

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS

FOR THE DEPARTMENT OF PUBLIC WELFARE

In the Matter of the Revocation)	FINDINGS OF FACT,
of the Provisional Discharge of)	CONCLUSIONS OF LAW
Elizabeth Korkowski)	and
	PROPOSED DECISION

The above-entitled matter came on for hearing before Allan W. Klein, duty appointed Hearing Examiner, on July 27, 1978, at the Auditorium Building, Anoka State Hospital, Anoka, Minnesota.

Representing the Hospital and the Department of Public Welfare (hereinafter the "Department") was James A. Jorgensen, Special Assistant Attorney General. Representing the resident, Elizabeth S. Korkowski was Charles Y. Lucas, Patient Advocate, Anoka State hospital, Mr- Lucas is not an attorney.

This matter was somewhat out of the ordinary in that the authority for the hearing itself is not contained in Minnesota Statutes. Rather, it derives from a Stipulation Agreement entered into by the Department in 1974, This Agreement comes from the case of Rubv Anderson, et al v. Vera Likens, et al, (D.C. Minn, 4-72 Civ. 422) a class-action brought on behalf of all persons whose provisional discharges from state hospitals had been extended or revoked without notice and an opportunity to be heard.

The Agreement sets forth a thorough set of procedural rules establishing such hearings and governing their conduct.

Subsequent to the execution of the Agreement, the Legislature amended Minn. Stat. Chapter 15 to create the office of Hearing Examiners (Laws of Minnesota 1975, Chapter 380).* Where there is a conflict between the Agreement and Chapter 15 or the Rules of

*Chapter 380 was an amendment to an existing law which was in force at the time that the Agreement was drafted. The Agreement refers to existing Law from time to time. For example, the Agreement contains a detailed procedure for appeal beyond that otherwise provided by law, but refers to Minn. Stat. . 15.0424. Following that reference, the Agreement states "The appellate rights created herein are in addition to, and not in derogation of, any other statutory remedies to which either party is entitled."

the office, it was determined that the Agreement shall govern. While every attempt was made to conduct the hearing so as to meet the requirements of both the Agreement and the office's rules, where necessary, the Agreement was followed. This was agreed to by all parties.

Notice is hereby given that the post-hearing procedure set forth in Articles VIII, E, F, G, and H, and Article TX shall govern this matter. Therefore, all parties shall have 5 days from service of this Report to file any written responses to it. If any such response is received, the Examiner will, within 5 days, reverse, modify or affirm his Proposed Decision, and serve it upon the parties. Either party may then appeal an adverse decision to the Commissioner by filing a written notice of appeal (in the form provided as Attachment C to the Stipulation Agreement) within 15 days of the service of the proposed decision. After following the procedure set forth in Article IX of the Agreement, the Commissioner will make a final decision, which is then appealable to the Courts pursuant to Minn. Stat. 15.0424 (1976),

Based upon all the testimony, exhibits, and arguments in the record, the Hearing Examiner hereby makes the following:

FINDINGS OF FACT

1. Elizabeth Ann Seeger Korkowski (hereinafter "Korkowski") was involuntarily (committed to Hastings State Hospital by order of the Ramsey County Probate Court dated December 1, 1977. She was actually admitted there on December 13, 1977.

2. As part of the Commitment order noted above, the Court ordered that;

Elizabeth Korkowski shall be involuntarily treated with lithium carbonate and anti-psychotic medications commonly known as major tranquilizers in the amounts determined to be appropriate in the judgment of the attending physician.

3. On or about January 16, 1978, a meeting was held at Hastings State Hospital to discuss the propriety of a provisional discharge for Korkowski, and the terms of such a provisional discharge.

Attending the meeting were Korkowski; Eugene W. Carroll (hereinafter "Carroll"), Social Worker with the Ramsey County welfare Department; the Patient's Advocate at Hastings; Ortrude Holte, a Senior Social Worker at Hastings; and other professionals from the Hastings Staff, At that meeting, Korkowski was permitted to choose between one of two boarding homes suggested by Holte and the Ramsey County Welfare Department. She chose Oakland Boarding Home, 97 N. Oxford Street. in Saint Paul,

4. sometime between January 16 and January 31, 1978, a short document entitled "Discharge Recommendations and After Care Plan"

(Agency Ex- 4) was prepared at Hastings.* It provided as follows:

- A. To live at the Oakland (sic) Home, 97 north Oxford. Saint Paul, Minnesota.
- B. To have weekly visits to a psychiatrist For at Least two months at the Saint Paul Ramsey Mental Health Center. To have medication supervision, consisting of,

Lithium Carbonate 600 mgm bid
(8 am and 8 pm)
Lithium Carbonate 300 mgm at
12 noon
Cogentin 2 mgm bid prn
Lithium level taken every Monday
or at the discretion of the
psychiatrist

- C. To keep in close contact with Gene Carroll, her Ramsey County Welfare Department social worker,
- d, To be on provisional discharge for one year.

5. The plan has never been revised or modified. Neither has it been reviewed on a quarterly (or any other) basis.

6. On or about February 13, 1978, Korkowski was provisionally discharged from Hastings. She was taken to the Oakland Boarding

*Korkowski signed this document, as did Holte and Keith Hartman, a psychiatrist at Hastings. Korkowski testified that she signed the plan because she did not want to argue about its terms, believing that if she did contest them, her provisional discharge would be held up. She believed that under a "new law", provisional discharges could only extend for 60 days (rather than the one year contained in the Plan)- She also did not like the portion of the plan that required her to take drugs, but she felt that she would have to agree to it in order to obtain the provisional discharge. IL was her understanding that she would only have to be on the drugs for 60 days, and see the psychiatrist for 60 days, but that at the end of 60 days, both the drugs and the visits could be terminated.

Home, where she joined approximately 30 other mentally ill female residents.

7. Oakland Boarding Home is owned by one Shirley Windish.

Norma Kane is employed at the home as the Program Director.

8. Norma Kane was the only person from Oakland who testified.

The essence of her testimony can be summarized from the following exchanges:

Q (by Mr. Jorgensen); Have you had occasion to talk to her (Korkowski) personally while she was at Oakland in between February and July third?

A (by Mrs. Kane): Many times.

Q: Maybe you could just bring us through a chronological -- from her admission in February -- Do you know whether or not she was taking medication at that time?

A: Yes, she was. She was on lithium when she first came. Her behavior was quiet, appropriate -- no problems.

Q. What do you mean by "appropriate"?

A: Well. no outbursts. She was doing the things that everyone else was doing. She was there the required times. She got along with people. She went out -- did the normal things that everyone does.

Due to the closing of Hastings State Hospital, Korkowski's Zile (and "paper" commitment) was transferred to Anoka State Hospital. The Commissioner approved the transfer on March 21, 1978. However. Korkowski continued to live at Oakland.

10. in early March of 1978, Carroll testified that Kane called him and stated that Korkowski was depressed, crying, and concerned about getting her children returned to her custody (they were, and still are. living with her brother in Cottage Grove). Carroll went to talk with Korkowski on or about March 8, and recommended that she become involved in a Day Activity Program. Korkowski agreed to do

this, and she started in that Program on March 15. She continued there until about May 10, 1978, when she stopped participating.

11. Carroll testified that Korkowski told him on May 13 that she had ceased taking her medications. Kane testified that she ceased taking her medications around the middle of April. Carroll stated in a letter (Agency Ex. 5) that she ceased taking the medications

on '!,ay 1-3. Regardless of the date, Kane testified that the stopping of medications coincided with a change in Korkowski's behavior. Kane testified as follows:

Q(by Mr. Jorgensen): Now when you say her behavior changed, how did it change? What -.

A(by Mrs. Kane): She got very hyper. Small things upset her. We started getting telephone calls, letters, visits from State Health Department, City Health Department, different agencies, with complaints like "the bacon wasn't cooked enough, she (Korkowski) was going to get trichinosis."

12. Kane presented a long list of complaints about Korkowski's behavior in the home. They included:

Monopolizing the telephone for residents
(there was only one)

Mailing letters to Government officials
ano agencies

offering psychiatric and legal advice to
other residents

Loud and boisterous behavior

Unable to accept direction from Kane and
other staff

Threats to sue Kane, Carroll, her financial
guardian, and others.

13. According to Kane, other residents complained both to her, and to Winish about Korkowski's behavior, and Winish finally decided (upon Kane's recommendation) in late June that Korkowski must leave Oakland.

14, A great deal of testimony from the three major witnesses who testified (Kane, Carroll, and Korkowski) dealt with the issue of medication, and Korkowski's ceasing to take it. At issue was the desirability of Korkowski's continuing to take medications and the position of her psychiatrist at the Ramsey County Mental Health Center, one Dr. Weier (who did not testify).

Korkowski believes (and has apparently so believed for

many years) that lithium depresses her, causes her to be mentally ill, and is addictive. She far prefers to be "on food" rather than "on drugs". She feels depressed when on drugs, but normal when off them.

She stated that when she is forced to take drugs, she gets so depressed that she contemplates suicide, but that she is happy when not forced to take them. She repeated this in a number of places in her testimony, giving different examples, and was consistent each time, Korkowski asked that a letter be entered into the record of this hearing. It is

Korkowski Ex. 2. In response to an inquiry from Korkowski, then Senator Walter F. Mondale inquired of the U.S. Food and Drug Administration about the adverse effects of lithium, thiorazine and prolixin. The exhibit is the FDA's response. It states that all potent drugs are capable of causing adverse reactions in some users, and that it is the duty of the prescribing physician to weigh the benefits of continuation against the risks of adverse reactions on a case-by-case basis.

on the other hand, Kane and Carroll both believe that drugs are needed to make Korkowski's behavior "acceptable", although Kane stated that at least 30% of the whole time that Korkowski was at Oakland she was depressed and cried, whether or not she was on medication. Kane testified that medication would be a condition of any return to Oakland. Carroll testified that he has decided, in his own mind, that Korkowski needs drugs to control her "agitation and disruptiveness"--*

Dr- John Benninahoff, the Chief Executive officer and Medical Director at Anoka (who was the only medical or psychiatric person who did testify) stated that one of the bases for his decision to revoke Korkowski's provisional discharge was the fact that Korkowski had terminated her medications. However, he had never met Korkowski at the time of making his decision, and his primary basis for revocation was the description of her behavior contained in the Carroll letter of June 28 and a summary of information from Carroll which was prepared by Harriet Mhoon, an staff person at Anoka.

Benninghoff offered no expert opinion on the issue of whether Korkowski ought to have continued medication, although it can be

*There was no evidence that Carroll had any medical training or background.

inferred from the above that he believed that she ought to have continued it.

There was a great deal of testimony regarding the medical opinion of a person who did not appear at the hearing, Dr- Weier of the Ramsey County Mental Health Center. He was the psychiatrist whom Korkowski saw weekly during the early part of her provisional discharge, Without repeating the testimony of various persons who spoke with Weier, it is found that Weier did recommend to Korkowski that she continue her medication, but that Korkowski did not want to do so. Weier took no affirmative steps to force her to continue, and in effect, allowed her to follow her own desires, although he continued to inform Kane and Carroll that he believed it would be better for Korkowski to remain on medication.

15. On at least five occasions in June, Carroll was contacted by Korkowski regarding her longer-term plans. Korkowski wanted to be permanently discharged and live in an apartment with her children. She reiterated this desire at the hearings stated that she has basic secretarial skills which have become "rusty", but that she believed she could go to night school, improve her skills, and obtain permanent employment, perhaps as a legal secretary. Although she asked Carroll to contact the financial guardian and urge him to release sufficient funds for her to acquire and furnish an apartment, Carroll never did so because he felt it would be "inappropriate" to implement such a plan at the time.

On June 28, 1978, the matter of Korkowski's continuation at Oakland came to a head. Pursuant to a request from Kane, Carroll went to Oakland and met with Kane and Korkowski. During the meeting, which was punctuated with shouting and threats from Korkowski, Carroll offered Korkowski three alternative courses of action, and told her that if she did not choose one of them, he would recommend that her provisional discharge be revoked. The three alternatives were:

- a. That she voluntarily admit herself to St. Paul Ramsey Hospital for evaluation.
- b. That she voluntarily resume her medications and visits to Dr. Weier (but continue to live at Oakland)-

C. That she voluntarily commit herself to Anoka State Hospital .

Korkowski rejected all of these, and reiterated her desire to get an apartment and live with her children-

17. Following the meeting, Carroll telephoned Hazel Mhoon at Hastings and informed her that he would be recommending a revocation of Korkowski's provisional discharge.

18, On the same day, he prepared a two-page letter (Agency Ex. 5) setting forth his recommendation for revocation. The letter contains the following items:

She is ill and in need of immediate hospitalization

She has become very manic

She has ceased taking medications

She has been both depressed and hyper-active

That in Carroll's opinion, she is mentally ill, a danger to herself and others, and in need of hospitalization

She has become unmanageable at Oakland

she has been requested to leave Oakland unless she resumes medications and improves her behavior

She has been disruptive to staff and residents

She has telephoned Health Department, Police Department . attorneys and county officials

She has written voluminous letters to congressmen, state and county officials and attorneys, "making bizarre requests"

She has threatened with law suits

At the meeting, she was very hostile, threatening. and almost violent

19. on the basis of the letter and the Mhoon memo, Benninghoff did, on June 29, revoke the provisional discharge and request that Korkowski be apprehended and returned to Anoka (Agency Ex. 7).

20. On July 3, 1978, Korkowski was taken to Anoka. She has remained there, under medication, since that date.

21. on July 17, 1978, Charles Lucas, the Patient's Advocate, submitted Agency Ex. 3, which contains Korkowski's allegations as to why the revocation was improper. They are:

- a. That She was in compliance with her "Discharge Recommendations and After Care Plan".
- b. That the Plan was inadequate in that it failed to provide adequate notice of specific behaviors which might lead to revocation.
- c. That the Plan failed to specify goals to be met in order to obtain a final discharge.
- d. That there was no attempt to modify the Plan so as to make it acceptable to Korkowski prior to revocation.
- e. That Korkowski's behavior was not sufficient to justify a revocation and that the standards for hospitalization contained in Minn. Stat. 253A.07, subd. 17(a) should apply, and
- f. That the revocation was based upon a report (Carioll's letter) which was erroneous, inaccurate, and based upon unsubstantiated opinions and conclusions.

Since the first four deal with the After Care Plan, they will be discussed together.

22. Article III of the Stipulation Agreement provides that:

Each patient released on provisional discharge shall receive a written Treatment Plan for the period of provisional discharge, developed in accordance with Minn. Stat. 253A.17,, Subd 9. This plan shall specify the expected period of provisional discharge and the precise goals in behavioral terms for the granting of a final discharge, and any conditions, duties or restrictions on the patient during the period of provisional discharge. Patients will not be penalized for objecting

to the provisions of the plan but must in any event comply with the terms of the plan pending review. The Treatment Plan shall be reviewed on a quarterly basis as provided by Minn. Stat. 253A.17, Subd 9. (Emphasis in original)

Minn. Stat. sec.. 253A.17, Subd. 9 states:

Every person hospitalized or otherwise receiving services under sections 253A.01 to 253A.21 shall be entitled to receive proper care and treatment, best adapted, according to contemporary professional standards, to rendering further custody,

institutionalization, or other services unnecessary. To this end the head of the hospital shall devise or cause to be devised for each person so hospitalized a written program plan which shall describe in behavioral terms the case problems, and the precise goals, including the expected period of time for hospitalization, and the specific measures to be employed in the solution or easement of said problems. Each plan shall be reviewed at not less than quarterly intervals to determine progress toward the goals, and to modify the program plan as necessary. The program plan shall be devised and reviewed in each instance with the appropriate county welfare department, and with the patient. The hospital record shall attest to the program plan review. If the county welfare department or the patient does not so participate in the planning and review, the hospital record shall include reasons for non-participation and the plans for future involvement.

The department of public welfare shall monitor the aforementioned program plan and review process to insure compliance with the provisions of this subdivision.

23. Comparing the Plan set forth in Finding No. 4 with the criteria set forth in the Statute and the Agreement, it is clear that the Plan does not specify ". . . precise goals in behavioral terms for the granting of a final discharge." Neither does it describe in behavioral terms the case problems. The Plan was never reviewed, let alone modified or revised. Thus, there was no hospital record of such a review. Finally, there was no evidence of departmental monitoring of either the original Plan or the review process.

24. Korkowski alleged that she had complied with the Plan. Comparing the Plan with the testimony related above, it is found that Korkowski did go to Oakland but that she was essentially "given notice" of her termination there unless she would go back on medication, which she refused to do. It is also found that she did see Dr. Weier

for almost three months, thus complying with the required two month period.* She did keep in contact with Carroll. The only other "duty"

*Dr. Benninghoff testified that the two month requirement in the Plan could be construed to require visits for a lengthier period to be determined by Dr. Weier. If it was the intent of the hospital to require visits so long as the doctor thought it was desirable the Plan should have clearly so specified.

in the plan was to continue medications, which she did so long as Weier supervised her. It is found that she did comply with the Plan, with the exception that she was on the verge of no longer living at Oakland.

25. Lucas alleged that the Plan was deficient because it failed to give adequate notice of behavior which could lead to revocation- Neither the Agreement nor the statute requires this, and thus it is found and concluded that the department was not in error with regard to this allegations

26. Lucas also alleged that there was no attempt to modify the plan prior to revocation- While it has been found above that the plan was never Teviewed, modified or revised, there is no requirement in either the Agreement or the Statute that an attempt be made to nidity the plan prior to revocation. Therefore. there was no error in the department's failure to modify the plan prior to revocation.

27. The most significant of Lucas' allegations is that there were inadequate grounds fox revocation, The statute does not contain any standards to be used in revoking provisional discharges, but the Agreement does. Article TV sets forth two sections which are relevant to this matter. That Article states:

The Medical Director may revoke a provisional discharge if any of the following grounds appear:

- A. The patient has departed from the treatment plan and is in need of hospitalization.
- B, The patient is exhibiting extreme forms of behavior symptomatic of mental illness for which treatment in the hospital is required.

Dr. Benninghoff testified that he relied upon Article TV.
B primarily, and upon Article IV. A secondarily. This squarely raises
the issue of whether the department did, by clear and convincing evi-
dence, justify the revocation. The primary ground relied upon was that
Korkowski was exhibiting "extreme forms of behavior symptomatic of

mental illness for which treatment in the hospital is required."*

28. The Agreement is unclear as to whether a hearing such as this is to be a de novo assessment of the patient's condition, or a review of the propriety of the Director's decision to revoke (compare Article VIII. C and Article VIII. E). It is found that these hearings are not de novo proceedings, but rather reviews of the Director's decision. However, the standard to be used in the issue at hand (the need for hospitalization) is the "clear and convincing" standard of Article VIII. E.

29. It is found that the department did not prove, by clear and convincing evidence, that the revocation should be sustained on the ground that Korkowski is in need of treatment in a hospital. What the department did prove is that Oakland could no longer tolerate Korkowski's behavior, and that Korkowski would not accept any alternative which required her to go back on medications,**

30. Lucas' final allegation is that the report (Carroll's letter) is erroneous, inaccurate, and based upon unsubstantiated opinions and conclusions. The report is found to be a generally correct statement of the facts. However, it does contain conclusory

*Lucas' allegation actually goes beyond this -- he implies that the only way to interpret the words "extreme form of behavior" is by reference to the standards contained in Minn. Stat. 253A.07, subd. 17(a), which are the standards for initial commitment. When Lucas argued this at the hearing, counsel for the department disagreed, arguing that the concept of a provisional discharge impliedly permits revocation upon a lesser showing than that required for initial commitment, and that had the drafters of the Agreement desired to use the higher standard of the statute, they would have specifically done so. The Examiner agrees that the appropriate standard is that of the Agreement alone. For an example of similar reasoning (although on a completely different issue) see *Lausche v. Commissioner*, 302 Minn. 65, 225 N.W.2d 366 (1974), cert. den'd., 420 U.S. 993. In that case, the court stated that the burden of proof imposed upon the State in an initial commitment proceeding need not be met in supplementary proceedings, such as petitions for discharge.

**The State has essentially asked the Examiner to assume that Korkowski is in need of hospitalization absent medication. Based upon the evidence offered at the hearing, the Examiner is unwilling to make that assumption in light of the standards imposed by the Agreement. The Agreement (and the Statute) place a substantial emphasis on the hospital as a place "of last resort", to be used after all other possible alternatives have been exhausted.

statements which are not warranted by those facts, For example, the

report states that Korkowski is a danger to herself and others. There

was no evidence offered to support a conclusion that she was a danger

to herself, and all witnesses agreed that this was incorrect. The

only fact which could lead Carroll to suggest that she was a danger

to others was her hostile behavior towards him at the July 28 meeting.

It is found that such behavior (shouting, standing up), in light of

a history of no physical violence, does not support a conclusion of

danger to others.

(1, The Agreement requires that the Report shall contain a state-

ment as to:

reasonable (1) Whether or not and viable alternatives to rehospitalization, such as community and area mental health centers, community hospitals licensed private practitioners, half-way houses and nursing homes where the patient could receive his/her needed care and treatment were considered.

alternative (2) The names of those locations, and

why?) (3) The reasons which (sic -- alternative was rejected, taking into account the following considerations:

and availability (a.) The need for of assistance in taking neces-

and acquiring necessary medication
necessary medical treatment
outside the state hospital.

(b) The willingness and ability of
the patient to care for himself.

(c) The willingness and ability of
other persons and community faci-
lities to assist

the patient.

32. The Report, and the record as a whole, does not indicate whether another boarding home or independent living constitute "reasonable and viable" alternatives. It is known that there is at least one other home which was considered at the time of Korkowski's provisional discharge. Would placement in that home be a "reasonable and viable" alternative? There was no evidence, from either party, regarding that second home. What about independent living?

Based upon the foregoing Findings, the Hearing Examiner hereby makes the following:

CONCLUSIONS OF LAW

1. -Any the foregoing Findings which should more properly be termed Conclusions are hereby adopted as such.
 2. Due, proper, and timely notice of this hearing was given by the Department-
 3. The After Care Plan did not meet the criteria for such plans set forth in the Agreement.
 4. The Department has failed to demonstrate, by clear and convincing evidence, that the revocation of the provisional discharge was proper in that there was no showing that hospitalization was required.
 5. The Report did not sufficiently consider all alternatives to hospitalization as required by the Agreement.
- based Upon the foregoing Conclusions, the Examiner hereby makes the following:

RECOMMENDATIONS

- A. That the revocation of the provisional discharge be rescinded.
2. That a new After Care Plan be prepared which meets the criteria of the Agreement and the Statute.
3. That Korkowski remain at Anoka pending the preparation of a new After Care Plan, which the Department shall prepare as soon as possible, but in any event not more than 10 days from the issuance of a final decision by the Commissioner in this matter.

Dated this 10th day of August, 1978.

ALLAN W. KLEIN
Hearing Examiner

The Examiner does not want persons to infer from this Report that he believes Korkowski to be totally free from mental illness, as that term is commonly used, He has assumed than mental illness, like many other illnesses, may be present in a spectrum of degrees, from very minor to extremely major. it is the proper role of the legislature and the Department to specify the point beyond which such illness must be present in order to invoke the power of the State. It is not the role of the Examiner to impose his own concept of where that point ought to be. Neither is it the tole of the Examiner to soeculate as to the true conditiol of a person such as Korkowski -- he is not equipped to do so. Rather, it is the proper role of the Examiner to whicb the evidence Presented by the State against the standards set forth in the Agreement. In this particular case, the Examiner has found that the State failed to meet the standard of proof imposed upon it by the Agreeenent-

The Examiner, in making such a determination, must however, exercise his own judgment as to the meaning of words such as "extreme forms of behavior sympotmatic of mental illness for which treatment in the hospital is required." While this Examiner, for one, would gladly defer to the expert opinion of a person trained in mental illnesses, little if any such opinion was offered in this case. If the Department is wondering what it could have done in order to have prevailed in this matter, it need look no further than the lack of expert opinion in the record. When the burden is upon the Department to demonstrate "by clear and convincing evidence" that the revocation was proper because a person has exhibited such extreme behavior that hospitalization is required, it would be desirable for the Department to offer expert testimony as to the medical interpretation to be accorded to various behavioral acts- Absent such opinion, the Examiner must exercise his own judgment in interpreting the words of the Agreement.

AWK