

FILED

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

Jul 31, 2020
Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 20N-00053

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 June 2, 2020 at 1:34 p.m.

APPEARANCES

For Petitioner: [REDACTED] Petitioner's wife ([REDACTED])
[REDACTED] Petitioner's daughter. ([REDACTED])

For Respondent: [REDACTED] Administrator

STATEMENT OF ISSUE

The petitioner appeals the respondent's action issuing a notice to discharge the petitioner from [REDACTED] (the facility). At issue is whether the discharge intent is correct based on the respondent's position that the petitioner is endangering the health and safety of other individuals in the facility. The respondent carries the burden of proof in this issue by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

By notice dated April 30, 2020, the respondent informed the petitioner that the facility was seeking to discharge/transfer him for two reasons: 1) the health of other individuals in this facility is endangered due to clinical or behavioral status, and 2) the safety of other individuals in this facility is endangered due to clinical or behavioral status.

On May 4, 2020, the petitioner timely requested a hearing to challenge the discharge/transfer.

Appearing as a representative for the petitioner was [REDACTED], District Ombudsman Manager. The petitioner was present for the telephonic hearing, but he did not provide testimony.

Appearing as witnesses for the respondent were [REDACTED] Director of Social Services, (Resp't Wit.1.), [REDACTED] the petitioner's social worker at [REDACTED] [REDACTED] [REDACTED]-Director of Nursing, and [REDACTED] Director of Operations at [REDACTED]

Justin Enfinger, Office of Appeal Hearings, was present as an observer.

Evidence was received and entered as the Respondent's Exhibits 1 through 16 and Petitioner's Exhibits 1-3.

Petitioner's Position

The petitioner's family took the position that the petitioner is not a threat to the safety and health of others in the facility. The petitioner's family asserts they were not notified of the petitioner's behaviors at the time they occurred. The petitioner's family feels insufficient time had elapsed to determine if any therapeutic interventions would be

successful. Furthermore, the petitioner's wife does not want her husband to leave the respondent's facility, particularly due to the current Coronavirus issue.

Respondent's Position

The respondent took the position that the petitioner endangered the health and safety of other individuals in the facility through displays of sexually overt behaviors including disrobing and masturbating in front of others. The respondent contends the petitioner engaged in sexual contact with others who lacked the capacity to consent. The respondent contends its efforts to redirect the petitioner have been unsuccessful.

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 was admitted into the facility on [REDACTED] 2019. (Respondent Testimony [REDACTED])
2. The petitioner's diagnoses include in part: Parkinson's disease, cognitive communication deficit, a history of falling, adjustment disorder with depressed mood, and major depressive disorder. (Resp't Exh. 3 at 1.)
3. The respondent issued a Nursing Home Transfer and Discharge Notice to the petitioner on April 30, 2020. The respondent listed two reasons for the discharge: 1) the health of other individuals in this facility is endangered due to clinical or behavioral status, and 2) the safety of other individuals in this facility is endangered due to clinical

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.

or behavioral status. The facility alleges the petitioner displays sexually overt behaviors and has engaged in sexual contact with person(s) lacking capacity to consent. This document was signed by [REDACTED] Administrator, and [REDACTED] ARNP. (Resp't Exh. 1.)

4. On February 3, 2020, a female resident was observed with her hand in the pants of the petitioner. The [REDACTED] Police Department responded. There were no criminal charges or arrests made from this incident. (Pet. Exh. 1.)

5. On February 4, 2020, the petitioner was removed from one-on-one supervision following the incident on February 3, 2020. (Resp't Exh. 4) and (Resp't Exh. 16 at 2.)

6. On February 6, 2020, a follow-up meeting was held with the petitioner and the nursing director. During this meeting the petitioner stated the February 3rd incident "should not have happened and would not happen again." The petitioner was advised that if a female customer makes sexual advances he should move away and tell a team member.

7. As of March 12, 2020, the petitioner's wife ([REDACTED]) became his primary contact and would make his medical decisions from that point forward. (Resp't Exh 3 at 3.)

8. On March 18, 2020, psychology progress notes indicate the petitioner "denied any instance of him being inappropriate with female peers. He was encouraged to be mindful of where he is and things he does as it is easy to [sic] things to be misinterpreted. He stated that he will keep that in mind." Respondent Exhibit 5.

9. On March 27, 2020, a facility staff member observed the petitioner masturbating in a public area. (Resp't Exh 6.)

10. The psychology progress notes dated April 1, 2020 report the petitioner has been engaging in inappropriate behaviors around the facility. The petitioner's privacy and the things that are not permitted to do in common areas, even if he thinks he may be alone in the moment, were discussed. Petitioner was encouraged to keep these activities to himself and in private. (Resp't Exh 7.)

11. On April 17, 2020, the petitioner had his pants on backwards and down to his thighs. A staff member assisted the petitioner with readjusting his pants. (Resp't Exh 3 at 2.)

12. On April 20, 2020, an allegation was made by a female resident that the petitioner masturbated in front of her in the library. The petitioner was placed on one-on-one supervision. The facility staff did not witness the alleged incident. (Resp't Exh 8.)

13. On April 20, 2020, the respondent conducted a telephonic meeting with the petitioner's wife. The respondent advised [REDACTED] of her husband's alleged sexually inappropriate behaviors. The respondent advised that the petitioner may be better suited in a smaller facility or an all-male facility due to his current behaviors. (Resp't Exh 3 at 3.)

14. According to the respondent's business notes dated April 21, 2020, the petitioner was placed on one-on-one supervision for the safety of other residents. The petitioner was also newly prescribed 10 mg Prozac. "Will increase dose if tolerated after 2 weeks." (Resp't Exh 9.)

15. On April 23, 2020, an initial psychiatric evaluation was conducted with the petitioner. The results noted were a diagnosis of “major neurocognitive disorder due to Parkinson’s disease, probable, with behavioral disturbance.” The recommendations were: 1) Increase Prozac to 30 mg, 2) Add Remeron 15 mg PO QHS. (Resp’t Exh 10 at 2.)

16. On April 27, 2020, a telephonic family meeting was held with [REDACTED] and facility staff. The petitioner was not present at the meeting. Staff notified [REDACTED] of the additional reports of petitioner disrobing, masturbating in public, and a suspected attempt to have a female customer touch his genitals. The respondent notified [REDACTED] that a 30-day notice would be forthcoming, and referrals sent for alternate location for placement of the petitioner. (Resp’t Exh 3 at 2.)

17. On April 27, 2020, several facility staff members met with the petitioner. [REDACTED] was not present. Staff advised the petitioner that he would be issued a 30-day notice and referrals to other facilities. (Resp’t Exh 3 at 2.)

18. A clinical note e-signed on April 29, 2020 by [REDACTED] ARPN, indicates:

Pt has been witnessed exhibiting inappropriate sexual behaviors in public areas in facility by several residents and staff members. Discussed behaviors with PCP, pt’s wife, social services, unit manager, & staff nurse. Attended care plan meeting. Pt’s wife is his RP & was upset about situation. Emotional support provided. Pt’s wife agreed for her husband to be started on antidepressant medication. Pt placed on 1:1 supervision for the safety of other residents. Pt has Parkinson’s disease with STM loss. His judgement is poor and may not realize that his behaviors are inappropriate. Seen by psychiatric NP and pt was started on Prozac. Pt denies exhibiting these behaviors to his wife. However staff and other residents have observed these behaviors on more

than one occasion. Verbal redirection has not been successful. Social services and facility administration recommended a more suitable facility for the resident. Another skilled nursing facility that would be more appropriate has agreed to accept resident. Will discharge resident when bed available. (Resp't Exh 11.)

19. The petitioner's family was not advised of the inappropriate behaviors at the time they occurred. On or around April 20, 2020, [REDACTED] was notified of the allegations made between February 4, 2020 and April 20, 2020. (Pet. Testimony [REDACTED])

20. The family was not advised of petitioner's therapeutic intervention until April 20, 2020. The family was not asked to participate in the petitioner's therapeutic intervention. (Pet. Testimony [REDACTED])

21. There have been no complaints lodged against the petitioner by other residents or their families. (District Ombudsman Manager testimony.)

22. As of June 2, 2020, the petitioner has had no documented sexually inappropriate behaviors since one-on-one supervision and Prozac therapy began on April 20, 2020. (Resp't Testimony [REDACTED])

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.

...

- (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. In this case, the respondent seeks to discharge the petitioner due to the health and safety of other individuals in the facility being endangered. These are two of the six reasons provided in federal regulation for which a nursing facility may involuntarily discharge a resident. The discharge notice was signed by a physician designee. The discharge notice also indicates the 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.

27. After careful review of the cited authorities, testimony, and evidence, the undersigned concludes the respondent has met the burden of proof by a level of clear and convincing evidence. While the findings show that the petitioner has had no documented sexually inappropriate behaviors after the facility imposed one-on-one supervision for the petitioner, the undersigned concludes that this measure cannot be maintained for a long period of time. The undersigned concludes that the petitioner's past behavior, while unsupervised, proved to be a safety/health for the other residents. Therefore, the undersigned upholds the respondent's intention to discharge the petitioner.

28. 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 resident for a safe and orderly transfer or discharge from the Facility. The undersigned

cannot and has not considered either of these issues. The undersigned has considered only whether the discharge is for a lawful reason.

29. Any discharge by the Facility must comply with all applicable federal regulations, Florida Statutes, and AHCA requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the AHCA'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. The facility has established that this discharge is permissible under federal or state regulations; therefore, the facility may proceed with the discharge at this time.

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 31 day of July, 2020,
in Tallahassee, Florida.


Judith Schneider
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Copies Furnished To:  Petitioner
 Respondent

Agency for Health Care Administration
