

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. 17,272  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision of the Department of Aging and Disabilities (DAD) upholding her discharge from a residential care home. DAD has moved that the case be dismissed for mootness.

FINDINGS OF FACT

In lieu of a hearing, the petitioner was asked to make an offer of proof in order to determine whether there is any discernible controversy here. For reasons of this preliminary ruling, the petitioner's allegations below are deemed to be true<sup>1</sup>:

1. The petitioner is eighty-five years old and is blind. She lived at a Level 3-community care home from February 2, 1999 until about August 16, 2001. Although she was legally blind when she was admitted to the community care home, she did have a little bit of sight in one eye, and she

was able to learn her way around the room and bathroom, and became very familiar with the layout of her space.

2. On June 3, 2001, the petitioner received a "Notice of Discharge" from the administrator of the community care home.<sup>2</sup>

3. The petitioner appealed the "Notice of Discharge" by letter dated July 18, 2001.<sup>3</sup>

4. The appeal was denied by the Director of DAD's Division of Licensing and Protection on August 10, 2001, and a timely appeal was filed with the Human Services Board.<sup>4</sup>

5. On August 16, 2001, the petitioner was brought from the community care home to a hospital by ambulance, and was not admitted to the hospital because there was no medical reason for her admission.<sup>5</sup> When she went to return to the community care home, the administrator refused to allow her to return, despite the fact that the DAD Residential Care Home

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<sup>1</sup> The Department in its memorandum does not appear to disagree with any of this information although the parties were unable after some effort to submit an agreed upon stipulation in this matter.

<sup>2</sup> The reason for this notice was the home's belief that the petitioner's care needs had become too difficult for it to handle. She was offered a place in a nursing facility.

<sup>3</sup> The gravamen of the petitioner's complaint, according to her attorney, was that transferring her on such short notice would be traumatic and that the home could obtain a waiver to care for her needs, at least for some period of time.

<sup>4</sup> Board records show that the appeal was filed on August 28, 2001.

<sup>5</sup> The Department adds that the trip to the hospital was on the advice of the petitioner's physician.

regulations provide that "the resident may remain in the room or home during the appeal." 5.3a(2)iii.

6. As a result of the administrator's refusal to allow her to return to her room, the petitioner was admitted to the hospital as a social admission (days for which Medicare did not pay, since there was no medical reason for the admission), and then moved to a nursing home.

7. The petitioner is currently living at the nursing home and wants to remain there rather than return to the community care facility, since she has now become used to it.

ORDER

The petitioner's appeal is dismissed as moot.

REASONS

Regulations adopted by the Department of Aging and Disabilities (DAD) require residential care homes operating under license in this state to give at least thirty days advance notice to a resident if an involuntary discharge is to take place. Residential Care Home Licensing Regulations, October 3, 2000 (RCHLR) 5.3.a.(1) and (2). A resident has the right to appeal that decision to the DAD licensing agency within ten days of the receipt of notice and to receive a

decision from the director within eight days of the appeal.

RCHLR 5.3.a.(3) Thereafter, an appeal must be taken within ten days to the Human Services Board which conducts a de novo evidentiary hearing in accordance with 3 V.S.A. § 3091. RCHKR 5.3.a.(3)(vi). The resident may stay in the room or home during the pendency of the appeal. RCHLR 5.3.a.(2)iii.

In this scheme and under 3 V.S.A. § 3091, the Board has jurisdiction over the actions of DAD not over the actions of the community care home itself:

An applicant for or a recipient of assistance, benefits or social services from . . . the department of aging and disabilities . . . may file a request with the Human Services Board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits or services is denied, or is not acted upon with reasonable promptness; or because the individual is aggrieved by any other agency action affecting his or her receipt of assistance, benefits, or services . . . or because the individual is aggrieved by agency policy as it affects his or her situation.

The grievance which the Board may hear in this case is the disagreement the petitioner has with the licensing director over the merits of the community care home's proposed transfer of her to a nursing facility. While the petitioner may have once disagreed with her transfer from the community care home, she no longer takes that position. She does not want to return to that home which she was forced to leave over

ten months ago. Her real grievance at this time appears to be with the nursing home for discharging her while her appeal was pending.<sup>6</sup>

While the petitioner may have a grievance against the nursing home if it violated the rules, she does not have any present grievance against DAD. There is no evidence that the DAD was consulted or took any part in the petitioner's discharge from the facility on August 16, 2002. The only role DAD has played in this matter is to agree with the original proposal of the community care home that it would be more appropriate and safe for her to be in a nursing home. As the petitioner is now in a nursing home and does not want to leave, it must be determined whether this case is "moot" and thus should be dismissed.

The Vermont Supreme Court has said that as a general rule a case becomes moot "when the issues presented are no longer

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<sup>6</sup> It appears that the petitioner was discharged after the Department had issued its decision agreeing with the community care home but before the petitioner had filed her appeal with the Human Services Board. The appeal appears to have taken place eighteen days after the Department's decision in this case and some twelve days after her discharge. Under DAD's rules, the petitioner had ten days to file an appeal with the Board but the notice provided by the Department said 30 days. It must be noted that the "ten" day provision conflicts with the Board's rules adopted under 3 V.S.A. 3091 which does provide for a thirty day appeal period unless otherwise provided by **statute**. The statute governing appeals from licensing decisions at 33 V.S.A. 7118 does not provide a different appeal period. It is not clear in the regulations whether the community care home is obligated to keep residents for the thirty day period following a decision by the licensing agency in case a further appeal is decided.

'live' or the parties lack a legally cognizable interest in the outcome." In re S.H. 141 Vt. 278, 280 (1982). In that case the Court decided that an appeal to the Human Services Board made by a minor in SRS custody regarding a school she had been placed in was moot once the minor left the school. The court also decided that absent an action for damages or representation of a class of persons similarly situated the petitioner had no further cognizable interest. Id. at 280. The only exception to the latter was limited to a case where the action was too short to be fully litigated prior to review *and* there was a reasonable expectation that the appellant would be subjected to the same action again. Id. at 281. In that particular case the Court determined that the chance of the minor being sent back to the school again for such a short period of time that review could be evaded was too remote to meet this exception.

Applying those principles to the petitioner's appeal it must be similarly found that there is no "live" issue. The petitioner appealed because she disagreed with the licensing director's decision that her discharge was warranted. However, the petitioner is no longer in the community care facility and no longer wishes to be there. Therefore, it is of no consequence now whether the director was right or wrong

in her decision. Like the minor in In re S.H., the petitioner is neither suing for damages nor leading a class action lawsuit (neither of which actions can take place before this Board). As a result, she has no further legally cognizable interest in the outcome of this matter. Likewise there is no "limited" exception to this standing doctrine in her case because it is extremely unlikely that she will ever be subjected to another decision from DAD agreeing to her transfer to a nursing home since she is already in one. Even if that were to happen, the facts of any new transfer would necessarily be unique and not a repeat of the old decision.

The petitioner has argued that failure to hear this case shields the administrator of the community care home from review of her "unlawful" actions. That is not true. DAD has an obligation to enforce its own regulations. If the petitioner can persuade DAD that the regulations have been violated, DAD has a number of remedies available to it to sanction the community care home. See RCHLR 4.15 and 4.16. and 33 V.S.A. § 7111. There may be other legal remedies such as a suit for damages or a class action lawsuit against the community care home available to the petitioner herself. However, the Board does not have the jurisdiction to hear grievances by the petitioner against the community care home,

only grievances against DAD. In as much as any grievance the petitioner may have had against DAD is now resolved, the case must be dismissed as moot.

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