

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

**FILED**

May 29, 2020

Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]

APPEAL NO. 20N-00016

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on April 9, 2020 at 8:40 a.m.

**APPEARANCES**

For Petitioner: [REDACTED] pro se

For Respondent: [REDACTED] Nursing Home Administrator

**STATEMENT OF ISSUE**

Petitioner appeals Respondent's action discharging Petitioner from [REDACTED] [REDACTED] (the "Facility") "due to the health and safety of other individuals in this facility are endangered." Respondent carries the burden of proof by clear and convincing evidence.

**SUMMARY OF PROCEEDINGS**

The hearing in this matter was originally scheduled for March 18, 2020 at 10:00 a.m. in [REDACTED] Florida. Due to the COVID-19 Pandemic, the in-person hearing was

changed to a telephonic hearing. On March 18, 2020, the undersigned dialed in and waited 30 minutes for the parties to dial in. Neither party dialed in. On March 19, 2020, the Nursing Home Administrator contacted the Office of Appeal Hearings ("OAH") regarding the missed hearing and advising they had an issue dialing into the telephonic hearing. The undersigned reset the hearing for April 2, 2020 at 3:30 p.m.

On April 2, 2020, and prior to going on record, Petitioner requested a continuance as he wished to seek legal counsel. The undersigned granted Petitioner's request for continuance and reset the hearing for April 9, 2020 at 8:30 a.m.

██████████ Petitioner's companion, appeared as a witness for Petitioner. ██████████ Director of Social Services, ██████████ Director of Nursing, and ██████████ Resident Nurse, appeared as witnesses for Respondent.

On March 5, 2020, the OAH received a letter from the Agency for Health Care Administration ("AHCA") which informed that an unannounced visit to the nursing facility was completed and there were no violations. This letter was entered into evidence and marked as Hearing Officer's Exhibit "1."

Petitioner did not submit any exhibits. Respondent submitted two exhibits, which were accepted into evidence and entered as Respondent's Exhibits "1" and "2". The record was left open until close of business on April 20, 2020 for submission of additional evidence from the parties. Petitioner was given an opportunity to provide documents to support his position. Petitioner did not submit any evidence. On April 20, 2020, Respondent submitted additional documents, which were accepted into evidence and entered as Respondent's Exhibit "3." The record closed on April 20, 2020. On April 23, 2020, Respondent submitted additional documents. The undersigned concluded

the additional documents were relevant; therefore, the record was reopened, and Respondent's additional documents were accepted into evidence and entered as Respondent's Exhibit "4." The record closed on April 23, 2020.

### **Petitioner's Position**

Petitioner took the position that Respondent's allegations regarding the incidents that occurred in the facility are false and he did not understand why Respondent Baker Acted and sent him to ██████████ Hospital on multiple occasions. He argued he has not caused harm to anyone in the facility. Petitioner asserted he gets along well with others and he can submit physician notes from ██████████ Hospital regarding his behavior. Petitioner has health issues and requires assistance from the facility, he wants to remain in the facility.

### **Respondent's Position**

Respondent took the position that the safety of Petitioner and others in the facility is their priority. Due to Petitioner's aggressive and combative behavior, the facility is unable to provide the necessary level of care to meet Petitioner's safety as well as the safety of others in the facility.

### **FINDINGS OF FACT<sup>1</sup>**

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, age 72, has been a resident in the skilled nursing facility since 2017.

Petitioner has been diagnosed with the following: Schizophrenia, Alzheimer,

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<sup>1</sup> Citations within the Findings of Fact and Conclusions of Law in this order follow Florida Rules of Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

Generalized Anxiety Disorder (“GAD”), Delusional Disorders, Diabetes, Chronic Kidney Disease, Vascular Disease, Bi-polar and Major Depressive Disorder. (Hr’g R.)

2. Petitioner was Baker Acted on July 24, 2019 and October 24, 2019. Respondent called the [REDACTED] police Department on July 24, 2019 and October 24, 2019 due to Petitioner’s aggressive and combative behavior. (Resp’t Ex. 2 at 10 – 13.) On both occasions, once Petitioner was stabilized from [REDACTED] Hospital (Baker Acted), Petitioner was discharged and returned to the facility. (Resp’t Test.)

3. On January 3, 2020, [REDACTED] was called by staff to report to Petitioner’s room. Petitioner’s roommate was eating breakfast with the door open. [REDACTED] observed Petitioner standing behind the room door, pushing the nurse out of the room and verbally assaulting the roommate and staff. (Resp’t Wit. Test.) Petitioner did not allow the facility staff to enter his room. (Hr’g R.) Petitioner was Baker Acted. (Resp’t Ex. 4 at 4 – 6.) Petitioner was discharged and returned to the facility. (Resp’t Wit. Test)

4. On January 8, 2020, a Nursing Home Transfer and Discharge Notice was issued to Petitioner. The reasons listed on the discharge notice indicate “the health of other individuals in this facility is endangered” and “the safety of other individuals in this facility is endangered.” The notice was signed by Dr. [REDACTED] A brief explanation to support the facility’s action indicates the following:

On 1/3/2020 [REDACTED] blocked the door to his room when the nurse wanted to assist his roommate and verbally assaulted the roommate.  
(Resp’t Ex. 1 at 1 – 2.)

5. On January 17, 2020, Petitioner punched a resident in the face. Petitioner was Baker Acted. Petitioner was discharged and returned to the facility. (Resp’t Ex. 2 at 2 – 6.)

6. On February 18, 2020, Petitioner was admitted to the hospital for aggression and agitated behavior at the facility, which escalated to threatening a staff member with a silver luncheon knife. Petitioner placed a silver luncheon knife close to Respondent's witness's face. She was fearful for her life and was afraid his aggressive behavior would escalate and cause her harm. She called 911. The [REDACTED] Police Department arrived after the 911 call. Petitioner was Baker Acted. Petitioner was discharged and returned to the facility. Petitioner remains in the nursing facility. (Resp't Ex. 2 at 7 – 9 and Hr'g R.)

7. Petitioner's witness did not see Petitioner holding a silver luncheon knife on February 18, 2020. (Pet'r Wit. Test.)

8. Respondent is not able to protect staff and other residents' safety due to Petitioner's unpredictable and unprovoked aggressive behavior. Additionally, Petitioner has psychological needs that require Petitioner take his medication. Petitioner refuses to take his medications and becomes aggressive with staff when attempts are made to give him his medication. (Resp't Test.)

#### **CONTROLLING LAW**

9. Section 400.0255(15), Florida Statutes, provides the Department of Children and Families, Office of Appeal Hearings, jurisdiction over the subject matter of this proceeding and the parties. This section further prescribes this order as the final administrative decision of the Department of Children and Families.

10. Title 42 Code of Federal Regulations Section 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—

(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;** (emphasis added)

(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.

11. Section 400.0255, 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.** (emphasis added)

(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.

...

(10) (a) A resident is entitled to a fair hearing to challenge a facility's proposed transfer or discharge. The resident, or the resident's legal representative or designee, may request a hearing at any time within 90 days after the resident's receipt of the facility's notice of the proposed discharge or transfer.

(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.

...

(12) After receipt of any notice required under this section, the State Long-Term Care Ombudsman Program or local ombudsman council may request a private informal conversation with a resident to whom the notice is directed, and, if known, a family member or the resident's legal guardian or designee, to ensure that the facility is proceeding with the discharge or transfer in accordance with this section. If requested, the State Long-Term Care Ombudsman Program or the local ombudsman council shall assist the resident with filing an appeal of the proposed discharge or transfer.

...

(15) (a) The department's Office of Appeals Hearings shall conduct hearings under this section...

(b) The department shall, by rule, establish procedures to be used for fair hearings requested by residents. These procedures shall be equivalent to the procedures used for fair hearings for other Medicaid cases, chapter 10-2, part VI, Florida Administrative Code. The burden of proof must be clear and convincing evidence...

...

### **CONCLUSIONS OF LAW**

12. On January 8, 2020, the facility issued a Nursing Home Transfer and Discharge Notice to Petitioner. The reasons for discharging Petitioner are that the health and safety of other individuals in the facility are endangered. These are two of the six reasons provided in federal regulation for which a nursing facility may involuntarily discharge a resident.

13. In accordance with the above federal regulation and statute, the discharge notice was signed by a physician. The discharge notice also indicated the reasons and effective date of the discharge, the location to which Petitioner is to be discharged, and Petitioner's appeal rights along with other required assistance information. A copy was provided to Petitioner.

14. In this case, Respondent seeks to discharge Petitioner due to the health and safety of other individuals in the facility being endangered. The evidence shows Petitioner has behaved aggressively on several occasions, which required Respondent to seek appropriate treatment for Petitioner outside of the facility on July 24, 2019, October 24, 2019, January 3, 2020, January 17, 2020 and February 18, 2020. Respondent called the [REDACTED] Police Department (911) multiple times due to Petitioner' aggressive and agitated behavior. The facility physician and nurse determined Petitioner needed to be Baker Acted on July 24, 2019, October 24, 2019, January 3, 2020, January 17, 2020 and February 18, 2020. The evidence submitted and testimony establish that Petitioner's clinical records were well documented with the behaviors that endanger the health and safety of other individuals in the facility, which is the basis for his discharge.

15. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The facility 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.

16. 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.

17. After careful review of the cited authorities, testimony, and evidence, the undersigned concludes the facility has met the burden of proof in establishing that the health and safety of other individuals in the facility is endangered by Petitioner. The undersigned concludes Respondent's action discharging Petitioner is proper.

### **DECISION**

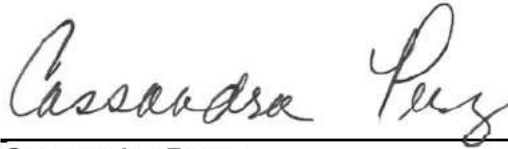
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in accordance with all applicable Agency for Health Care Administration requirements.

### **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.

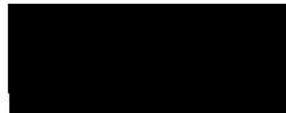

DONE and ORDERED this 29 day of May, 2020,

in Tallahassee, Florida.



Cassandra Perez  
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Copies Furnished To:

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