BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES

In the Matter of the	)	
	)	
S T	)	OAH No. 13-0197-DHS
	)	

COMMISSIONER'S DECISION

In accordance with AS 44.64.060(e)(4), the undersigned, by delegation from the Commissioner of the Department of Health and Social Services, rejects a factual finding in the Administrative Law Judge's March 26, 2013 proposed decision.

The proposed decision makes an ultimate finding of fact that:

> Mr. T certainly has a mental illness. It is treatable and under control. Whether he may decompensate in the future is uncertain. However, as in 2009 and 2011, when his medications were adjusted, he can be monitored for signs of decompensation and treated if that occurs. He is being treated by the VA and ACMHS, and the record indicates that treatment will continue. Under the Pioneer Home regulations and policy, Mr. T falls within the category of someone whose behaviors are under control with treatment and have been for a number of years. He has mental health treatment resources in place to address his needs, should his symptoms exacerbate. It is therefore more likely true than not true that he does not constitute a behavioral threat or risk to other Pioneer Home residents, visitors, or staff.[1]

That factual finding is replaced with the following:

> Mr. T's mental illness, while treatable and currently under control, is difficult to treat and unpredictable in nature. This finding is supported by Dr. Mueller's letter that it is not possible to guarantee that Mr. T might not decompensate in the future,[2] by Mr. T's extensive history of psychiatric hospitalizations, which included five hospitalizations between January 2005 and August 2006, and by his 2009 and 2011 psychiatric hospitalizations.[3] Mr. T's mental illness has resulted in a history of disruptive and dangerous behaviors, as discussed in the proposed decision.[4] Consequently, it is more likely true than not true that Mr. T poses a behavioral threat or risk to other Pioneer Home residents, visitors or staff.

The disposition of the case is revised as follows: Mr. T, as an applicant for admission to the Pioneer Home, had the burden of proof to demonstrate that he did not pose a behavioral threat or

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1 Proposed Decision, p. 10.
2 R. 888.
3 Proposed Decision, pp. 2 – 3.
4 *Id.*

risk. He failed to meet his burden of proof, and as a result, the Pioneer Home's decision to deny Mr. T's application is therefore upheld.

The Administrative Law Judge's March 26, 2013 decision document, as modified above, constitutes the final decision of the Commissioner in this case.

Appeal Rights:

This decision is the final administrative action in this proceeding. Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 8th day of May, 2013.

By: *Signed*
Jared C. Kosin
Executive Director, Office of Rate Review
Department of Health and Social Services

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DECISION

I. Introduction

S T applied to become a resident at the Anchorage Pioneer Home (Pioneer Home). The Pioneer Home denied his application due to concerns, based upon his history, that he was a safety threat to the home's residents, visitors, and staff. Mr. T appealed the denial. The Commissioner of Health and Social Services' delegate referred the matter to the Office of Administrative Hearings for preparation of a proposed decision.

The parties agreed that no evidentiary hearing should be held. The matter was submitted as ripe for decision based upon the stipulated record.[5]

As discussed in detail below, the facts demonstrate that Mr. T's mental illness, despite a pre-2007 history of disruptive and dangerous behaviors occasioned by it, has been well controlled for the past six years, and that he does not pose a safety threat to the residents, visitors, or staff of the Anchorage Pioneer Home. Under the applicable legal standard, his application should therefore have been approved, and its denial is overturned.

II. Facts

Mr. T is a 71 year old man with a complex interwoven psychiatric and legal history. His current medical conditions are hypertension, diabetes – type II – insulin controlled, and hyperlipidemia. His psychiatric diagnoses include schizoaffective disorder – bipolar type, bipolar disorder, dementia, and personality disorder NOS. He receives medical and psychiatric care from the Veteran's Administration (VA) and Anchorage Community Mental Health Services (ACMHS).

Mr. T's history through late 2006, which is recounted below, includes arsons, criminal convictions, threatening behaviors, and a large number of psychiatric commitments. However,

[5] The record consists of documents which were supplied by DHSS as part of the referral (numbered pages 1 - 859) and documents supplied by Mr. T on March 4, 2013 (numbered pages 860 - 890). The documents supplied by DHSS contain occasional interlineations and written comments.

since late 2006, there have been no incidents of, or threats of, arson and minimal behavioral concerns.

The only problems since 2006 have related to medication management. A medication management problem began in March 2009, when Mr. T's caseworker noticed he was experiencing changes in his mental status.[6] Mr. T had two visits to the Providence Hospital emergency room that month due to an altered mental state. He was advised to change his medications (Claritin, pseudoephedrine, and Darvon) during these visits.[7] He was not admitted to Alaska Psychiatric Institute (API).

Mr. T was admitted to API on June 23, 2009 from the Providence Hospital emergency room, due to concerns he was experiencing increased agitation, insomnia, labile mood, and had difficulty controlling his behavior. He was noted to be pleasant and cooperative on admission. He was discharged a week later.[8] Mr. T had one further admission to API, which was from June 10 through June 26, 2011. The 2009 and 2011 admissions

> were brought on by increased symptoms Mr. T experienced during medication adjustments that were being made by his psychiatric provider at the VA. Mr. T fully cooperated with going to the Providence Emergency Room for evaluation and cooperated during his brief admissions at API on both occasions.[9]

In sum, Mr. T's psychiatric condition has been well controlled since 2006.

Before late 2006, Mr. T had a very troubled history. He began committing arsons as a child.[10] He was diagnosed with schizoaffective disorder in 1972.[11] He has three felony convictions: one for arson in 1988, another for damage to property in 1988, and another for arson in 2002 from an incident in 2001. He also has two misdemeanor convictions: one for criminally negligent burning and the other for assault.[12] He was continuously incarcerated from late October 2001 until late June 2004, when he was placed in an assisted living facility (ALF) under the Institutional Discharge Project as part of his probation.[13] His probation continues through June 2014.[14]

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6 R. 419.
7 R. 437.
8 R. 464, 467.
9 R. 26. The record does not contain API records for the 2011 admission.
10 R. 70.
11 R. 518.
12 R. 799, 858.
13 R. 858 - 859.
14 R. 805.

Mr. T was admitted to API in late January 2005, pursuant to an involuntary commitment proceeding that alleged that he was verbally abusive, displayed paranoid delusions, and was seen putting mutilated photographs of other ALF residents on the door of his room.[15] This was his 18th admission to API and his first admission since 2001. Mr. T was discharged approximately a week later.[16] He was then arrested four days later because he was stalking a fellow resident at his ALF.[17] He experienced delusions and auditory and visual hallucinations while incarcerated. He remained in custody until he was discharged to his ALF on April 11, 2005.[18]

Mr. T was again involuntarily committed to API at the end of October 2005, due to claims he was decompensating, not sleeping, and had reported plans to commit arson. Mr. T was discharged a week later.[19]

Mr. T was readmitted to API on November 29, 2005 based upon a petition that claimed he had been refusing his medications for four days, and that he was delusional, easily agitated, and irritated.[20] He was verbally abusive, made sexually inappropriate comments to female staff, threw various items (dinner tray, cup of coffee, telephone) at staff, and engaged in exhibitionistic/masturbatory and self-mutilating behavior during this admission.[21] He was discharged ten days later.[22]

Mr. T was jailed for several weeks during January 2006. He was apparently arrested due to his probation officer's concerns that he was argumentative with his ALF staff and refusing to take his medications.[23]

Mr. T's next API visit came six months later, from July 26 through August 8, 2006. The discharge summary reads that he was admitted because he had "developed hypomania, insomnia, irritable behaviors, and threatened to throw a remote control at a peer in the assisted living facility. He has been taking his medications." The discharge summary relates that he had recently been given a new sleeping pill and that he had "some stress with a peer in the assisted living facility, but other precipitants are not known." The physician who completed the discharge summary stated "[t]he patient is very cooperative. I have never seen this patient

15 R. 703, 708, 711.
16 R. 218, 573, 702.
17 R. 775.
18 R. 827 - 834.
19 R. 699 - 701.
20 R. 137.
21 R. 656 - 658, 663, 667, 669, 671, 673 - 674, 678 - 679.
22 R. 135.
23 R. 818, 826.

looking so psychiatrically healthy, and I have considerable experience with this patient."[24] Mr. T's medications were adjusted while at API and his diagnosis on discharge was "Bipolar Disorder, Most Recent Episode Hypomanic without Psychotic Features."[25]

Mr. T was again jailed from September 5 through October 9, 2006, apparently as a result of missing a single dose of his medications and water intoxicating.[26]

The record contains several psychological evaluations of Mr. T. The first was conducted by Dr. Von Hafften of ACMHS in 2004, immediately after he was released from prison. The assessment portion reads:

> Mr. T is a 62-year-old man with schizoaffective disorder. He has a history of poor insight. In the past he has frequently gone off medications with resulting mania and psychosis. Do not feel he is an imminent danger to himself or other at this time. He is currently on probation and parole. He is living at No Name.[27]

The evaluation states that Mr. T's Axis 1 Clinical diagnoses are schizoaffective disorder, bipolar type, and alcohol abuse (by history).[28]

Dr. Curtis of ACMHS conducted an evaluation of Mr. T in 2005.[29] That evaluation contains a diagnosis of schizoaffective disorder, bipolar type, and states, in the assessment portion, that Mr. T "has a history of poor insight. In the past he has frequently gone off medications with resulting mania and psychosis. He continues to have severe side effect, but also prodromal manic symptoms with current medication regimen."[30]

There is a 2007 evaluation conducted by Dr. Curtis of ACMHS, [31] which states Mr. T "has tended to discontinue medications when not in court-ordered treatment."[32] That same evaluation indicates that Mr. T experienced side effects from his medications in 2004 and 2005 that resulted in two non-psychiatric hospitalizations, and that his medication regimen since late 2006 had "resulted in fairly good management of his mania. Parkinsonian tremor has persisted."[33] The assessment portion of the evaluation states that Mr. T's "illness has led to repeated hospitalizations and periods of incarceration. Within the last six months, he has had

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24 R. 188.
25 R. 189.
26 R. 799 - 800.
27 R. 40.
28 R. 40.
29 R. 32 - 36.
30 R. 35.
31 The document consists of five pages. Page 1 is in the record at R. 530. Pages 2 - 5 are in the record at R. 28 - 31.
32 R. 530.
33 R. 530.

improved stability in terms of symptoms and side effects."[34] The concluding diagnosis is schizoaffective disorder, bipolar type.[35]

The most recent evaluation in the record is a neuropsychological examination conducted by neuropsychologist Dr. Dukarm for the VA on May 7, 2010.[36] It concludes, after testing, that "Mr. T is exhibiting wide-spread neurocognitive deficits on this brief examination."[37] The evaluation states that Mr. T's Axis 1 diagnoses are "Dementia, NOS; Schizoaffective Disorder (by history)."[38] The last psychological document in the record is a "mental health note" authored by Dr. Curtis of the VA on January 30, 2012.[39] It states Mr. T experienced medication side effects of tremor, an affected gait, "reduced armswing, head hunched down."[40] The note concludes as follows:

> Vet presents doing well. As usual, balancing [symptom management] and [side effects] is difficult. He gets manic with any reduction in antipsychotic; has Parkinsonism with current med doses and has had falls (but only outside and ? role of ice); has had cognitive impairment leading to questing of presence of dementia when he was on higher dose of anticholinergic.[41]

The concluding diagnosis is for schizoaffective disorder, bipolar type.[42]

Mr. T applied for admission to the Anchorage Pioneer Home. He was interviewed on March 15, 2012 where he stated, in part, that he would like to take less medication due to the side effects.[43] At the time of his interview, he was residing at No Name, the ALF where he had been residing since February 2005.[44]

The Anchorage Pioneer Home Administrator denied Mr. T's application for admission on May 16, 2012. The denial letter contains numerous grounds for denial, which consist of concerns over a history of failure to comply with medications, resulting in symptom

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34 R. 30.
35 R. 30.
36 R. 69 - 74.
37 R. 73.
38 R. 73.
39 R. 107 - 109.
40 R. 107.
41 R. 109.
42 R. 109.
43 R. 80, 861.
44 R. 80. Mr. T was residing in No Name ALF until the beginning of February 2005, as indicated by the February 1, 2005 API discharge notes indicating he was released to No Name ALF. R. 590. He moved to No Name ALF shortly thereafter, as indicated by Department of Correction records that refer to his belongings being located at No Name ALF as of February 16, 2005. R. 752.

exacerbation, and a history of aggressive and violent behaviors.[45] Mr. T appealed the denial to the statewide Director of the Alaska Pioneer Homes, supporting the appeal with an August 22, 2012 letter from Pauline Slisz, a Licensed Master Social Worker who works for the Alaska Department of Corrections. Ms. Slisz's letter recounts that she has worked with Mr. T since August 2005, and that he had two API admissions in the prior six years (June 23 to July 1, 2009 and June 10 to June 26, 2011):

> [t]hese admissions were brought on by increased symptoms Mr. T experienced during medication adjustments that were being made by his psychiatric provider at the VA. Mr. T fully cooperated with going to the Providence Emergency Room for evaluation and cooperated during his brief admissions at API on both occasions. [46]

Ms. Slisz's letter stated that Mr. T had been a model probationer during the preceding six years and that he had not "posed a danger to himself or others in any capacity in the last six years."[47]

The Director denied Mr. T's appeal on September 14, 2012, due to concerns that Mr. T posed a significant health and safety risk: "[t]he primary reason for coming to this decision is that Mr. T has a history of arson which dates back to his childhood and he served several years in prison for one of the arsons."[48] Mr. T appealed that decision to the Commissioner on October 15, 2012.[49]

The Commissioner delegated the appeal to former Deputy Commissioner Kimberli Poppe-Smart, who requested additional information from the parties.[50] Deputy Commissioner Poppe-Smart then remanded the matter to the Administrator on December 3, 2012, with specific instructions that it reconsider Mr. T's application after contacting Mr. T's medical providers to determine the answers to the following questions:

1) Mr. T has previously demonstrated behaviors that are not conducive to safe placement in a large assisted living home including fire-setting behaviors and assault. Are Mr. T's previous dangerous behaviors likely to occur again? Are they treatable?

2) What would be the effect on Mr. T's behaviors if he transfers from the small, specialized psychiatric assisted living home with extensive case

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45 R. 860 - 864.
46 R. 867.
47 R. 867.
48 R. 876.
49 R. 22 - 23.
50 *See* December 3, 2012 letter from Deputy Commissioner Poppe-Smart, which referenced her letter dated November 21, 2012 and responses from Mr. T's lawyer and the Administrator. R. 19 - 21. The Deputy Commissioner's November 21, 2012 correspondence and the responses to it are not contained in the record.

> management and other professional supports to the large (167 residents) unstructured Anchorage Pioneer Home without specialized psychiatric care? Will Mr. T and other residents remain safe after such a transfer?[51]

The Administrator received input from Dr. Mueller of the VA, who is Mr. T's primary medical provider. After stating that he was "not as qualified to comment on [Mr. T's] mental state as is his mental health care provider," Dr. Mueller gave his opinion that while it was not possible to guarantee that Mr. T might not decompensate in the future, there was a low risk of violence when Mr. T was compliant with his medications. He concluded the Pioneer Home would be an appropriate placement (if Mr. T had continued mental health support), and that the Pioneer Home had the resources to ensure his medication compliance. Dr. Mueller objected to the characterization of Mr. T's current ALF as "'specialized psychiatric assisted living'" as a "stretch," based upon having visited Mr. T on "at least a dozen occasions" at the ALF.[52]

The Administrator also received supplemental input from Dr. Curtis, a psychiatrist who had treated Mr. T "off and on since the late 1990's, first at Anchorage Community Mental Health and more recently at the VA." She stated that Mr. T had not shown signs of dangerousness for a "number of years," that his "symptoms have remained at a low level with medications," and that he would continue to be treated by the VA and ACMHS. She concluded that there was "no indication that Mr. T would pose a danger to any residents, staff or visitors of the Anchorage Pioneer Home."[53]

On January 31, 2013, the Administrator wrote Jared Kosin, who was assigned by the Commissioner to decide this case upon the resignation of Deputy Commissioner Poppe-Smart. The Administrator reaffirmed his denial of Mr. T's application.[54] The Administrator's reasoning was based upon Mr. T's behavior in the past, his history of medication non-compliance, and his concerns that Mr. T would return to being medically non-compliant once he was off probation:

> As I stated in the previous denial, I commend Mr. T for being compliant in the recent past; however, from reviewing his medical and mental health records, I still believe it is more likely than not that, when Mr. T's probation is lifted, he will become non-compliant with his medication regime. It would be irresponsible of me to put at risk any of the other 167 residents, their family, visitors, and the

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51 R. 20 - 21.
52 R. 888.
53 R. 890.
54 R. 881 - 884.

> Pioneer Home staff – all of whom I am responsible for – on the chance Mr. T remains medication compliant for the length of his stay at the Pioneer Home.[55]

Mr. Kosin then referred the case to the Office of Administrative Hearings for preparation of a proposed decision.

III. Discussion

The Anchorage Pioneer Home is an assisted living facility administered by the Alaska Department of Health and Social Services.[56] Each resident is entitled to "live in a safe . . . environment."[57] A Department regulation denies admission to a pioneer's home "for a person while the person has . . . a behavior problem that would threaten the health, safety, or welfare of that person or other residents or recipients, as determined by the department."[58] The Alaska Pioneer Home policy statement on admissions explains further:

> Residents whose records indicate that the resident has a behavior problem that would threaten the health, safety, or welfare of that person or other residents, recipients, or staff may be denied admission based upon those behavioral issues. Prior to denying residents admission based on behaviors alone, an inquiry will be conducted with residents' providers to determine if the behaviors have come under control with treatment, are predictable and treatable, or were the result of an anomalous event and unlikely to recur again.[59]

The applicable regulation and the policy statement are clear that denial must be based on current behaviors. The regulation reads: "[a]dmission . . . will not be approved for a person *while the person has* . . . a behavior problem."[60] The policy statement requires "an inquiry . . . to determine if the behaviors *have come under control* with treatment, are predictable and treatable, or were the result of an anomalous event and unlikely to recur again."[61]

Mr. T has a history of arsons, coupled with a reported threat to commit arson in 2005. He displayed very volatile behaviors from his release from prison in late June 2004 through late 2006, which resulted in five API admissions and three reincarcerations. His last period of incarceration ended on October 9, 2006. His behaviors included aggression, stalking a fellow resident at the ALF, a threat to commit arson, self-mutilation, and exhibitionism, coupled with a lack of medication compliance.

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55 R. 883 - 884.
56 AS 47.55.010(a); 7 AAC 74.010(b).
57 AS 47.33.300(a); 7 AAC 74.010(a) and (b).
58 7 AAC 74.060(b).
59 R. 874.
60 7 AAC 74.060(b) (emphasis added).
61 R. 874 (emphasis added).

However, Mr. T has been incident-free since late 2006. He has been to the emergency room on several occasions due to medication management concerns. He has had two API admissions, one in 2009 and the other in 2011, both of which were occasioned by changes in his medications, not by his refusal to take medications or by untoward behaviors. He has managed to reside in the same ALF since February 2005.

Mr. T continues to have a diagnosis of schizoaffective disorder, bipolar type. He had a one-time diagnosis in 2010 of dementia. His treating psychiatrist, Dr. Curtis, who has treated him since the 1990s, states that "Mr. T had not shown signs of dangerousness for a "number of years," that his "symptoms have remained at a low level with medications," and that there was "no indication that Mr. T would pose a danger to any residents, staff or visitors of the Anchorage Pioneer Home."[62] His medical care provider, Dr. Mueller, believes that Mr. T would be low risk so long as he was compliant with his medications. The Corrections' Licensed Master Social Worker, Ms. Slisz, regards him as a model probationer, observing that he has not "posed a danger to himself or others in any capacity in the last six years."[63]

In contrast, the Administrator's denial focused upon Mr. T's previous behaviors and lack of medication compliance. It speculated that Mr. T will become medically non-compliant after his probation period ends. The most recent letter from the Administrator specifically referred to Mr. T's interview statement that he would like to decrease his medications due to side effects,[64] a not unreasonable hope on Mr. T's part, given medically documented side effects of tremor, reduced arm swing, falls (possibly ice related), head hunched over, and possible medication related cognitive impairment.[65]

While the Pioneer Home cannot admit individuals whose behaviors pose a risk to other residents, visitors, and staff, the applicable regulation, 7 AAC 74.760(b), requires that the risky behavior be current, *i.e.*, not historical. The admission policy underscores this requirement by requiring the Pioneer Home to inquire whether the behaviors are under control with treatment.

Mr. T certainly has a mental illness. It is treatable and under control. Whether he may decompensate in the future is uncertain. However, as in 2009 and 2011, when his medications were adjusted, he can be monitored for signs of decompensation and treated if that occurs. He is

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62 R. 890.
63 R. 867.
64 R. 883.
65 R. 107 - 109.

being treated by the VA and ACMHS, and the record indicates that treatment will continue. Under the Pioneer Home regulations and policy, Mr. T falls within the category of someone whose behaviors are under control with treatment and have been for a number of years. He has mental health treatment resources in place to address his needs, should his symptoms exacerbate. It is therefore more likely true than not true that he does not constitute a behavioral threat or risk to other Pioneer Home residents, visitors, or staff.[66]

IV. Conclusion

Mr. T had the burden of proof in this case. He met his burden of proof and demonstrated that he is not a behavioral threat or risk to other Pioneer Home residents, visitors, or staff. As a result, his application to become a resident at the Anchorage Pioneer Home should be approved.

DATED this 26th day of March, 2013.

Signed
Lawrence A. Pederson
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]

[66] Mr. T also raised a cursory argument that the denial of his application constituted discrimination based upon a disability, which violated both the federal American with Disabilities Act and Alaska Human Rights law. *See* R. 22 - 23. However, it is not necessary to address this argument because the decision finds for Mr. T based upon Alaska Pioneer Home regulations and policy.