

Jan 28, 2019

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-00139

PETITIONER,

Vs.

Administrator
BAY BREEZE SENIOR LIVING AND REHABILITATION CENTER
3387 GULF BREEZE PARKWAY,
GULF BREEZE, FL 32563

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on January 16, 2018, at 3:40 p.m., at [REDACTED]

[REDACTED] in [REDACTED] [REDACTED]

APPEARANCES

For the Petitioner: [REDACTED], wife
[REDACTED], Department of Elder Affairs, North Florida
Region Ombudsman, Manager
[REDACTED], Department of Elder Affairs,
Certified Ombudsman

For the Respondent: [REDACTED] Facility Administrator (Facility)

ISSUE

Federal regulations limit the reasons for which a Medicaid or Medicare certified nursing home may discharge a patient. At issue is whether or not the nursing home's action to transfer and discharge the petitioner is an appropriate action based on the federal regulations at 42 C. F. R. § 483.15. The nursing home discharged petitioner

because the safety of other individuals in this facility is endangered. The burden of proof is clear and convincing evidence and is assigned to the facility.

The only issue before the hearing officer is whether the discharge was in accordance with federal regulations. Any issues concerning petitioner's allegations of improper protocol of the facility staff, or treatment the petitioner received while residing at the facility are not within the jurisdiction of the hearing officer.

PRELIMINARY STATEMENT

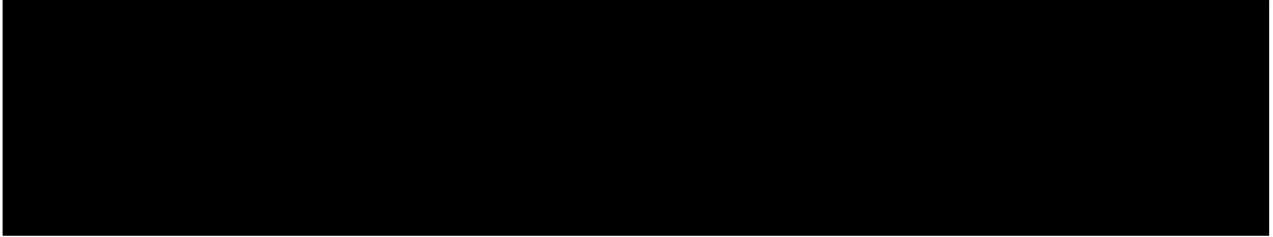
By Nursing Home Transfer and Discharge Notice, dated October 5, 2018, the respondent informed the petitioner that he was being discharged from the facility effective October 5, 2018. On October 15, 2018, the petitioner timely requested an appeal to challenge the respondent's action.

During the hearing, the petitioner and the respondent presented exhibits. Two exhibits were submitted by the respondent. The Agency for Health Care Administration (AHCA) complaint survey form is Respondent's Exhibit "1". The petitioner objected to admission of the survey form as it is conclusory. The undersigned took the objection under advisement and admitted it into evidence. The records from the [REDACTED] [REDACTED] is Respondent's Exhibit "2". The petitioner submitted four additional exhibits which were admitted into evidence and marked as Petitioner's Exhibits "1" through "4".

No representative from ACHA was present.

FINDINGS OF FACT

1. The petitioner is an institutionalized adult male with the following diagnoses:



2. The petitioner was admitted to the Facility on May 21, 2018.
3. On May 24, 2018, it was noted in the petitioner's care plan notes that the petitioner was sexually inappropriate with staff and residents; therefore, the petitioner had a sitter and one-on-one care and supervision (Petitioner's Exhibit 1).
4. On September 12, 2018, the petitioner committed an act that was subsequently identified by the [REDACTED] as misdemeanor battery and misdemeanor indecent exposure (Respondent's Exhibit 1). A Sheriff's deputy arrived at the Facility and interviewed the petitioner, staff and patients.
5. Because of the September 12, 2018 incident, the facility re-instituted one-on-one care and supervision of the petitioner.
6. On October 5, 2018, a Sheriff's deputy arrived at the Facility and arrested the petitioner taking him to jail.
7. On October 5, 2018, the Facility informed the petitioner's wife that her husband was being discharged effective October 5, 2018 to the [REDACTED] and would not be allowed in the facility from that day forward (Petitioner's Exhibit 4).
8. The respondent offered no evidence or testimony of the petitioner acting dangerously, or of there being additional incidents from September 12, 2018 through

October 5, 2018. The Facility noted the petitioner's care record within weeks of his admission that he was sexually inappropriate with the staff and residents. Interventions to be used by staff when behaviors were present included "1. One on one 2. Activity 3. Adjust room temperature 4. Backrub 5. Change position 6. Give fluids 7. Give food 8. Redirect 9. Refer to progress notes 10. Remove resident from environment 11. Return to room 12. Toilet" (Petitioner's Exhibit 1). According to the same patient care records, the above interventions were cancelled on October 8, 2018.

9. Testimony was given that staff understood that being sexually inappropriate was symptomatic for individuals [REDACTED]. The patient was verbally inappropriate and attempted to touch staff inappropriately; however, staff knew to expect such behavior and testimony was given that that the staff did not feel they were in danger when caring for the petitioner.

10. The reason given for the Facility's discharge is that the petitioner had been arrested for misdemeanor battery and indecent exposure, not that the petitioner was a danger to staff or other residents. The petitioner believes that if the Facility provided the care they are required to for a resident with [REDACTED] he would not be a potential source of endangerment.

CONCLUSIONS OF LAW

11. 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.

12. Federal Regulations at 42 C. F. R. § 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; (emphasis added)

(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.

...

(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.

...

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

...

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) 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.

13. On October 5, 2018, the Facility issued a discharge notice to the petitioner. The Facility's reason for discharging the petitioner was the safety of other individuals in this facility is endangered. This reason is one of the reasons permitted for discharge from a facility in accordance with the above federal regulation.

14. Section 400.02555, Florida Statutes, 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.

...

(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:


...

(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.

...

(10)(b) If a resident requests a hearing within 10 days after receiving the notice from the facility, the request shall stay the proposed transfer or discharge pending a hearing decision. The facility may not take action, and the resident may remain in the facility, until the outcome of the initial fair hearing, which must be completed within 90 days after receipt of a request for a fair hearing.

15. The undersigned reviewed the findings, evidence, and testimony in regard to the safety of other individuals in this facility is endangered. The findings show that the petitioner was identified upon admission as someone who acts in a sexually inappropriate manner with staff and residents. The findings show an incident on September 12, 2018 which was reported to staff by a resident which was referred to the

 The findings show no report of endangering behavior from the date of the initial incident, September 12, 2018 to the date of the petitioner's arrest, October 5, 2018.

16. That the petitioner was arrested for committing misdemeanor battery and misdemeanor indecent exposure is an allegation and not proof of the petitioner being a

danger to other residents in the Facility. The Facility provided no evidence of endangerment other than the arrest record. The undersigned concludes that the Facility failed to meet the burden of clear and convincing evidence of the petitioner being a danger to staff and residents.

17. Based on the evidence presented, the nursing facility has NOT established that the safety of other individuals in this facility is endangered based on the petitioner's continued sexually explicit behavior. 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; however, after careful review of the evidence and testimonies, the undersigned concludes that the respondent has NOT MET the burden of proof to show the petitioner may be discharged based for this reason.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the petitioner's appeal is GRANTED. The facility erred when it discharged the petitioner for being a danger to others in the Facility. The Facility is ordered to reverse its decision and allow the petitioner to return to the facility when the next bed is 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.

FINAL ORDER (Cont.)

18N-00139

PAGE -10

DONE and ORDERED this 28 day of January, 2019,

in Tallahassee, Florida.



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

Copies Furnished To: [REDACTED] PETITIONER

[REDACTED] AGENCY FOR HEALTH CARE ADMINISTRATION

[REDACTED] RESPONDENT