

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

FILED

Nov 30, 2018

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00120

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, a hearing in the above-referenced matter was convened on November 2, 2018 at 10:00 a.m. at the [REDACTED] located in [REDACTED]

APPEARANCES

For the Petitioner: [REDACTED], petitioner's daughter

For the Respondent: [REDACTED]

ISSUE

At issue is the facility's intent to discharge the petitioner due to the facility not being able to meet his needs; a Nursing Home Transfer and Discharge Notice was issued on August 3, 2018 with an effective date of August 3, 2018.

The facility has the burden of proof to establish by clear and convincing evidence that the petitioner's discharge is in accordance with the requirements of the Code of Federal Regulations at 42 C.F.R. § 483.15 and Section 400.0255, Florida Statutes.

PRELIMINARY STATEMENT

By a notice dated August 3, 2018, the respondent informed the petitioner that the facility was seeking to discharge/transfer him due to the facility not being able to meet his needs. On August 24, 2018, the petitioner (through his daughter) timely requested a hearing to challenge the discharge/transfer.

Appearing as witnesses for the respondent were his daughters [REDACTED] and

[REDACTED] (appeared telephonically), and his wife, [REDACTED]

The petitioner did not submit any documents as evidence for the hearing.

Appearing as witnesses for the respondent were [REDACTED] nursing assistant, [REDACTED] nursing assistant, [REDACTED] assistant administrator,

[REDACTED]

The respondent submitted a physician's letter and medical order as evidence for the hearing, which were marked as Respondent Exhibit 1. The respondent also submitted the notice of transfer/discharge and the facility's bed-hold policy. These documents were marked as Respondent Exhibit 2.

After the hearing was concluded, the Agency for Health Care Administration (AHCA) submitted a letter dated November 15, 2018 which indicated that it found no

violations during an unannounced visit on November 5, 2018 to the facility. This was entered into the record as the Hearing Officer's Exhibit 1.

FINDINGS OF FACT

1. The petitioner was admitted to the nursing facility in November, 2016. He was diagnosed with [REDACTED] and he is currently 74 years old. At that time, his condition was stable and the facility had no issues with his behavior. The facility administrator reports that the petitioner's behavior became progressively worse and he began hitting staff members. The petitioner was transferred to the hospital on August 3, 2018 due to aggressive behavior. According to the facility administrator, the facility could no longer meet the petitioner's needs because it does not have a lock-down unit to control his behavior.

2. The facility's nursing assistants described how the petitioner would kick or hit them. They also reported he was aggressive with both male and female nursing assistants and he had a very strong physical condition. One of the nursing assistants also stated the nurses could not assist the petitioner with his daily living activities when he was in an aggressive mood.

3. The Director of Nursing stated the petitioner was diagnosed with unspecified [REDACTED] when he was taken to the hospital. He had been previously transferred to the hospital in January, 2018 for aggressive behavior but the facility had taken him back at that time.

4. The petitioner's representative reported her father spent 20 days in the hospital following his transfer from the nursing facility in August, 2018. When he left the

hospital, he began residing at a different nursing facility in [REDACTED]. She reports her father has not had any [REDACTED] or any incidents of aggressive behavior in the new facility.

CONCLUSIONS OF LAW

5. 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.

6. Federal Regulations, appearing at 42 C.F.R. § 483.15, set forth the reasons a nursing 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—

(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:

(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—[emphasis added]

(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; [emphasis added] 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.

7. Florida Statutes, 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.** [Emphasis added] 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).

8. In this case, the nursing facility discharged the petitioner to the hospital on August 3, 2018 on the basis of not being able to meet his needs. The discharge notice was also dated August 3, 2018. Although a 30-day advance notice was not given, the 30-day requirement does not apply where the discharge is based on not being able to meet the individual's needs.

9. However, as clearly specified in both the actual notice form and the authorities set forth above, in cases where the discharge is based on the facility not being able to meet the individual's needs, the notice must be signed by a physician or have an attached physician's order. The notice was not signed by a physician. Although the facility produced the physician's order on the day of the hearing, it was required to provide this to petitioner and/or his family as part of the discharge notice on August 3,

2018. Having failed to do so, the facility did not comply with the discharge requirements set forth above.

10. After review of the cited authorities and evidence, the undersigned concludes that the facility's action in discharging the petitioner was improper, as the facility failed to provide a proper notice of discharge to the petitioner on August 3, 2018.

11. Since the petitioner is no longer residing in the nursing facility at issue, the respondent must allow the petitioner to return (if he so desires) pursuant to the facility's bed hold policy.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is GRANTED. The respondent has not established that this discharge was in compliance with Federal or State regulations.

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.

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.

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.

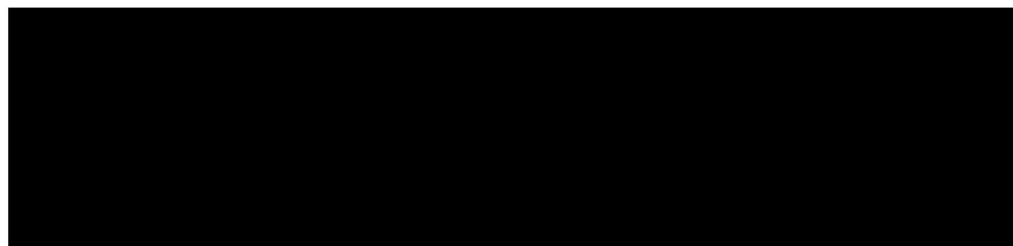
DONE and ORDERED this 30 day of November, 2018,

in Tallahassee, Florida.



Rafael Centurion
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