OAH 8-0900-36790

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HEALTH

In the Matter of the Involuntary Discharge/Transfer of C.K., Petitioner, by Edenbrook of Edina, Respondent	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**

The Minnesota Department of Health (Department) initiated this contested case proceeding by issuing a Notice of and Order for Hearing on March 30, 2020. A telephone evidentiary hearing was held on April 6, 2020. The hearing record closed at the end of the evidentiary hearing following the receipt of the parties' closing statements.

Kristen R. Rice, Ombudsman for Long-Term Care, appeared on behalf of C.K. (Petitioner or Ms. K.) Marie B. Robertsdahl, Director of Social Services, appeared on behalf of Edenbrook of Edina (Edenbrook or the Facility).

STATEMENT OF THE ISSUE

Can Edenbrook lawfully discharge the Petitioner, C.K., for her failure to pay for the nursing care services she has received?

SUMMARY OF THE RECOMMENDATION

The Administrative Law Judge recommends that the Department affirm Ms. K.'s appeal on the grounds that Edenbrook did not provide a proper discharge notice or undertake reasonable discharge planning, as required by federal law.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Ms. K. is a 74-year-old woman who was admitted to Edenbrook for skilled nursing care and physical therapy following reconstructive surgery to her knee.[1]

2. Ms. K. had surgery on her knee after she had suffered a series of falls.[2]

3. Ms. K. was discharged from the Hennepin County Medical Center on January 17, 2020, and was admitted to Edenbrook on the same day.[3]

[1] Exhibit (Ex.) at 1; Testimony (Test.) of C.K.
[2] Ex. at 1 at 2; Test. of C.K.

4. Since her knee surgery, Ms. K. is not ambulatory. During her recuperation at Edenbrook, Ms. K. uses a wheelchair during many of the daytime hours.[4]

5. Ms. K. is financially responsible for her own affairs and signed the admissions agreement to Edenbrook in her own name. Her admissions agreement did not include a financial guaranty from another person.[5]

6. As part of her admissions agreement with Edenbrook, Ms. K. promised that she would promptly apply for government assistance, social security benefits, pension benefits, insurance payments, and other payments as may be required to satisfy her payment obligations to the Facility.[6]

7. Ms. K. did, in fact, sign application materials for medical assistance and emergency medical assistance, in addition to a release of information regarding those applications in favor of Edenbrook.[7]

8. On or about March 4, 2020, staff in Edenbrook's business office received a "payer message" from federal officials that Ms. K.'s application for Medicare benefits was denied.[8]

9. On March 17, 2020, Ms. K. applied for Medical Assistance benefits from the state of Minnesota. As of the date of the evidentiary hearing, however, that application had not yet been approved.[9]

10. On March 20, 2020, Edenbrook hand-delivered a Notice of Discharge to Ms. K. The Notice asserted that payments for Ms. K.'s care had not been made and that $23,059.63 was more than 60 days past due. For that reason, Edenbrook stated that it was discharging Ms. K. to her former residence in Brooklyn Park, Minnesota. The Notice stated that unless Ms. K. agreed in writing to make immediate payment of the past due sums, the discharge would occur one week later, on Friday, March 27, 2020.[10]

11. The staff of Edenbrook believe that Ms. K.'s former residence in Brooklyn Park is the home of her grandson, that the home has a split-level construction and a set of stairs that connects the two different levels.[11]

12. None of Edenbrook's staff has been to this home. Beyond a general awareness that it has a split-level construction, the staff are not aware of any other

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[3] Ex. at 1 at 1; Ex. 7 at 2; Test. of C.K.
[4] Test. of C.K.; Test. of Diane Willette.
[5] Ex. 3 at 11; Test. of C.K.
[6] Ex. 3 at 6.
[7] Exs. 5, 7; Test. of Jennifer Ketcham.
[8] Ex. 6.
[9] *See* Test. of J. Ketcham; *see also* Exs. A, B.
[10] Ex. C; Test. of C.K.; Test. of J. Ketcham.
[11] Test. of J. Ketcham.

features of the home. Specifically, the staff is not aware of whether the home includes any accessibility features or the number and ages of people now residing in the home.[12]

13. Edenbrook plans to dispatch an occupational therapist to the home to review its features and make recommendations for a care plan. However, as of the evidentiary hearing, Edenbrook had not scheduled or begun such a review.[13]

14. The staff of Edenbrook has not discussed its discharge plan for Ms. K. with her grandson. Similarly, the staff do not know whether Ms. K.'s grandson agrees to the transfer of his grandmother to his home or whether he is willing to assume the responsibility of providing her care.[14]

15. Ms. K.'s grandson neither testified nor appeared at the evidentiary hearing.[15]

16. As of April 1, 2020, Ms. K.'s account with Edenbrook was past due and had a balance of $33,007.35.[16]

Based upon the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. Minnesota and federal law authorize the Administrative Law Judge to: (a) conduct this proceeding; (b) make recommendations to the Commissioner of the Department (Commissioner) as to whether Edenbrook's proposed discharge of Ms. K. meets the requirements of the law; and (c) make findings, conclusions, and orders that are related to the appeal.[17]

2. The Department gave proper notice for the hearing and has complied with all procedural requirements of statute and rule. This matter is properly before the Administrative Law Judge and the Commissioner.

3. Edenbrook has proved by a preponderance of the evidence that Ms. K. has failed to pay for her stay at Edenbrook's facility. As a result, Ms. K. may be subject to discharge from the Facility.

4. Edenbrook is a "facility" under 42 C.F.R. § 483.5(a) (2019) and is therefore subject to the requirements imposed by federal law relating to the discharge or transfer of any of its residents.[18]

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[12] *See* Test. of D. Willette.
[13] *Id*.
[14] *Id*.
[15] *See* Digital Recording, OAH Docket No. 8-0900-36790 (April 6, 2020).
[16] Ex. 9 at 12.
[17] *See* 42 U.S.C. §§ 1395i-3(e)(3), 1396r(e)(3) (2019); 42 C.F.R. §§ 483.15, 483.204 (2019); Minn. Stat. §§ 14.50, 144A.135 (2018).
[18] *See generally* 42 C.F.R. § 483.5(a).

5. Ms. K. is a resident of Edenbrook under 42 C.F.R. § 483.10 (2019) and is therefore entitled to the rights created by federal law relating to any transfer or discharge by Edenbrook.

6. The Regional Ombudsman, on behalf of Ms. K., filed a timely appeal of Edenbrook's Notice of Discharge.

7. Before a Medicare-certified long-term-care provider may involuntarily discharge a resident, however, the facility must notify the resident, and, if known, a family member or legal representative of the resident of the proposed discharge.[19]

8. Additionally, the facility must communicate this information in a language and manner that the recipients of the notice understand.[20]

9. The notice must also specify the location to which the resident will be transferred, the effective date of the discharge, and the resident's right to appeal the discharge decision.[21]

10. Similarly, Minnesota's "Bill of Rights" for nursing-home residents provides in part that:

> [R]esidents shall not be arbitrarily transferred or discharged. Residents must be notified, in writing, of the proposed discharge or transfer and its justification no later than 30 days before discharge from the facility and seven days before transfer to another room within the facility. This notice shall include the resident's right to contest the proposed action, with the address and telephone number of the area nursing home ombudsman pursuant to the Older Americans Act, section 307(a)(12). The resident, informed of this right, may choose to relocate before the notice period ends. The notice period may be shortened in situations outside the facility's control, such as a determination by utilization review, the accommodation of newly-admitted residents, a change in the resident's medical or treatment program, the resident's own or another resident's welfare, or nonpayment for stay unless prohibited by the public program or programs paying for the resident's care, as documented in the medical record. . . .[22]

11. Under Minnesota law, Edenbrook has the burden to prove facts that are required by law to support the discharge of C.K. by a preponderance of the evidence.[23]

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[19] 42 C.F.R. § 483.15(c)(3)(i); *In re Involuntary Discharge or Transfer of J.S. by Ebenezer Hall*, 512 N.W.2d 604, 610 (Minn. Ct. App. 1994).
[20] 42 C.F.R. § 483.15(c)(3)(i) .
[21] 42 C.F.R. § 483.15(c)(5)(ii)-(iv).
[22] Minn. Stat. § 144.651, subd. 29 (2018).
[23] Minn. R. 1400.7300, subp. 5 (2019); *see also J.S.*, 512 N.W.2d at 610 (Minn. Ct. App. 1994) (the Minnesota Court of Appeals confirms that "a nursing facility proposing to transfer or discharge a resident must prove the supporting facts by a preponderance of the evidence.").

12. Edenbrook did not provide 30 days advance notice of the proposed discharge as required by 42 U.S.C. § 1396r (c)(2)(B)(ii) (2018), 42 C.F.R. § 483.15 (c)(4)(i) and Minn. Stat. § 144.651, subd. 29.

13. Under 42 C.F.R. § 483.15(c)(7), "[a] facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility."

14. There is no evidence in the hearing record to show that Edenbrook has completed (or substantially completed) reasonable discharge planning for C.K.

15. There is no evidence in the hearing record that Edenbrook provided the needed orientation so as to ensure Ms. K.'s safe and orderly discharge from the Facility.

16. While the Facility asserts that Ms. K.'s care needs can be met at her grandson's home, that conclusion is not supported by the hearing record.

17. Under the current circumstances, Edenbrook may not lawfully discharge Ms. K. from its nursing facility.

Based upon the foregoing conclusions of law, the Administrative Law Judge makes the following:

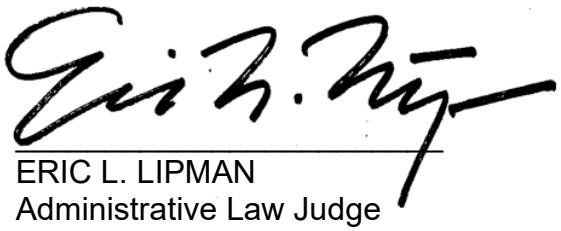
RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commissioner:

(1) **GRANT** Ms. K.'s appeal of the discharge; and

(2) **DENY** Edenbrook's request to discharge Ms. K. from its facility.

Dated: April 21, 2020



ERIC L. LIPMAN
Administrative Law Judge

NOTICE

This report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2018), the Commissioner shall not make a final decision until this report has been made available to the parties for at least ten days. The parties may file exceptions to this report, and the Commissioner must consider the exceptions in making a final decision. Parties should contact Benjamin Hanson, Appeals Coordinator, Department of Health, 625 Robert Street North, PO Box 64975, St. Paul, MN 55164-0975, (651) 201-5810, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2018).

Under Minn. Stat. § 14.62, subd. 1 (2018), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first-class mail or as otherwise provided by law.

MEMORANDUM

Ms. K. makes two key claims in support of her petition — specifically, that Edenbrook did not provide sufficient discharge planning and orientation services to her, and that the discharge notice was not served 30 days prior to the proposed discharge date. Each of these claims has merit.

There is not any evidence that Edenbrook engaged in pre-discharge planning or orientation for Ms. K. The Facility's reply that these steps would occur "later" in the discharge process[24] misstates its legal obligations. The federal regulations contemplate that this work would at least be in draft form, subject to later revision and updating, whenever the facility "anticipates discharge" of a resident. For example, 42 C.F.R. § 483.21 (c)(2) (2019) provides that:

> *When the facility anticipates discharge* a resident must have a discharge summary that includes, but is not limited to, the following:
>
> > (i) A recapitulation of the resident's stay that includes, but is not limited to, diagnoses, course of illness/treatment or therapy, and pertinent lab, radiology, and consultation results.
> >
> > (ii) A final summary of the resident's status to include items in paragraph (b)(1) of § 483.20, at the time of the discharge that is available for release to authorized persons and agencies, with the consent of the resident or resident's representative.

[24] *See* Test. of D. Willette.

> (iii) Reconciliation of all pre-discharge medications with the resident's post-discharge medications (both prescribed and over-the-counter).[25]

In this case, however, none of the preparations that should have preceded Ms. K.'s departure from the Facility – whether voluntarily or involuntarily – have begun. The Facility had nearly no detail about the proposed discharge location when it selected that site and has not found out any additional details about the home since that time. Edenbrook did not "provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the Facility,"[26] as those terms are used in the federal regulations.

Similarly, Edenbrook's proposal to discharge Ms. K. seven days after serving its notice is improper. While facilities are authorized, under certain exigent circumstances, to transfer a resident within a few days' notice, none of those rare exceptions apply here.[27] A seven-day notice period is insufficient in this case.

Notices of discharge should be re-issued, and the statutory time periods reset, when the federal notice requirements are not met. As the Department notes in Information Bulletin 94-1:

> On several occasions, facilities have had to reissue the notice of discharge because the notice was not in compliance with the provisions of 42 CFR [§] 483.12 (a)(6). They have then had to provide a new 30 day notice period.[28]

Because Edenbrook did not undertake the required preparations or provide the proper notice, discharging Ms. K. is improper. If Ms. K. still does not pay the overdue amounts, Edenbrook can seek another discharge when it has an appropriate discharge plan and has provided the required notice.[29]

For these reasons, the Commissioner should grant the petition and deny the discharge of Ms. K.

E. L. L.

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[25] 42 C.F.R. § 483.21(c)(2).
[26] 42 C.F.R. § 483.15(c)(7).
[27] *See* 42 C.F.R. § 483.15 (c)(4)(i),(ii), (c)(8).
[28] *See* Information Bulletin 94-1, (Minn. Dep't of Health, March 19, 2013 (Correct Notice Procedure) (https://www.health.state.mn.us/facilities/regulation/infobulletins/ib94_1.html); *accord In the Matter of the Involuntary Discharge of E.H. by Augustana Health Care Center of Hastings*, OAH Docket No. 8-0900-17475-2, 2006 WL 2952715 at *6 (Minn. Off. Admin. Hrgs. 2006).
[29] *See In the Matter of the Involuntary Discharge/Transfer of V.M. by Lakeside Heath Care Center of Dassel*, OAH 8-0900-19416-2, 2008 WL 642734, at *7 (Minn. Off. Admin. Hrgs. 2008); *In the Matter of the Involuntary Discharge/Transfer of* B.O., *by Long Lake Health Care Center,* OAH Docket No. 12-0900-14234-2, 2001 WL 568442, at *4 (Minn. Off. Admin. Hrgs. 2001).