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

Bill J. Crouch
Cabinet Secretary

BOARD OF REVIEW
Raleigh County DHHR
407 Neville Street
Beckley, WV 25801

Jolynn Marra
Inspector General

October 12, 2022

[redacted]

RE: [redacted]
ACTION NO.: 22-BOR-2161

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,

Kristi Logan
Certified State Hearing Officer
Member, State Board of Review

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

cc: [redacted]

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES
BOARD OF REVIEW

[redacted],

Resident,

v. **Action Number: 22-BOR-2161**

[redacted],

Facility.

DECISION OF STATE HEARING OFFICER

INTRODUCTION

This is the decision of the State Hearing Officer resulting from a fair hearing for [redacted]. 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 11, 2022, on an appeal filed September 21, 2022.

The matter before the Hearing Officer arises from the August 25, 2022, decision by the Facility to initiate the involuntary discharge of the Resident from [redacted].

At the hearing, the Facility appeared by [redacted], Administrator. Appearing as witnesses for the Facility were [redacted], Social Worker and [redacted], RN, Director of Nursing. The Resident appeared by her aunt and medical attorney-in-fact, [redacted]. The witnesses were sworn, and the following documents were admitted into evidence.

Facility's Exhibits:

F-1 Medical Records from [redacted] dated December 23, 2017, March 24, 2022 and July 14, 2022
F-2 Care Plan updated September 15, 2022
F-3 Progress Notes from October 2018 – September 2022
F-4 Medical Records from [redacted] dated February 8, 2022
F-5 30-Day Notice of Discharge dated August 25, 2022

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) The Resident was admitted to [redacted] (Facility) on April 5, 2017.

2) The Resident began exhibiting sexual behaviors and inappropriate touching of other residents in the Facility around November 2021 (Exhibit F-3).

3) Facility staff would redirect the Resident after these incidents and moved her to a private room (Exhibit F-3).

4) On August 25, 2022, the Facility issued a 30-Day Notice of Discharge to the Resident's representative advising that she would be discharge to another skilled nursing facility that had yet to be determined due to welfare of other residents (Exhibit F-5).

APPLICABLE POLICY

Code of Federal Regulation Title 42 §483.15 provide that the nursing facility 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:

(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;
- (B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
- (C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
- (D) The health of individuals in the facility would otherwise be endangered;
- (E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or

her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

- (F) The facility ceases to operate.

(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.

(6) Changes to the notice. If the information in the notice changes prior to effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.

(7) Orientation for transfer or discharge. A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.

(8) Notice in advance of facility closure. In the case of facility closure, the individual who is the administrator of the facility must provide written notification prior to the impending closure to the State Survey Agency, the Office of the State Long-Term Care Ombudsman, residents of the facility, and the resident representatives, as well as the plan for the transfer and adequate relocation of the residents.

(9) Room changes in a composite distinct part. Room changes in a facility that is a composite distinct part (as defined in § 483.5) are subject to the requirements of § 483.10(e)(7) and must be limited to moves within the particular building in which the resident resides, unless the resident voluntarily agrees to move to another of the composite distinct part's locations.

DISCUSSION

Federal regulations permit the involuntary discharge of a nursing home resident if the safety of other individuals in the facility is endangered due to the clinical or behavioral status of the resident. The Facility initiated discharge proceedings against the Resident due to inappropriate touching of other residents.

[redacted], administrator of [redacted], testified that the decision to discharge the Resident was due to her inappropriate and unwanted touching of other residents. While [redacted] noted that these behaviors have occurred in the past, another resident expressed being fearful of the Resident as result of an incident in August 2022. [redacted] contended that staff have redirected the Resident from these behaviors, have performed 15-minutes checks on the Resident and have moved her to a private room to prevent these behaviors. [redacted] stated the Facility could no longer accommodate the Resident and ensure the safety of the other residents.

The Resident's representative, [redacted], noted that the 30-Day Discharge Notice did not include a location of where the Resident would be discharged and included the incorrect name and date of discharge. [redacted] testified that moving the Resident to another Facility would be detrimental to the Resident as her father and brother live nearby and visit her often.

The documentation provided noted the Facility's attempts to curb the Resident's behaviors by redirecting her when she exhibited undesirable behaviors, changes to her medications and transferring the Resident to a private room. However, federal regulations stipulate that when a discharge is sought when the welfare and safety of other residents is endangered due to the clinical and behavioral status of the Resident, the medical record must include documentation from a physician that the discharge is necessary. The documentation provided from a physician was a progress note made by [redacted] on March 24, 2022, during a routine visit stating "she does

demonstrate inappropriate sexual behaviors at times. The best option is to allow her to develop relationships with people however try to avoid inappropriate touching and monitor that situation on an ongoing basis". Another progress note from visit with [redacted] on July 14, 2022, indicated that "Sexual and inappropriate behavior seems less lately but continues at times per staff". No further documentation was made by a physician regarding the Resident's behaviors or that her discharge was necessary to ensure the welfare and safety of other residents.

Whereas the Resident's medical records failed to provide sufficient physician documentation of the need to discharge the Resident due to the safety of others, the Facility failed to adhere to federal regulations in the involuntary discharge of the Resident.

CONCLUSIONS OF LAW

1) Federal regulations permit the involuntary discharge of a nursing home resident if the discharge is necessary because safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident.

2) The medical record must include documentation from a physician that the discharge is necessary.

3) The Facility failed to provide sufficient physician documentation of the need to discharge the Resident due to the safety of others.

4) The Facility improperly initiated discharge proceedings for the Resident.

DECISION

It is the decision of the State Hearing Officer to **reverse** the decision of Fayette Nursing and Rehabilitation Center to involuntary discharge the Resident.

ENTERED this 12th day of October 2022.

_____

Kristi Logan
Certified State Hearing Officer