

Nov 13, 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-00095

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, a hearing in the above-referenced matter convened on

September 26, 2018 at 9:47 a.m. at the

[REDACTED]

[REDACTED]

**APPEARANCES**

For the Petitioner: The petitioner was present and represented herself.

For the Respondent: J

[REDACTED]

At issue is whether discharge intent was correct based on the safety of other individuals in the facility is endangered. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.15 and Section 400.0255, Florida Statutes.

The respondent carries the burden of proof by clear and convincing evidence.

**PRELIMINARY STATEMENT**

By notice dated July 31, 2018, the respondent informed the petitioner that it was seeking to discharge/transfer her from its facility because safety of other individuals in the facility is endangered. The petitioner timely requested a hearing on the matter and continues to reside at the facility pending the outcome of the hearing. The notice was signed by the facility's designee, [REDACTED] Advanced Registered Nurse Practitioner (ARNP).

Present as a witness for the petitioner was [REDACTED] Local Ombudsman.

Present as witnesses for the respondent were [REDACTED] Director of Nursing (DON), and [REDACTED] Certified Nursing Assistant (CNA).

A letter dated August 23, 2018 from the Agency for Health Care Administration (AHCA) indicated that AHCA did not find the facility in violation of any laws or rules. This was entered as Hearing Officer Exhibit 1.

Evidence was submitted and entered as the Respondent's Exhibit 1.

The record was held open until 5:00 p.m. on October 17, 2018 to allow for the respondent to submit any additional evidence and for the petitioner to review the facility's evidence that was presented during the hearing and post-hearing. The petitioner was to submit any written responses and/or objections to the respondent's evidence.

On October 15, 2018, the petitioner submitted a letter, which consisted of information regarding her and her family's personal, military, educational, and vocational background. The petitioner's letter also included a statement on how much she has

learned from this experience and apologized that "I got off on the wrong foot with the new administrator." The petitioner further explained that it would be a great hardship on her if she is discharged from the facility after residing there since 2007. The petitioner also submitted written responses to the respondent's evidence, which was entered as the Petitioner's Exhibit 1.

The evidence submitted during the hearing has been entered as the Respondent's Exhibit 2. No additional evidence was submitted.

The record was closed at 5:00 p.m. on October 17, 2018.

#### **FINDINGS OF FACT**

1. Based on the evidence and testimony, the following findings are made:
2. The petitioner, age 69, has resided at the facility since January 2007.
3. The facility's administrator began his administration at the facility in April 2018.
4. The facility's administrator contends that the petitioner phoned the facility 36 times on September 9, 2018 and left messages with the receptionist. The facility's administrator contends that it provides the petitioner with one on one care. The facility's administrator contends that its staff attends to the petitioner's needs, which causes other residents to be in danger of not receiving care.
5. The facility's administrator recalled the time that the petitioner complained that the water she was using to bathe herself was freezing cold. The facility's administrator contends that when he checked the temperature of the water, it was 113 degrees, and pointed out that water set at 115 degrees is detrimental to one's health. The facility's

administrator contends that he took corrective action by changing the water heater. The petitioner provided a written response which states: "Didn't install because of me-it was old-worn out" (Petitioner's Exhibit 1). The DON believes the petitioner was unable to feel that the water was hot due to her [REDACTED]

6. The facility's administrator contends that the petitioner complains that she does not have enough towels. The facility's administrator believes that the petitioner had an agreement with the former administrator that she would be provided with as many towels as she requests, and that his administration is not able to accommodate her requests for several towels. The facility's administrator contends that the petitioner has filed several complaints on not getting enough water, while she has three or four cups of water or tea on her tray at any given time. The facility's administrator contends that the petitioner is non-compliant with taking her medication. The Respondent's Exhibit 2, page 14, includes progress notes dated July 27, 2018, which state: "...Res refused [REDACTED] 1PM." The facility's administrator contends that the petitioner sometimes hoards her medication. The facility's administrator contends that the petitioner wants to keep all of her medication on a table in her room. The facility's administrator contends that the petitioner is verbally abusive and has called the DON a "bitch" and has called the administrator a "son of a bitch." The facility's administrator contends that the petitioner has called staff "rodents", as well.

7. The DON contends that the petitioner has filed complaints with AHCA, as well as with the Department of Children and Families (DCF). The DON contends that the

CNAs to not want to service the petitioner due to her behavior, and that [REDACTED] is one of the two CNAs who will deal with her. The CNA contends that she has not witnessed any of the petitioner's alleged physically aggressive behaviors but acknowledges that she observed the petitioner with a pill wrapped up in a sheet. The CNA contends that the petitioner can push staff to the limit if they do not comply with her demands. The CNA believes that the petitioner's behavior is getting better and that she believes that she was getting away with bad behavior with the former administration. The DON contends that the petitioner has slapped one of the nurses. The DON contends that this nurse did not show up for work anymore. The DON contends that the petitioner grabbed another nurse by her hands when she refused to leave medication in the petitioner's room. The DON contends that this nurse quit working for the facility.

8. The facility's business record (progress notes) contains entries dated between January 9, 2018 and September 20, 2018 documenting the petitioner's verbally and physically aggressive behaviors, which include cursing, name-calling, hitting, and grabbing nursing facility employees (Respondent's Exhibit 2).

9. On May 20, 2018, the progress notes state: "...Resident expressed agitation with writer after voicing understanding that this writer is unable to leave Tx meds [REDACTED] at bedside... Resident began to aggressively [sic] grip writers [sic] hand, restricting writers [sic] ability to step away from resident..." The progress notes were e-signed by [REDACTED] licensed Practical Nurse (LPN) (Respondent's Exhibit 2, page 33). The petitioner's written response to these progress notes was: "I do not have strength to snap snaps on gowns...how could I grip anyone?" (Petitioner's Exhibit 1).

10. The progress notes dated May 23, 2018 state: "It was reported by CNA [REDACTED] that [REDACTED] hit her. While Nurse when [sic] to give meds to Resident, Nurse told her that was not nice to put Hands on people. Resident acted all night. At the end resident called Nurse by a bad name" (Respondent's Exhibit 2, page 32). The petitioner written response to these progress notes was to circle the part that said "hit her", followed by a large, handwritten "NO" (Petitioner's Exhibit 1).

11. The progress notes dated July 27, 2018 state: "Resident was mad due to the fact she couldn't have water to wash herself the way that she used to. CNA Parker gave her a basin and toothbrush, she threw the basin at her..." The progress notes continue for July 27, 2018 and state: "This writer answered call light... This writer questioned resident about report of her throwing water basin at staff, resident admitted to throwing it, but states "it wasn't a hard throw" and motioned like a small toss with right hand..." (Respondent's Exhibit 2, page 14). The progress notes written on July 27, 2018 at 16:58 state: "This writer, NHA, and SW visited resident to issue her a 30 day notice related to safety of others, (staff). Resident this a.m. at 0330 threw a basin of water at aides. This is a continuation of residents behaviors, as in the past she has grabbed nurses by the arm and hit aide..." (Respondent's Exhibit 2, page 13). The petitioner's written response to these progress notes was: "No grab-no hit...again-I can't even snap gowns-how can I pick up a basin of water and throw it this is unreal" (Petitioner's Exhibit 1).

12. The petitioner argues that she left messages for the DON because she was told that the DON handled the supplies. The petitioner denies yelling and screaming at

staff. The petitioner explained that she called DCF because she did not have an aide for the shift between 7 a.m. and 3:00 p.m. and did not know what else to do. The petitioner denies slapping or touching anyone. The petitioner contends that she refused to take certain medication because she did not recognize the pills that were being given to her and felt like the pills were not what were prescribed for her. The petitioner argues that she has never had a problem with previous administrators. The petitioner recognizes that some of the facility's staff work hard to take care of her. The petitioner contends that she is willing to comply with the current administration, as she has been residing at the facility for 12 years. The petitioner argues that she has no other family.

13. The facility's administrator is concerned for the safety of the staff members and fears that it will lose more staff due to the petitioner's behavior.

#### **CONCLUSIONS OF LAW**

14. 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 said authority, this order is the final administrative decision of the Department of Children and Families.

15. Federal Regulations appearing 42 C.F.R. § 483.15, sets forth the reasons a facility may involuntarily discharge a resident as follows: Admission, transfer and discharge rights.

(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—

...

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident...

(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:

(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.

(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;

16. The petitioner argues that she did not slap or touch any of the staff employed by the facility. The undersigned does not find the petitioner's arguments persuasive, as the findings show that the respondent's business records include documentation of the incidents when the petitioner was physically aggressive with the staff. The facility's designee, [REDACTED] ARNP, signed the Nursing Home Transfer and Discharge Notice. Based on the evidence presented, the undersigned concludes that the nursing facility has established that the safety of other individuals in the facility is endangered. This is one of the six reasons provided in federal regulation (42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident.

17. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

18. Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

### **DECISION**

Based upon the forgoing Findings of Fact and Conclusions, the appeal is denied. The respondent may proceed with the discharge. The facility must act in accordance with the Agency for Health Care Administration's rules and regulations for discharge procedures.

### **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

FINAL ORDER (Cont.)

18N-00095

PAGE - 10

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 13 day of November, 2018,

in Tallahassee, Florida.



---

Paula Ali  
Hearing Officer  
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal.Hearings@myffamilies.com

Copies Furnished To: 