

Oct 25, 2018

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. [REDACTED]

PETITIONER,

Vs.

Administrator

[REDACTED]
[REDACTED]
[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative nursing home discharge hearing in the above-referenced matter on September 11, 2018, at 10:22 A.M., at Avante at [REDACTED]).

APPEARANCES

For the Petitioner: [REDACTED]

For the Respondent: [REDACTED], Nursing Home Administrator

STATEMENT OF ISSUE

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

PRELIMINARY STATEMENT

[REDACTED] Unit Manager; [REDACTED], Social Services; [REDACTED]
[REDACTED]

Social Services Director; appeared as witnesses for Respondent.

The reason for the discharge, given in the Nursing Home Transfer and Discharge Notice (Discharge Notice), is Petitioner's needs cannot be met in this facility. During the hearing, Respondent provided testimony that another reason for the discharge was that the safety of other individuals in the facility is endangered.

Petitioner did not present any exhibits. Respondent introduced seven exhibits which were accepted into evidence. The evidence was received and marked as the Respondent's Exhibits 1 through 7.

Respondent's Exhibit #6 was received and marked over Petitioner's hearsay objection, with the understanding that the undersigned would determine the appropriate weight of the evidence. Exhibit #6 is a Witness Statement dated July 18, 2018. The substance of the Witness Statement is as follows:

██████ informed me while I was assisting on the smoke porch that he is getting kicked out of here because they found a crack pipe in his room. He stated to me "Yes I smoke crack and yes I like it" He stated he didn't know what the big deal is. He did say he didn't want to leave and they cannot make him leave

Full weight is given to Exhibit #6 as, pursuant to § 90.803 (18), Fla. Stat. (2018), the statements offered are admissions. Said statement also corroborates admissions, made by Petitioner, during the hearing.

The record was left open until the close of business, September 12, 2018, for the Facility to submit copies of its policy on drug use and possession to the undersigned. Said evidence was never received by the undersigned. The record was closed on September 12, 2018.

No representative from the Agency for Health Care Administration (AHCA) was present. On September 24, 2018, the Office of Appeal Hearings received a letter from

AHCA indicating it completed an unannounced visit to the Facility. It was determined there were no violations.

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 has resided in the Facility for three years.
2. The Facility's policy is to keep all medications secured from the residents.
3. Petitioner has a prescription for opiates, but not for marijuana or cocaine.
4. Petitioner admitted that he has utilized non-prescription narcotics while off of the grounds of the nursing facility.
5. On December 13, 2017, Petitioner was in possession of marijuana. Petitioner intended on smoking the marijuana. Law enforcement was notified, appeared, and confiscated the marijuana. Petitioner was subsequently transported by EMS to the hospital.
6. On February 6, 2018, Petitioner was in possession of marijuana. Petitioner testified that he smoked the marijuana after the Super Bowl. The [REDACTED] Department (Police Department) was called to the scene, and confiscated the marijuana. The Police Department subsequently prepared an incident and property report regarding same.
7. On July 8, 2018, Petitioner tested positive for cocaine metabolite and opiates. The opiates were prescribed, but the cocaine was not. Petitioner testified that he took "two hits off of a crack pipe."

8. On July 9, 2018, the Police Department responded to the Facility in reference to what appeared to be a crack pipe. The Police Department confiscated the pipe, and prepared an incident report and property report regarding same.
9. On July 18, 2018, Petitioner admitted that he was getting kicked out of the facility because a crack pipe was found in his room. Petitioner also admitted “yes I smoke crack and yes I like it.” Petitioner made statements during the hearing that mirror these admissions.
10. On July 26, 2018, Petitioner tested negative for marijuana, amphetamines, barbiturates benzodiazepines, cocaine metabolite, opiates, and phencyclidine.
11. On July 26, 2018, Petitioner was given a Discharge Notice.

CONCLUSIONS OF LAW

12. The Florida Department of Children and Families (Department), 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.
13. 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;

(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:

(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 (c)(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 resident's 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 (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. (Emphasis added).

14. On July 26, 2018, the Facility issued the Discharge Notice. The Facility's reason for discharging Petitioner was that his needs could not be met at the Facility. This is the only reason being considered for discharge from the facility pursuant to the above cited Federal Regulation.

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

...
(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...

...

(8) The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer. Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. In addition to any other pertinent information included, **the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action.** Further, the form must state the effective date of the discharge or transfer and the location to which the resident is being discharged or transferred. The form must clearly describe the resident's appeal rights and the procedures for filing an appeal, including the right to request the local ombudsman council review the notice of discharge or transfer. A copy of the notice must be placed in the resident's clinical record, and a copy must be transmitted to the resident's legal guardian or representative and to the local ombudsman council within 5 business days after signature by the resident or resident designee. (Emphasis added).

16. In accordance with the above Federal Regulation and State Statute, the Discharge Notice was signed by the Facility Administrator and Physician/Designee. A copy was also provided to Petitioner. The Discharge Notice 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.

17. However, the evidence submitted does not establish that Petitioner's medical records were well documented with the reasons by which his medical needs could not be met. The evidence indicates Petitioner was in possession of non-prescription

narcotics on three occasions, and used non-prescription narcotics on at least two occasions. No evidence was provided of documentation, by Petitioner's physician and in Petitioner's medical record, revealing the basis for the transfer and the specific needs of Petitioner that cannot be met, as well as, the attempts to meet said needs, and the service available to the receiving facility to meet those needs.

18. *Edgewater at Waterman Village v. Youngren*, 803 So.2d 900 (2002), is the controlling precedent with regards to this issue. In *Youngren*, a nursing facility appealed an administrative order from the Department. The hearing officer determined the nursing facility did not have the authority to transfer the resident to another facility. The Fifth District Court of Appeal held "when the facility transfers or discharges a resident, the resident's clinical record must be documented."

19. At the fair hearing, the Facility argued that the reason for only citing the inability to meet Petitioner's needs as the basis for the discharge is because the prior Nursing Home Administrator prepared the Discharge Notice. Yet, then Facility argued, Petitioner is a danger to others in the nursing facility because his non-prescription narcotics could be ingested by other residents. While such an argument holds factual credibility, Florida Statute makes it clear that the Discharge Notice must specify the reason, as well as an explanation in support thereof, to discharge a resident from a nursing facility. In this case, as only the inability to meet Petitioner's needs was noticed, it would be in violation of Florida Statute and due process to move forward on any other grounds.

20. In accordance with the above cited authorities, Respondent sought to involuntarily discharge Petitioner to Horizon ALF for the reason that “[his] needs cannot be met in this facility.”

21. 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 Respondent’s evidence does not rise to the level of clear and convincing.

22. After careful review of the cited authorities and evidence, the undersigned concludes that Respondent did not meet the burden of proof by clear and convincing evidence. The undersigned concludes that Respondent’s action discharging Petitioner is improper, as the Facility failed to prove that it could not meet his needs.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is GRANTED. Respondent has not established that this discharge is permissible under Federal or State regulations. Therefore, Respondent may not proceed with the discharge.

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)).”

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 25 day of October, 2018,

in Tallahassee, Florida.



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