

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

FILED

May 21, 2018

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00016

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned convened a nursing home discharge hearing in the above-referenced matter on April 26, 2018 at 2:00 p.m., at [REDACTED]

[REDACTED]

APPEARANCES

For Petitioner: [REDACTED], Petitioner's Daughter

For Respondent: [REDACTED], Director of Nursing

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging her from the Facility. Respondent carries the burden of proof by clear and convincing evidence in this appeal.

PRELIMINARY STATEMENT

Pursuant to notice, this hearing was initially scheduled with Hearing Officer Rick Zimmer. On March 20, 2018, this appeal was reassigned to the undersigned as Hearing Officer Zimmer would not be available for the scheduled hearing. On March 21, 2018,

the parties were notified of this reassignment through an Order Transferring Hearing Officer.

Petitioner called no witnesses. [REDACTED], Social Services Director and Abuse Coordinator, and [REDACTED], Licensed Practical Nurse, appeared as witnesses for Respondent.

On March 19, 2018, the Agency for Health Care Administration submitted a survey, based on an on-site visit of the Facility, indicating that it determined the Facility committed a violation of the Code of Federal Regulation, Section 483.12, regarding its action to discharge a resident (Hearing Officer's Exhibit 1). The undersigned did not take this survey into consideration regarding the final decision.

Petitioner submitted no evidence. Respondent submitted an evidence packet consisting of six exhibits, which were entered into evidence and marked as Respondent's Exhibits "1" – "5." Subsequent to hearing, the undersigned discovered that two exhibits were marked as Respondent's Exhibits "4" and re-marked the last two exhibits as Respondent's Exhibits "5" and "6." The undersigned submitted one exhibit, which was entered into evidence and marked as Hearing Officer's Exhibit "1." The record closed on April 26, 2018.

FINDINGS OF FACT

1. On December 8, 2017, Facility admitted Petitioner, now age 57, to the [REDACTED] Unit suffering from [REDACTED], and [REDACTED] (Respondent's Exhibit 3, Page 27). Petitioner currently resides at [REDACTED] in [REDACTED] (Testimony of [REDACTED])

2. Respondent alleges that Petitioner's needs could not be met in its Facility as a result of Petitioner's behavior, which involved unpredictable and unprovoked incidents on two dates resulting in physical altercations between Petitioner and five individuals in the Facility (Testimony of [REDACTED]). Because of Petitioner's behavior, Respondent is unable to provide the necessary level of care to meet her needs (*Id.*).

3. From December 8, 2017 through January 9, 2018, there were no indications of any physical altercations between Petitioner and any other resident or staff at the Facility (Respondent's Exhibit 4, Pages 9 – 17).

4. Up to January 8, 2018, Petitioner's medications consisted of 625 mg of [REDACTED], 10 mg of Zyprexa, and .5 mg of [REDACTED] (Respondent's Exhibit 3, Page 10).

[REDACTED] was administered as Petitioner's psychiatric medication (Testimony of [REDACTED], [REDACTED]).

5. On January 8, 2018, Dr. [REDACTED] Facility's psychiatrist, decreased Petitioner's [REDACTED] from 10 mg to 5 mg as a trial dose reduction due to her positive reaction to the current dose (Respondent's Exhibit 3, Page 11).

6. On January 19, 2018, Petitioner was involved in an incident that involved her swinging at other residents and being uncooperative with staff and care (Respondent's Exhibit 4, Page 8). There is no indication that any resident or staff member was actually struck (*Id.*).

7. On January 20, 2018, Petitioner was involved in multiple incidents that involved her striking three residents and a staff member (*Id.*). [REDACTED] appeared and authenticated her witness statement dated January 20, 2017 (Respondent's Exhibit 3, Page 24), stating that the year 2017 indicated in her statement was a clerical error and

that the correct year was 2018, and also indicated these incidents occurred over a time span of approximately 10 – 15 minutes (Testimony of [REDACTED]).

8. On January 22, 2018, [REDACTED] increased Petitioner's [REDACTED] from 5 mg back to 10 mg (Respondent's Exhibit 3, Page 13), noting a failed attempt to reduce her [REDACTED] dose (*Id.*).

9. Petitioner remained on 1:1 observation from January 20 – 26, 2018 (*Id.* at 17).

10. On January 29, 2018, Petitioner was involved in another incident that involved her striking a resident twice in the back of the head, causing a laceration above the right eye when the resident fell hitting her face on the floor (Respondent's Exhibit 4, Page 1).

11. As a result of this incident, and in conjunction with the past incidents, Dr. [REDACTED] Baker Acted Petitioner (*Id.*) due to the safety of her well-being as well as others as a result of her mental illness (Respondent's Exhibit 1, Pages 12 – 13).

12. On January 30, 2018, Respondent provided a Nursing Home Transfer and Discharge Notice (DN) to Petitioner, effective the same date, transferring her to [REDACTED] [REDACTED] (*Id.* at 5 – 11). The DN was signed by David Jones, Facility Administrator, and [REDACTED] Tolentino, Facility psychiatrist, and delivered to [REDACTED] [REDACTED] by certified mail (*Id.*).

13. Respondent provided its bed-hold policy to Petitioner's representative at the time of admission (Respondent's Exhibit 5), but stated that it failed to provide its bed-hold policy at the time of discharge (Testimony of [REDACTED]). However, Respondent did state that it was below 95% capacity at the time of Petitioner's discharge (*Id.*).

14. Also, on January 30, 2018, [REDACTED] transferred Petitioner to [REDACTED] a sister hospital, as it had no beds available (Testimony of [REDACTED]).
15. On January 31, 2018, a social worker with St. Anthony's Hospital contacted Respondent to inquire whether it intended to readmit Petitioner (*Id.*).
16. Respondent argued that the social worker confirmed that Petitioner was still acting unpredictably and, as such, refused to readmit Petitioner (Testimony of Maria Noboa).
17. [REDACTED] argued that Petitioner's behavior was based on the dosage alterations to her medications, and that prior to the decrease in her [REDACTED] her behavior was predictable and without threat to the safety of herself or others (Testimony of [REDACTED]). [REDACTED] further argued, that since Petitioner's admittance to [REDACTED], and subsequently to [REDACTED] as well as being on stabilized doses of her medications subsequent to that admittance, she has remained predictable and without threat to the safety of herself or others (*Id.*).
18. [REDACTED] argued that it is her wish for Respondent to readmit Petitioner to the Facility (*Id.*).

CONCLUSIONS OF LAW

19. 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. In accordance with that section this order is the final administrative decision of the Department of Children and Families.

20. The Code of Federal Regulations, Title 42, Section 483.15, Admission, transfer and discharge rights in relevant part states:

- ...
- (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** (emphasis added);
 - (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.
- (ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to §431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to §431.220(a)(3) of this chapter, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.
- (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** (emphasis added):
 - (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 (emphasis added)...

...

(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 (c)(5) of this section.

(4) *Timing of the notice.* (i) Except as specified in paragraphs (c)(4)(ii) and (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 (c)(1)(i)(C) of this section;

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

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

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(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 (c)(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.

21. On January 30, 2018, the Facility issued Petitioner's DN. The Facility's reason for discharging Petitioner was that her needs could not be met at the Facility. This is one reason permitted for discharge from a facility in accordance with the above Federal Regulation.

22. The Florida Statutes, Title 29, Section 400.0255, Resident transfer or discharge; requirements and procedures; hearings in part states:

...
(3) When a discharge or transfer is initiated by the nursing home, the nursing home administrator employed by the nursing home that is discharging or transferring the resident, or an individual employed by the nursing home who is designated by the nursing home administrator to act on behalf of the administration, must sign the notice of discharge or transfer. Any notice indicating a medical reason for transfer or discharge must either be signed by the resident's attending physician or the medical director of the facility, or include an attached written order for the discharge or transfer. The notice or the order must be signed by the resident's physician, medical director, treating physician, nurse practitioner, or physician assistant.

...
(c) If the hearing decision is favorable to the resident who has been transferred or discharged, the resident must be readmitted to the facility's first available bed....

...
(7) At least 30 days prior to any proposed transfer or discharge, a facility must provide advance notice of the proposed transfer or discharge to the resident and, if known, to a family member or the resident's legal guardian

or representative, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician...

...

23. In accordance with the above Federal Regulation and State Statute, the DN was signed by the Facility Administrator and the Facility Physician (Psychiatrist) and a copy provided to Petitioner's representative by certified mail. The DN also indicated the reason and effective date of the discharge, the location to which Petitioner was to be discharged, and Petitioner's appeal rights along with other required assistance information.

24. However, the evidence submitted does not establish that Petitioner's medical records were well documented with the reasons by which her medical needs could not be met. The evidence indicates that, though Petitioner instigated a number of physical altercations on two separate dates, those altercations were likely a result of the decreased dosage of her [REDACTED] medication on January 8, 2018, one and a half weeks prior to the first altercation. Petitioner's [REDACTED] medication was then increased on January 22, 2018 back to the original dosage. However, this increase may not have had time to take effect to prevent the January 29, 2018 altercation.

25. Prior to the decrease in Petitioner's [REDACTED] medication, the evidence indicates that the Facility had no issues meeting her needs. Furthermore, there is no evidence indicating the Facility implemented any behavior or treatment plans to reasonably attempt to meet Petitioner's needs, without success, after the physical altercations began. Though Petitioner's welfare may have been in question at the time of her

discharge on January 30, 2018, the undersigned concludes that Respondent failed to prove that it could not meet her needs. If the hearing decision is favorable to the resident who has been transferred or discharged, the resident must be readmitted to the Facility's first available bed.

26. In accordance with the above authorities, the Facility sought to involuntarily discharge Petitioner to [REDACTED] for the reason that "[her] needs cannot be met in this facility."

27. The controlling authorities require a higher standard of proof in nursing home discharge hearings; there must be substantial and credible evidence at the level of clear and convincing¹. The undersigned concludes the respondent's evidence does not rise to the level of clear and convincing.

28. After careful review of the cited authorities and evidence, the undersigned concludes that Respondent did not meet its burden of proof by clear and convincing evidence indicating that it could not meet Petitioner's needs. The undersigned concludes that Respondent's discharge of Petitioner was improper, as it failed to indicate the Facility could not meet her needs. As such, the Facility must readmit Petitioner to the first available bed.

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))."

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is GRANTED. The Facility is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

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 21 day of May, 2018,
in Tallahassee, Florida.



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Copies Furnished To [REDACTED] Petitioner [REDACTED] Respondent

Agency for Health Care Administration
[REDACTED]