

STATE OF RHODE ISLAND
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
APPEALS OFFICE

V.

DOCKET No. 24-2219

DECISION

I. INTRODUCTION

A telephonic hearing on the above-entitled matter was held on Monday, April 29, 2024. The Appellant, [REDACTED] initiated this matter to appeal the 30-Day Discharge Notice (hereinafter "Discharge Notice") dated March 21, 2024, issued by [REDACTED], an assisted living residence (hereinafter "ALR"). The Discharge Notice does not show a reason for discharge or transfer, only a comment to see an addendum attached to the notice. The addendum provides an explanation of why the facility is seeking to discharge the Appellant but the specific reason for discharge is not made clear other than that the Appellant was unwilling to retrieve and provide necessary documentation related to continuity of care, that he was unwilling to participate in a Rhode Island Department of Health mandated 90-day review, and that he has a "protective order" against the facility's only nurse. The Appellant disagrees with the facility and is seeking to have the discharge rescinded so he may remain at the ALR. For the reasons discussed in more detail below, the Appellant's appeal is granted.

II. JURISDICTION

The Executive Office of Health and Human Services (hereinafter "EOHHS") is authorized and designated by R.I.G.L. §42-7.2-6.1 and EOHHS regulation 210-RICR-10-05-2 to be the entity responsible for appeals and hearings related to transfers or discharges for all residents of ALRs, regardless

of whether Medicare, Medicaid, or private parties pay for a resident's stay. The Administrative Hearing was held in accordance with the Administrative Procedures Act, R.I.G.L. §42-35-1 et seq. and EOHHS regulation 210-RICR-10-05-2.

III. ISSUE

The issue is whether there is sufficient evidence and compliance with administrative procedures to permit the involuntary discharge of the Appellant.

IV. STANDARD OF PROOF

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, unless otherwise specified, a preponderance of the evidence is generally required to prevail. (2 Richard J. Pierce, *Administrative Law Treaties* §10.7 (2002) & see *Lyons v. Rhode Island Pub. Employees Council 94*, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases)). This means that for each element to be proven, the factfinder must believe that the facts asserted by the proponent are more probably true than false. When there is no direct evidence on a particular issue, a fair preponderance of the evidence may be supported by circumstantial evidence. (*Narragansett Electric Co. vs. Carbone*, 898 A.2d 87 (R.I. 2006)).

V. PARTIES AND EXHIBITS

██████████, Administrator ██████████ (hereinafter "Administrator ██████████" attended the hearing and provided testimony relevant to the Appellant's involuntary discharge. Administrator Langlois submitted the following exhibits as evidence:

Exhibit #1 – Ninety (90) Day RN Review to Administrator.

Exhibit #2 – Declination Form.

Exhibit #3 – Discharge Notice issued by ██████████ to the Appellant.

Exhibit #4 – Addendum to Pre-Transfer or Pre-Discharge 30-Day Notification.

The Appellant, [REDACTED], attended the hearing and testified on his own behalf. Charline Scanlon (hereinafter "Ombudsman Scanlon"), on behalf of the Alliance for a Better Long-Term Care/the Ombudsman Office, also attended the hearing and testified in support of the Appellant. Neither the Appellant nor Ombudsman Scanlon presented any evidence at the hearing.

VI. RELEVANT LAW/REGULATIONS

Both licensed nursing facilities and ALRs must provide a formal notice of the intent to transfer/discharge to the resident. For the notice to be valid, it must include the following written in plain language: a) The reason for the transfer; b) The effective date of the transfer; and c) Where the resident will be re-located. See (210-RICR-10-05-2.4.8(D)(2)(a-c)).

Residents of assisted living facilities may be discharged only for the following reasons and within the following guidelines: (A) Except in life threatening emergencies and for nonpayment of fees and costs, the residence gives thirty (30) days' advance written notice of termination of residency agreement with a statement containing the reason, the effective date of termination, and the resident's right to an appeal under state law; (B) If the resident does not meet the requirements for residency criteria stated in the residency agreement or requirements of state or local laws or regulations; (C) If the resident is a danger to himself or herself or the welfare of others and the residence has attempted to make a reasonable accommodation without success to address the resident's behavior in ways that would make termination of residency agreement or change unnecessary, which would be documented in the resident's records; (D) For failure to pay all fees and costs stated in the contract, resulting in bills more than thirty (30) days outstanding. A resident who has been given notice to vacate for nonpayment of rent has the right to retain possession of the premises, up to any time prior to eviction from the premises, by tendering to the provider the entire amount of fees for services, rent, interest, and costs then due.

The provider may impose reasonable late fees for overdue payment; provided that the resident has received due notice of those charges in accordance with the residence's policies. Chronic and repeated failure to pay rent is a violation of the lease covenant. However, the residence must make reasonable efforts to accommodate temporary financial hardship and provide information on government or private subsidies available that may be available to help with costs; and (E) The residence makes a good faith effort to counsel the resident if the resident shows indications of no longer meeting residence criteria or if service with a termination notice is anticipated. See (R.I. Gen. Laws §23-17.4-16(a)(2)(xviii)(A-E)).

A nurse review is necessary for all levels of licensure. In those residences that have one (1) or more licensed registered nurses (i.e., at least one (1) full-time equivalent equal to thirty-five (35) hours) on-site, the nurse review shall be completed at least once every ninety (90) days. See (216-RICR-40-10-2.4.17(F) et seq.).

VII. FINDINGS OF FACT

1. The Appellant was admitted into [REDACTED] on December 23, 2023.
2. The Appellant received a Discharge Notice on March 21, 2024.
 - A. The notice does not clearly state a reason for the discharge in plain language.
 - B. Under the Explanation section of the Discharge Notice, it reads “*See Addendum.”
 - C. The Addendum states that the Appellant was unwilling to retrieve and provide necessary documentation related to continuity of care, that he was unwilling to participate in a Rhode Island Department of Health mandated 90-day Nurse Review, and that he has a “protective order” against the facility’s only nurse.

- D. The Addendum also states concerns about how the Appellant had difficulty descending stairs during a fire drill, and the Appellant may be better served in a setting with more behavioral support and access to mental health services.
3. Ombudsman Scanlon testified that the Appellant is very intimidated by the facility's registered nurse because of her accusations that he was knocking on other resident's doors and touching other residents.
 4. The Appellant initially declined to participate in a 90-day Nurse Review on March 18, 2024, but he eventually agreed to complete the 90-day Nurse Review on April 1, 2024.
 - A. Ombudsman Scanlon testified that the Appellant was under the impression that he did not need to complete the 90-day Nurse Review because he had been previously evaluated by his own doctor.
 - B. Ombudsman Scanlon further testified that the Appellant delayed completing the 90-day Nurse Review because he wanted Ombudsman Scanlon to be present during the review, but the ombudsman was unable to attend the Appellant's 90-day Nurse Review due to conflicting schedules between Ombudsman Scanlon and the facility's registered nurse.
 5. Ombudsman Scanlon testified that the Appellant now understands that certain facility requirements are not optional and that he has no intention of refusing to complete mandatory facility requirements in the future.
 6. The 90-day Nurse Review states that the Appellant agrees that he can live independently.
 7. Ombudsman Scanlon testified that while the Appellant can independently make appointments, he does not feel that he is ready to leave the facility. Ombudsman Scanlon further testified that the Appellant does not engage in more of the facility's services like eating in the dining room, because he is afraid that engaging in these services will expose him to more accusations.
 8. Administrator [REDACTED] testified that the Appellant refused a mental health evaluation per his PCP but was unable to provide any evidence to support his testimony.
 9. The Appellant disputes that he refused a mental health evaluation.

10. During the Appellant's stay at the ALR, there have not been any incidents where he had threatened the safety of others or himself.
11. There was one incident on March 2, 2024, where the Appellant had difficulty descending stairs during a fire drill. The Appellant has since undergone physical therapy and it is unclear if the Appellant still struggles to evacuate the ALR during fire drills.

VIII. DISCUSSION

As stated above, ALRs must provide a formal notice of the intent to transfer/discharge to the resident. For the notice to be valid, it must include the reason for the transfer to be written in plain language. The Discharge Notice that was given to the Appellant on March 21, 2024, does not clearly state the reason for the transfer in plain language. The Addendum to the Discharge Notice makes references to concerns that the Appellant was unwilling to retrieve and provide necessary documentation related to continuity of care, that he was unwilling to participate in a Rhode Island Department of Health mandated 90-day Nurse Review, and that he has a "protective order" against the facility's only nurse. The Addendum also mentions concerns about how the Appellant had difficulty descending stairs during a fire drill, and the Administrator believes that the Appellant may be better served in a setting with more behavioral support and access to mental health services.

Per R.I. Gen. Laws §23-17.4-16(a)(2)(xviii)(E), the facility is required to make a good faith effort to counsel the resident if the resident shows indications of no longer meeting residence criteria or if service with a termination notice is anticipated. The facility was unable to provide any evidence or testimony to show that the Appellant was clearly informed of the consequences of his failure to complete the 90-day Nurse Review or for failing to retrieve and provide necessary documentation related to continuity of care.

Besides the Addendum to the Discharge Notice which mentions that the Appellant had difficulty descending stairs during a fire drill, the facility provided no testimony or evidence to show that the

Appellant is incapable of evacuating the building during a fire drill. There is not a preponderance of evidence to show that the health and/or safety of the Appellant or other individuals in the facility are endangered by the Appellant's presence in the ALR. Because of the incomplete Discharge Notice and the lack of evidence to show that the facility made a good faith effort to counsel the resident when he showed indications of no longer meeting residence criteria or when service with a termination notice was anticipated, there is insufficient evidence and compliance with administrative procedures to permit the involuntary discharge of the Appellant.

IX. CONCLUSION OF LAW

After careful review of the testimony and evidence present at the administrative hearing, this Appeals Officer concludes that:

1. The Discharge Notice does not clearly state the reason for the transfer in plain language.
2. The facility failed to make a good faith effort to counsel the resident when he showed indications of no longer meeting residence criteria or when service with a termination notice was anticipated.
3. There is insufficient evidence and compliance with administrative procedures to permit the involuntary discharge of the Appellant.

X. DECISION

Based on the foregoing findings of fact, conclusions of law, evidence, and testimony it is found that a final order be entered that there is not sufficient evidence to support the involuntary discharge of the Appellant. [REDACTED] is to rescind the Pre-Transfer or Pre-Discharge 30 Day Notice dated March 21, 2024.

APPEAL GRANTED

/s/ Jack Peloquin

Jack Peloquin

Appeals Officer

NOTICE OF APPELLANT RIGHTS

This Final Order constitutes a final order of the Department of Human Services pursuant to RI General Laws §42-35-12. Pursuant to RI General Laws §43-35-15, a final order may be appealed to the Superior Court Sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such an appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

