

**STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
FOR THE DEPARTMENT OF COMMUNITY HEALTH**

P.O. Box 30763, Lansing, MI 48909
(517) 335-2484; Fax: (517) 373-4147

IN THE MATTER OF:

Docket No. 2013-30449 IVT

██████████,

Petitioner,

v.

Cambridge East Healthcare Center,

Respondent.

_____ /

DECISION AND ORDER

This matter is before the undersigned Administrative Law Judge (ALJ) pursuant to MCL 333.21773 and MCL 333.21774 upon the Petitioner's request for a hearing.

After due notice, a hearing was held March 8, 2013. Appellant appeared and testified on his own behalf. Colette Lewis, Administrator, appeared and testified on behalf of the Respondent. Social workers Ashley Palarski and Barbara Kemp also testified as witnesses for Respondent.

ISSUE

Did the Respondent properly propose the Involuntary Transfer or Discharge of the Petitioner?

FINDINGS OF FACT

The Administrative Law Judge, based upon the competent, material, and substantial evidence on the whole record, finds as material fact:

1. Petitioner is a resident of Respondent nursing facility and has lived there since at least April of 2010. (Undisputed testimony during hearing).
2. Since his admission, the Petitioner has had several incidents of verbal or physical altercations with other residents. Petitioner has switched rooms and been spoken to about his behaviors, but the behaviors have continued.

(Exhibit 2; Testimony of Lewis; Testimony of Palarski; Testimony of Kemp).

3. On February 12, 2013, Respondent nursing facility delivered a Notice of Involuntary Transfer or Discharge to Petitioner outlining Petitioner's verbally and physically abusive behavior as the reason for the involuntary transfer or discharge.
4. On February 15, 2013, Petitioner's appeal contesting the proposed Involuntary Transfer or Discharge was received.

CONCLUSIONS OF LAW

The Admission, Transfer and Discharge rights of nursing facility residents are provided in 42 CFR 483.12(a). This regulation provides in pertinent part:

§ 483.12 Admission, transfer and discharge rights.

(a) Transfer and discharge—

(1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

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

- (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- (ii) 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;
- (iii) The safety of individuals in the facility is endangered;
- (iv) The health of individuals in the facility would otherwise be endangered;
- (v) 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. 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

- (vi) The facility ceases to operate.
- (3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by—
 - (i) The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section; and
 - (ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.
- (4) Notice before transfer. Before a facility transfers or discharges a resident, the facility must—
 - (i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.
 - (ii) Record the reasons in the resident's clinical record; and
 - (iii) Include in the notice the items described in paragraph (a)(6) of this section.
- (5) Timing of the notice.
 - (i) Except when specified in paragraph (a)(5)(ii) of this section, the notice of transfer or discharge required under paragraph (a)(4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.
 - (ii) Notice may be made as soon as practicable before transfer or discharge when—
 - (A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section;
 - (B) The health of individuals in the facility would be endangered, under paragraph (a)(2)(iv) of this section;
 - (C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a)(2)(ii) of this section; (C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a)(2)(ii) of this section;
 - (D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a)(2)(i) of this section; or
 - (E) A resident has not resided in the facility for

30 days.

- (6) Contents of the notice. The written notice specified in paragraph (a)(4) 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 that the resident has the right to appeal the action to the State;
 - (v) The name, address and telephone number of the State long term care ombudsman;
 - (vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and
 - (vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

The State of Michigan has codified the Involuntary Transfer and Discharge provisions of the federal regulations in the Michigan Public Health Code (Code). The Code provides in pertinent part:

A nursing home may involuntarily transfer or discharge a patient for one or more of the following reasons:

- (a) Medical reasons.
- (b) The patient's welfare.
- (c) The welfare of other patients or nursing home employees.
- (d) Nonpayment for the patient's stay, except as prohibited by title XIX of the social security act, chapter 531, 49 Stat. 620, 42 U.S.C. 1396 to 1396r-6 and 1396r-8 to 1396v. [MCL 333.21773(1).]

“Welfare” means:

with reference to a patient, the physical, emotional, or social well-being of a patient in a nursing home, including a patient awaiting transfer or discharge, as documented in the patient's clinical record by a licensed or certified health care professional. [MCL 333.21703(5).]

MCL 333.21773 also provides:

- (2) A licensed nursing home shall provide written notice at least 30 days before a patient is involuntarily transferred or discharged. The 30-day requirement of this subsection does not apply in any of the following instances:
 - (a) If an emergency transfer or discharge is mandated by the patient's health care needs and is in accord with the written orders and medical justification of the attending physician.
 - (b) If the transfer or discharge is mandated by the physical safety of other patients and nursing home employees as documented in the clinical record.
 - (c) If the transfer or discharge is subsequently agreed to by the patient or the patient's legal guardian, and notification is given to the next of kin and the person or agency responsible for the patient's placement, maintenance, and care in the nursing home.
- (3) The notice required by subsection (2) shall be on a form prescribed by the department of consumer and industry services and shall contain all of the following:
 - (a) The stated reason for the proposed transfer.
 - (b) The effective date of the proposed transfer.
 - (c) A statement in not less than 12-point type that reads:

“You have a right to appeal the nursing home's decision to transfer you. If you think you should not have to leave this facility, you may file a request for a hearing with the department of consumer and industry services within 10 days after receiving this notice. If you request a hearing, it will be held at least 7 days after your request, and you will not be transferred during that time. If you lose the hearing, you will not be transferred until at least 30 days after you received the original notice of the discharge or transfer. A form to appeal the nursing home's decision and to request a hearing is attached. If you have any questions, call the department of consumer and industry services at the number listed below.”
 - (d) A hearing request form, together with postage paid, preaddressed envelope to the department of consumer and industry services.
 - (e) The name, address, and telephone number of the responsible official in the department of consumer and industry services.

- (4) A request for a hearing made under subsection (3) shall stay a transfer pending a hearing or appeal decision.
- (5) A copy of the notice required by subsection (3) shall be placed in the patient's clinical record and a copy shall be transmitted to the department of consumer and industry services, the patient, the patient's next of kin, patient's representative, or legal guardian, and the person or agency responsible for the patient's placement, maintenance, and care in the nursing home.
- (6) If the basis for an involuntary transfer or discharge is the result of a negative action by the department of community health with respect to a Medicaid client and a hearing request is filed with that department, the 21-day written notice period of subsection (2) does not begin until a final decision in the matter is rendered by the department of community health or a court of competent jurisdiction and notice of that final decision is received by the patient and the nursing home.
- (7) If nonpayment is the basis for involuntary transfer or discharge, the patient may redeem up to the date that the discharge or transfer is to be made and then may remain in the nursing home.
- (8) The nursing home administrator or other appropriate nursing home employee designated by the nursing home administrator shall discuss an involuntary transfer or discharge with the patient, the patient's next of kin or legal guardian, and person or agency responsible for the patient's placement, maintenance, and care in the nursing home. The discussion shall include an explanation of the reason for the involuntary transfer or discharge. The content of the discussion and explanation shall be summarized in writing and shall include the names of the individuals involved in the discussions and made a part of the patient's clinical record.
- (9) The nursing home shall provide the patient with counseling services before the involuntary transfer or discharge and the department shall assure that counseling services are available after the involuntary transfer or discharge to minimize the possible adverse effect of the involuntary transfer or discharge.
- (10) If a nursing home voluntarily withdraws from participation in the state plan for Medicaid funding, but continues to provide services, the nursing home shall not, except as provided in subsection (1), involuntarily transfer or discharge a patient, whether or not the patient is eligible for Medicaid benefits,

who resided in the nursing home on the day before the effective date of the nursing home's withdrawal from participation. The prohibition against transfer or discharge imposed by this subsection continues unless the patient falls within 1 or more of the exceptions described in subsection (1).

- (11) If an individual becomes a patient of a nursing home after the date the nursing home withdraws from participation in the state plan for Medicaid funding, the nursing home, on or before the date the individual signs a contract with the nursing home, shall provide to the patient oral and written notice of both of the following:
- (a) That the nursing home is not participating in the state plan for Medicaid funding.
 - (d) That the facility may involuntarily transfer or discharge the patient for nonpayment under subsection (1)(d) even if the patient is eligible for Medicaid benefits.

Here, Respondent issued the Notice of Involuntary Transfer or Discharge based on the welfare of other nursing facility residents. Specifically, Respondent's representative and witnesses testified regarding four incidents of inappropriate behavior by Petitioner. The first occurred in August of 2012 and, as documented in Respondent's social progress notes regarding Petitioner, Petitioner was heard using verbally inappropriate language toward his roommate. Respondent's staff spoke with Petitioner soon after and Petitioner stated he would keep to himself. (Exhibit 2, page 1). Similarly, in November of 2012, Petitioner was again reported to be verbally abusive toward his roommate. (Exhibit 2, pages 2-3). On January 14, 2013, Respondent's notes further document Petitioner's aggressive behavior toward another resident. (Exhibit 2, pages 4). Finally, on February 11, 2013, an incident report was filed and the police were called after staff observed Petitioner kicking and striking another resident who had wandered into Petitioner's room. (Exhibit 2, page 5; Exhibit 4, page 1). Respondent's social worker witnesses also testified regarding their attempts to speak with Petitioner and curb his inappropriate behavior.

In response, Petitioner testified that none of the events documented in the progress notes or incident reports ever occurred. Petitioner also testified that he is only interested in maintaining his health and that he stays out of people's way. Petitioner did, however, subsequently testify that, while he did not have any issues with his former roommate, he did have some problems with the roommate's family and the hours they kept. Petitioner further testified that some of the newer staff members appear out to get him and that staff and residents who have been at the facility for a long-time know that he would not attack other residents.

However, this Administrative Law Judge finds Petitioner to lack credibility regarding the alleged incidents in this case. While Petitioner initially denied that anything occurred, he later conceded that he did have problems with his roommate's family and it appears that at

least some verbal altercations occurred despite Petitioner's claims otherwise. Moreover, Petitioner denied speaking with any social workers regarding his behavior while those conversations were documented and testified to by the social workers. Additionally, while Respondent only submitted an incident report regarding the physical attack, it is undisputed that the staff who witnessed the altercation also called the police and filed the proper reports. Kemp even filed a petition to have Petitioner hospitalized as a danger to himself and others.

Given the above evidence and credibility determination, this Administrative Law Judge finds that Petitioner's conduct does endanger the safety and welfare of the other nursing facility residents and that Respondent has met its burden of proof under MCL 333.21774(3) to show why the requested involuntary transfer or discharge of the Petitioner should be granted.

DECISION AND ORDER

The Administrative Law Judge, based on the above findings of fact and conclusions of law, decides that the Respondent properly proposed the Involuntary Transfer or Discharge of the Petitioner.

IT IS THEREFORE ORDERED that:

The Respondent's request for Involuntary Transfer or Discharge is GRANTED.

/S/

Steven Kibit
Administrative Law Judge

cc:

[REDACTED]

Date Mailed: 3/12/2013

***** NOTICE *****

The law provides the Respondent may appeal this Decision and Order to the circuit court for the county in which he/she lives.