October 14, 2018; PT Discharge Summary, dated September 4, 2018 through October 25, 2018; PT Recertification/Monthly Summary, dated October 1, 2018 through October 30, 2018; PT Supplemental Findings, dated October 4, 2018; and PT Initial Evaluation, dated September 4, 2018
- F-5      ██████████, Report of Consultation, dated September 24, 2018
- F-6      Occupational Therapy (OT) Recertification/Monthly Summary, dated October 3, 2018 through November 1, 2018; OT Progress report, dated September 3, 2018

through September 16, 2018; OT Progress Report, dated September 17, 2018 through September 28, 2018; OT Progress Report, dated October 3, 2018 through October 16, 2018; OT Discharge Summary, dated September 3, 2018 through October 19, 2018; OT TEN Notes, dated October 1, 2018 through October 19, 2018

**Resident's Exhibits:**

A-1            Application for Involuntary Custody for Mental Health Examination, dated October 25, 2018

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) Resident [REDACTED] has been a resident of [REDACTED] of [REDACTED] West Virginia (Facility) since September 1, 2018. (Exhibit F-2)
- 2) On September 21, 2018, the Facility verbally gave notice to Resident [REDACTED] of its intent to discharge him effective September 27, 2018.
- 3) On September 24, 2018, the Facility issued a written notice to Resident [REDACTED] of its intent to discharge him on September 27, 2018. This notice provided several reasons for discharge: Resident [REDACTED] health was improving; the discharge was necessary for Resident [REDACTED] welfare and that his needs could not be met by the Facility; and the safety of other individuals in the Facility is endangered.
- 4) Resident [REDACTED] discharge notice did not provide a 30-day notice because the Appellant had resided in the facility for less than 30 days.
- 5) Resident [REDACTED] Activities of Daily Living (ADL) records from September and October 2018 indicate that he is independent and does not need staff help or staff oversight at any time. (Exhibit F-1)
- 6) Resident [REDACTED] is wheelchair-bound, however is independent with bed mobility, transferring, eating, toilet use, locomotion, dressing, personal hygiene, bathing, or bowel movements. (Exhibit F-1)
- 7) On September 24, 2018, Dr. [REDACTED], with [REDACTED], indicated that Resident [REDACTED] can be discharged to a homeless shelter, he is not appropriate for the facility, and that he is a danger to other residents. (Exhibit F-5)
- 8) On October 19, 2018, the Facility transferred Resident [REDACTED] to [REDACTED] for a mental health examination due to a reported suicidal comment made by the Resident. (Exhibit A-1)

- 9) Mental evaluation findings indicated that Resident [REDACTED] is not mentally ill, and he is not likely to cause harm to himself or others. (Exhibit A-1)
- 10) Resident [REDACTED] health has improved, and he no longer requires the level of skilled care and services provided by the Facility.

### **APPLICABLE POLICY**

#### **Code of Federal Regulations 42CFR § 483.10(c)(6) provides in part:**

The Resident has the right to be informed of and participate in his treatment including the right to request, refuse, and/or discontinue treatment, and to formulate an advance directive.

#### **Code of Federal Regulations 42CFR § 483.10(f)(1) provides in part:**

The Resident has the right to choose activities, schedules (including sleeping and waking times), assessments, plan of care, and other applicable provisions.

#### **Code of Federal Regulations 42CFR § 473.12(a)(6)(iii) provides in part:**

The written notice must include the location to which the resident is discharged.

#### **Code of Federal Regulations 42CFR § 483.15(c)(1)(i)(A) provides in part:**

The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility.

#### **Code of Federal Regulations 42CFR § 483.15(c)(1)(i)(B) provides in part:**

The transfer or discharge is appropriate because the resident's health has improved sufficiently and no longer needs services provided by the Facility.

#### **Code of Federal Regulations 42CFR § 483.15 (c)(1)(i)(C) provides in part:**

The safety of individuals in the facility are endangered.

#### **Code of Federal Regulations 42CFR § 483.15(F)(ii)(D) provides in part:**

The Facility may not transfer or discharge the resident while the appeal is pending, unless the failure to discharge or transfer would endanger the health or safety of the Resident or other individuals.

**Code of Federal Regulations 42CFR § 483.15(4)(e) provides in part:**

The notice of transfer or discharge shall be made by the nursing home at least thirty (30) days before the resident is discharged or transferred, **except the notice shall be made as soon as practicable before the transfer or discharge** when the safety of persons in the nursing home would be endangered, the health of persons in the nursing home would be endangered, health improves, **or the resident has been at the facility less than 30 days.**

**DISCUSSION**

On September 24, 2018, the Facility issued a written notice of its intention to discharge Resident [REDACTED]. The notice stated several reasons for the discharge: Resident [REDACTED] health was improving; the discharge was necessary for Resident [REDACTED] welfare and that his needs could not be met by the Facility; and the safety of other individuals in the Facility is endangered. The notice also gave a discharge date of September 27, 2018. Resident [REDACTED] does not contest that the notice was insufficient. He proffers that the notice of discharge was insufficient based upon his being discharged to a homeless shelter where he believes his needs cannot be met.

The Facility must prove by a preponderance of evidence that it properly followed regulations in Resident [REDACTED] proposed discharge. The Facility had to demonstrate that Resident [REDACTED] health had improved so that he no longer required the services of the Facility and that the notice of discharge correctly followed statutory guidelines.

*Eligibility for Discharge:*

The Facility's witness, [REDACTED], testified that the Resident [REDACTED] did not require assistance from staff to perform ADLs. Ms. [REDACTED] stated that Resident [REDACTED] is in a wheelchair but is independent with bed mobility, transferring, eating, toilet use, locomotion, dressing, personal hygiene, bathing, and bowel movements. Additionally, the Facility submitted documentation corroborating Ms. [REDACTED] testimony that Resident [REDACTED] could independently perform his ADL's.

Dr. [REDACTED] noted in his report of consultation that Resident [REDACTED] is not appropriate for the Facility. Dr. [REDACTED] stated that Resident [REDACTED] is a danger to dementia residents and their privacy is being violated. Dr. [REDACTED] stated that Resident [REDACTED] can be discharged to a homeless shelter because he doesn't need facility services. The Facility's progress notes regarding Resident [REDACTED] were submitted into evidence which corroborate Dr. [REDACTED] evaluation. Resident [REDACTED] testified that Dr. [REDACTED] consultation was a "hit job" connected with the Facility trying to get him discharged.

Although the notice included several other reasons for discharge, they were not considered in the decision because the Facility showed by a preponderance of evidence that Resident [REDACTED] health had improved. Policy does not require more than one reason be indicated to properly discharge a resident.

*Notice:*

The evidence showed that a discharge location (the [REDACTED]) was included in the notice of discharge. However, the testimony by Mr. [REDACTED] indicated that the [REDACTED] no longer will allow Resident [REDACTED] into their facility. The evidence did show there were multiple attempts to find an alternative discharge location in various shelters in several counties, however, either the contacted shelters/facilities would not allow Resident [REDACTED] to return or there were no available spaces. Mr. [REDACTED] testified that it was finally determined that Resident [REDACTED] would be discharged to the [REDACTED] in [REDACTED] West Virginia.

Resident [REDACTED] contended that because he is wheelchair-bound, a homeless shelter would not be appropriate due to the treatments required for his medical conditions and that he would have to travel to another location for his daily meals. Mr. [REDACTED] stated that the [REDACTED] indicated that they would accommodate Resident [REDACTED] and that medical services would be provided.

The Facility showed by a preponderance of evidence that it followed regulations in the proposed discharge of Resident [REDACTED]. The evidence and testimony showed: 1) Resident [REDACTED] health had improved sufficiently so that he no longer required the services provided by the Facility; 2) the Facility located a suitable discharge location for Resident [REDACTED] and, 3) because policy does not require a 30-day prior notice of discharge of a resident who has been at a facility for less than 30 days, the Facility correctly determined Resident [REDACTED] discharge date.

**CONCLUSIONS OF LAW**

- 1) The Facility may discharge the Resident when the Resident's health has improved sufficiently so that the Resident no longer needs the services provided by the Facility.
- 2) Credible evidence was entered to corroborate that the Resident independently performed ADLs and that his health had improved sufficiently so that he no longer required the services provided by the Facility.
- 3) The Facility proved that the Resident was eligible for discharge, September 27, 2018, prior to a 30-day notice of discharge.

**DECISION**

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

**ENTERED this \_\_\_\_ day of 2018.**

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**Danielle C. Jarrett**  
**State Hearing Officer**