

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

FILED

Jul 02, 2020

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 20N-00048

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing telephonically in the above-referenced matter on June 3, 2020, at 3:15 p.m.

APPEARANCES

For Petitioner: [REDACTED]

For Respondent: [REDACTED] Nursing Home Administrator

STATEMENT OF ISSUE

Petitioner appeals the respondent's action of April 9, 2020. Respondent carries the burden of proof by clear and convincing evidence.

At issue is the facility's intent to discharge the petitioner. A Nursing Home Transfer and Discharge Notice was issued on April 9, 2020 with an effective date of [REDACTED] 2020. The nursing home (facility) rescinded that order but issued another Transfer and Discharge Notice dated April 29, 2020. The facility is seeking to discharge

the petitioner due to his alleged aggressive behavior that is endangering the health and safety of staff and other patients at the facility. 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 Title 42 Code of Federal Regulations Section 483.15 and Florida Statutes, Section 400.0255.

SUMMARY OF PROCEEDINGS

[REDACTED] Ombusman, appeared as a witness for the petitioner.

The following appeared as witnesses for the facility: [REDACTED] Nurse Practitioner, [REDACTED] and Director of Nursing, [REDACTED] Physician.

Petitioner's evidence was entered as Petitioner's Exhibit "1". Respondent's evidence was entered as Respondent's Exhibits "1".

The record was held open for the respondent to submit additional evidence, specifically: smoking policy, admission agreement and progress notes. This was received and entered into the record as Respondent's Exhibits "2"- "5". The petitioner submitted additional evidence during this time, and it was received and entered as Petitioner's Exhibit 2. The record closed on June 17, 2020.

Petitioner's Position

Petitioner's parents took the position that the petitioner is not a real threat to the safety of others in the facility. The petitioner has limited mobility and only has use of his arms and hands and should not be discharged to a facility that cannot meet his needs.

Respondent's Position

Respondent took the position that the petitioner is non-compliant with the rules and regulations of the nursing home and the petitioner is a threat to the safety of the

staff and other patients. Respondent asserts that the nursing home can no longer meet the needs of the petitioner.

FINDINGS OF FACT¹

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. The petitioner has been a resident of [REDACTED] since [REDACTED] 2015. (Resp't Ex. 4 at 1.)
2. The petitioner is a quadriplegic who has use of his hands and arms. (Pet'r Test. & Resp't Wit. 3 Test.)
3. On April 9, 2020, the facility issued the petitioner a Nursing Home Transfer and Discharge Notice.
4. On April 15, 2020, the petitioner's parents filed a fair hearing request with the Office of Appeal Hearings (OAH).
5. On April 20, 2020, the OAH issued an Order to Produce Nursing Home Transfer and Discharge Notice to the respondent.
6. On April 24, 2020, the respondent faxed a copy of the requested notice along with a statement signed by the nursing home administrator, [REDACTED] that the notice had been withdrawn.
7. On April 29, 2020, the undersigned issued a Preliminary Order of Dismissal to determine if the petitioner's parents still desired a hearing since the facility had rescinded the Notice dated April 9, 2020.

¹ 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.

8. On April 29, 2020, the petitioner's parents responded that they still wanted a hearing as the nursing home was still trying to discharge their son from the facility.

9. On April 29, 2020, the facility issued a Nursing Home Transfer and Discharge Notice stating that "The safety of other individuals in this facility is endangered". The effective date of discharge was [REDACTED] 2020. The form was signed by [REDACTED] and [REDACTED]. The petitioner refused to sign the Notice of Transfer and Discharge. (Resp't Ex. 1.)

10. On May 13, 2020, the undersigned issued an Order granting the hearing and scheduling the hearing for June 3, 2020 at 3:00 PM by telephone.

11. On June 3, 2020, the petitioner was in the hospital. (Resp't & Pet. Test.)

12. The respondent argued that the petitioner is a non-compliant resident. The petitioner refuses to abide by the smoking policies and becomes aggressive with staff if they do not allow him to smoke when he wants to. The respondent stated that the petitioner has become a danger to the staff and other residents and the facility can no longer meet his needs. (Resp't Test.)

13. The petitioner's parents countered that he is a quadriplegic and he is bi-polar, and they acknowledged that he can be difficult to deal with but believe that the facility is the best placement for him. They believe that the staff is somewhat complicit in his non-compliance with the smoking rules as he must get cigarettes and the lighter from the staff. (Pet'r Test.)

14. The facility has documented at least eleven instances of non-compliance with medical care and the smoking policies between January 2020 and May 2020. (Resp't Ex. 2.)

1/19/20	Refused to return from smoking area to receive IV treatment.
2/10/20	Resident asked to smoke during nonsmoking time, became angry knocking items off nurses desk, verbally abusive.
2/15/20	Refused to comply with facility smoking rules, was outside smoking during nonsmoking hours.
2/20/20	Attempts were made to change dressing 3x, one time resident was outside smoking.
3/2/20	Refused picc line flush, requested to smoke.
3/3/20	Refused to take jacket off for IV inspection, stated he was going to smoke.
3/19/20	Asked to smoke, reeducated to appropriate smoking times.
4/8/20	Resident was screaming in hall way at 5:15 am, wanted to smoke, refused to hand over lighter, proceeded to knock down pictures off wall, cna gave him 2 cigs and took him to smoke, he continued to yell.
4/9/20	Resident was smoking unsupervised, did not comply with request to give up lighter and lit another resident's cig, flicked his cig towards administrator, law enforcement called and arrived. Resident smeared his feces on his face, parents called. Resident Baker acted at 13:30 and transferred to St Anthony's hospital. Concerns expressed to parents. Resident stated he did not have time to be cleaned after bowl movement because of smoking rules.
4/10/20	Resident agreed to discharge due to smoking noncompliance.
4/13/20	Parents notified of resident's smoking noncompliance, will be starting the discharge due to the noncompliance and flicking cig at administrator.
4/15/20	Resident fell while getting up to go smoke.
4/24/20	Smoking privilege revoked due to noncompliance of smoking policy.
4/30/20	Considering Albina Manor for transfer because they have a more lenient smoking policy.
5/4/20	Resident reminded his smoking privilege had been revoked.

15. The Ombudsman stated that even though the petitioner has acted out by flicking the lit cigarette, no one has been in any real danger and that the petitioner should be allowed to stay in the facility. (Pet'r Wit. Test.)

16. The petitioner's physician stated that the petitioner has been under her care for five years and that when he is in a "good" cycle, he is compliant. However, she stated that his condition and/or temperament has worsened, and it is her belief that the facility is no longer able to meet his needs because he refuses to comply with his medical and behavior agreement. (Resp't Wit. 3.)

17. The Director of Nursing (DN) stated that the staff are afraid of him and that they will give in to his wishes when he becomes aggressive. (Resp't Wit. 1.)

18. The Nurse Practitioner concurred with the testimony of the DN and the physician.

(Resp't Wit. 2.)

19. The DN asserted that the petitioner is not happy and wants to leave the facility.

(Resp't Wit. 1.)

20. The petitioner's parents stipulated that their son is not happy but disagreed with the statement that he wants to leave the facility.

21. The petitioner's parents believe that a skilled nursing facility is the best placement for their son.

22. The facility believes that the petitioner's needs can be met in another skilled nursing facility or an ALF that has more lenient smoking policies. The facility believes that the petitioner is a danger to others and is seeking to discharge the petitioner from their facility.

CONTROLLING LAW

23. 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.

24. 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.

25. 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

26. On April 29, 2020, the facility issued a Nursing Home Transfer and Discharge Notice to the petitioner. The reasons for discharging the petitioner is that "the safety of other individuals in this facility is endangered". This is one of the six reasons provided in federal regulation for which a nursing facility may involuntarily discharge a resident.

27. In accordance with the above federal regulation and statute, the discharge notice was signed by a physician. The notice of discharge indicated the reason and effective date of the discharge, the location to which the petitioner is to be discharged, and the petitioner's appeal rights along with other required assistance information. A copy was provided to the petitioner. On April 29, 2020, the petitioner refused to sign the Notice of Transfer and Discharge.

28. In this case, the respondent seeks to discharge the petitioner due to safety of other individuals in the facility being endangered. The evidence shows the petitioner has been non-compliant and/or behaved aggressively on several occasions between January 19, 2020 and May 4, 2020.

29. The evidence submitted, and testimony offered together establish that the petitioner's clinical records were well documented with the behaviors that endanger the safety of other individuals in the facility, which is the basis for his discharge. The petitioner's parents and Ombudsman do not dispute the behaviors but believe that no one's safety is endangered.

30. The fact that staff were able to avoid harm does not negate the fact that possible harm existed. The attempts to injure others is as valid as the execution of such attempts. The undersigned finds that the petitioner does not need to be successful in injuring someone before his actions are deemed dangerous.

31. After careful review of the cited authorities, testimony, and evidence, the undersigned concludes the facility has met the burden of proof by clear and convincing evidence that the safety of other individuals in the facility is endangered by the

petitioner. The undersigned concludes the respondent's action discharging the petitioner is proper.

32. 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.

33. 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 foregoing Findings of Fact and Conclusions of Law, the appeal is hereby denied, as the facility's action to discharge the petitioner is correct and in accordance with Federal Regulations. The facility may proceed with the discharge as discussed in the Conclusions of Law, in accordance with applicable Agency of Health Care Administration requirements.

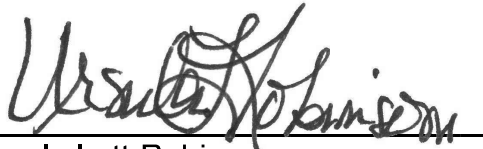
NOTICE OF RIGHT TO APPEAL

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 02 day of July, 2020,

in Tallahassee, Florida.



Ursula Lett-Robinson
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: [Redacted] Petitioner
[Redacted] Respondent

Agency for Health Care Administration
[Redacted]