

**FILED**

Oct 17, 2018

Office of Appeal Hearings  
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 18N-00089

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on September 25, 2018 at 2:05 p.m.

**APPEARANCES**

For Petitioner: [REDACTED] ombudsman

For Respondent: [REDACTED]

**STATEMENT OF ISSUE**

Petitioner appeals the respondent's action discharging him from its long term care facility. The respondent carries the burden of proof by clear and convincing evidence.

**PRELIMINARY STATEMENT**

The respondent issued a discharge notice to the petitioner on July 16, 2018. The petitioner informed him that he was being discharged from the respondent's long term care facility because his "needs cannot be met in this facility."

The petitioner filed a hearing request on July 20, 2018 to appeal the respondent's decision.

A telephonic pre-hearing conference was conducted on August 31, 2018 to determine the petitioner's current location and if he wished to return to the respondent facility. The petitioner was represented by [REDACTED] Present on the petitioner's behalf: [REDACTED] wife and [REDACTED], ombudsmen. The respondent was represented by [REDACTED] Present on behalf of the respondent: [REDACTED] administrator and [REDACTED] business office manager. Present as observers: [REDACTED] in-house counsel and [REDACTED] in-house counsel. The petitioner's representative asserted that he is currently in a local hospital, pending discharge, and confirmed that he wished to return to the respondent facility.

During the pre-hearing conference, the petitioner requested an expedited hearing. The respondent did not object. The parties agreed to convene telephonically on September 25, 2018 at 2:00 p.m. The hearing convened as scheduled.

The petitioner was represented by [REDACTED] ombudsmen. [REDACTED], wife of petitioner, was present as a witness on his behalf. The petitioner did not submit documentary evidence.

The respondent was represented by [REDACTED] administrator, [REDACTED] was present as a witness for the respondent. [REDACTED] in-house counsel, was present as an observer. The respondent did not submit documentary evidence.

The hearing record was closed on September 25, 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. The petitioner was admitted into the respondent facility on September 30, 2016. His diagnoses include [REDACTED] with recurring [REDACTED] features, [REDACTED] [REDACTED] (testimony)

2. The petitioner meets the criteria for placement in a long term care facility. This fact is not disputed.

3. The respondent discharged the petitioner to the [REDACTED] of [REDACTED] [REDACTED] on July 16, 2018. The discharge notice lists "your needs cannot be met in this facility" and "sexual behaviors, i.e., harassment" as the reason for the discharge action. The respondent intended for the discharge to be permanent and refused to admit the petitioner when the hospital determined that he could be discharged. [REDACTED] (testimony)

4. The petitioner filed a hearing request to challenge the respondent's decision on July 20, 2018. The petitioner remains in the [REDACTED] pending the outcome of the hearing.

5. [REDACTED] the current facility administrator and only respondent witness, was not the administrator during the petitioner's residency and discharge. She had no firsthand knowledge of the circumstances which lead to the facility issuing the discharge notice. She did not have access to the petitioner's complete medical record and could only testify to second hand allegations of the petitioner touching and exposing himself to another resident as the reason for the discharge. ([REDACTED] testimony)

6. When questioned about discharge reason, "your needs cannot be met in the facility", [REDACTED] could not explain what the petitioner's needs were or why the facility was not able to meet those needs. [REDACTED] had no knowledge about any corrective action measures taken by the facility to address the petitioner's alleged behaviors.

[REDACTED] testimony)

7. The petitioner's wife asserted that the alleged allegations were false. The petitioner has no history of sexual harassment or sexual misconduct. He has a history of [REDACTED] and at least [REDACTED] attempt. ([REDACTED] testimony)

#### CONCLUSIONS OF LAW

8. 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.

9. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

10. In accordance with Fla. Admin. Code R. 65-2.060 (1), the burden of proof was assigned to the respondent.

11. 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.

12. The respondent asserted that the petitioner's needs could not be met at its long term care facility and discharged him to a local hospital on July 16, 2018. However, the respondent provided no direct evidence of the petitioner's medical and/or psychiatric needs, what measures it took to address those needs, and why it concluded the facility was unable to meet those needs. The respondent provided only hearsay testimony from a witness who had no firsthand knowledge of the circumstances which precipitated the discharge action under appeal. In Johnson v. Department of Health and Rehabilitative Services 537 So.2d 675 (Fla. 1<sup>st</sup> DCA 1989), the court stated "hearsay alone is insufficient to support a finding..."

13. After careful review of the evidence and controlling legal authorities, the undersigned concludes that respondent did not provide clear and convincing evidence that it could not meet the petitioner's needs. The respondent did not meet its burden of proof in this matter. The undersigned concludes that the respondent's discharge of petitioner was improper; as such, the facility must readmit petitioner to the first available bed.

### **DECISION**

Based on the foregoing Findings of Fact and Conclusions of Law, the appeal is GRANTED. The respondent is ordered to readmit the petitioner to the next 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 17 day of October, 2018,

in Tallahassee, Florida.



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