

FILED

May 24, 2018

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO.: 18N-00013

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic administrative hearing in the above-referenced matter on April 9, 2018 at 9:12 a.m. and on April 11, 2018 at 8:30 a.m.

APPEARANCES

For Petitioner:

[REDACTED]

Petitioner's Son

For Respondent:

[REDACTED]

STATEMENT OF ISSUE

Petitioner is appealing the nursing home facility's decision to transfer and/or discharge her from the nursing home. The facility has the burden of proving by clear and convincing evidence that the transfer and/or discharge was appropriate under 42 C.F.R. § 483.15.

PRELIMINARY STATEMENT

[REDACTED], District Ombudsman Manager and [REDACTED] Certified Ombudsman, appeared as witnesses for Petitioner. Petitioner introduced Composite Exhibit "1," which was accepted into evidence.

At the request of Petitioner, the Hearing Officer took administrative notice of the following:

- Section 400.022, Florida Statutes
- 42 C.F.R. § 483.15

[REDACTED] R.N., Care Manager and Discharge Planner with [REDACTED] [REDACTED] appeared as a witness for Respondent. Respondent introduced Composite Exhibit "1," which was accepted into evidence.

The record was held open until April 18, 2018 for Respondent to provide additional evidence regarding the physician's signature and for both parties to submit proposed orders or final statements.

Respondent submitted the additional evidence on April 11, 2018, which was entered into evidence as Composite Exhibit "2." Respondent filed a closing statement on April 17, 2018 and Petitioner filed a proposed order on April 18, 2018.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner entered the facility on November 14, 2017 and was discharged from the facility on December 6, 2017 due to dementia and a decline in her cognitive ability.

2. Respondent's witness [REDACTED] admitted that the facility failed to provide a thirty (30) days discharge notice to Petitioner. However, Respondent's witness [REDACTED] stated on December 1, 2017, the facility did discuss with Petitioner's son by phone about Petitioner's pending discharge from the facility.

3. The Notice of Resident Transfer or Discharge dated December 1, 2017 states:

As per the admission agreement, the facility must transfer/discharge a resident when the facility determines that such action is appropriate in order to meet the resident's needs for healthcare services. This correspondence is to inform you that [Petitioner] will be transferred/discharged to [REDACTED] Florida on December 6, 2017 for the following reason(s): The resident's health has improved sufficiently that the resident no longer needs the services provided by this facility. The notice further states: The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility. (See Petitioner's Composite Exhibit 1)

4. Respondent's witness admitted that the reason provided in the discharge notice was incorrect. The correct reason is that the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in this facility. The facility provided a care patrol to Petitioner. A care patrol is a person who locates appropriate nursing home facilities for patients. The care patrol helped Petitioner's son locate a secure and safe nursing home for Petitioner.

5. Respondent's witness [REDACTED] provided testimony, which is summarized as follows: Petitioner suffers from [REDACTED]. The facility is not secure enough to handle a [REDACTED] patient. Petitioner had instances where she could not remember how she reached a location within the facility. Petitioner would ambulate to the front hallway creating a potential for elopement. Petitioner would make statements like "it's her birthday" or "arriving from Germany."

6. The Nursing Home Discharge Summary plan indicated Petitioner's family initiated the discharge to [REDACTED] and that the family and patient was in agreement with the discharge plan. However, Petitioner's son stated that he did not request Petitioner to be discharged from the facility. He received a phone call from the facility about his mother being discharged and had to find a new nursing home.

7. Petitioner's witness [REDACTED] argued that the discharge notice was not valid because the wrong reason was provided on the notice for Petitioner's discharge.

8. Petitioner's witness [REDACTED] stated the medical certification form provided with the discharge notice did not provide sufficient evidence that Petitioner suffered from a decline in cognitive abilities. The mental cognitive status on the report provides that Petitioner is alert, disoriented, but can follow simple instructions. The report does not indicate elopement as a patient risk alert for Petitioner. (See Petitioner's Composite Exhibit 1).

9. Petitioner's witness [REDACTED] provided a letter from [REDACTED] that indicated they do not have a memory unit or secure unit, and Petitioner did not exhibit any behavior of elopement or wandering. (See Petitioner's Composite Exhibit 1).

CONCLUSIONS OF LAW

10. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 400.0255(15), Florida Statutes. This order is the final administrative decision of the Department of Children and Families under Section 400.0255(15), Florida Statutes.

11. 42 C.F.R. § 483.15 limits the reasons a nursing facility may discharge a Medicaid or Medicare patient and states in part:

- (c) Transfer and discharge— (1) Facility requirements—(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—
- (A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
 - (B) The transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;
 - (C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;
 - (D) The health of individuals in the facility would otherwise be endangered;
 - (E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or
 - (F) The facility ceases to operate.

(2) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

- (i) Documentation in the resident's medical record must include:
- (A) The basis for the transfer per paragraph (c)(1)(i) of this section.
 - (B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).
- (ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—
- (A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and
 - (B) A physician when transfer or discharge is necessary under paragraph (b)(1)(i)(C) or (D) of this section.
- (iii) Information provided to the receiving provider must include a minimum of the following:

- (A) Contact information of the practitioner responsible for the care of the resident
- (B) Resident representative information including contact information.
- (C) Advance Directive information.
- (D) All special instructions or precautions for ongoing care, as appropriate.
- (E) Comprehensive care plan goals,
- (F) All other necessary information, including a copy of the residents discharge summary, consistent with §483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) Notice before transfer. Before a facility transfers or discharges a resident, the facility must—

(i) **Notify the resident and the resident's representative(s) of the transfer** or discharge and the **reasons for the move in writing** and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (b)(5) of this section.

(4) Timing of the notice. (i) Except as specified in paragraphs (b)(4)(ii) and (b)(8) of this section, **the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.**

(ii) Notice must be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the facility would be endangered under paragraph (b)(1)(ii)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (b)(1)(ii)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (b)(1)(ii)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (b)(1)(ii)(A) of this section; or

(E) A resident has not resided in the facility for 30 days.

(5) Contents of the notice. The **written notice specified in paragraph (b)(3) of this section must include the following:**

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name,

address (mailing and email), and telephone number of the entity which

receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

(6) Changes to Notice. **If the information in the notice changes prior to effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.** (Emphasis Added).

12. The above-cited authority sets forth the conditions, which must exist for a nursing home to involuntarily discharge a resident. Respondent admitted that the facility initiated the discharge of Petitioner.

13. In the instant case, Petitioner was given a Nursing Home Transfer and Discharge Notice on December 1, 2017, which indicated that “the resident’s health has improved sufficiently that the resident no longer needs the services provided by this facility” and she would be discharged on December 6, 2017. The reason provided on the discharge notice is a lawful reason. However, Respondent’s witness admitted the reason provided on the discharge notice is incorrect. The correct reason is “the transfer or discharge is necessary for the resident’s welfare and the resident’s needs cannot be met in this facility.” Respondent failed to provide the changes in writing and in a timely manner to

all relevant parties. Therefore, Petitioner's discharge notice is defective because it lacks the correct reason for the discharge.

14. Petitioner signed the discharge notice on December 1, 2017 and she was discharged on December 6, 2017. However, Respondent admitted they did not provide a thirty ("30") day notice of the discharge to Petitioner; and did not send a copy of the discharge notice to Petitioner's representative, instead they informed him by phone about the discharge on December 1, 2017. The authority above states:

"the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged...and Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand."

15. Based on the totality of the evidence, Respondent has not met its burden of proving by clear and convincing¹ evidence. The Notice of Transfer and Discharge Notice dated December 1, 2017, signed by Petitioner, is defective because it provided the incorrect reason for her discharge and does not comply with the procedural requirements of the above cited authority.

16. Respondent reported a change for the discharge reason on the day of Petitioner's appeal hearing, which is not timely, and it does not negate the requirement that the changes needs to be in writing. Petitioner's representative testimony is found to be credible that he did not receive the discharge notice in writing. Respondent admitted

¹ State v. Graham, 240 So.2d 486 (1974), states, "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. (Id. quoting Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983))."

to not providing Petitioner with sufficient notice of the discharge. The undersigned Hearing Officer will not address the merits of this case because the Discharge Notice is defective and does not comply with procedural requirements as outlined in the authority above. The facility has failed to provide a proper discharge notice to Petitioner as required by the Code of Federal Regulations.

DECISION

Based upon the foregoing findings of fact and conclusions of law, Petitioner's appeal is GRANTED. The resident must be readmitted to the facility's first available bed.

NOTICE OF RIGHT TO APPEAL

The decision of the hearing officer is final. Any aggrieved party may appeal the decision to the district court of appeals in the appellate district where the facility is located. Review procedures shall be in accordance with the Florida Rules of Appellate Procedure. To begin the judicial review, the party must file one copy of a "Notice of Appeal" with the Office of Appeal Hearings, Bldg. 5, Rm.255, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. The party must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The department has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this 24 day of May, 2018, in
Tallahassee, Florida.



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Copies Furnished To  Respondent

 Agency for Health Care Administration
