

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

**FILED**

Nov 19, 2020

Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]  
[REDACTED]  
[REDACTED]

APPEAL NO. 20N-00093

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]  
[REDACTED]  
[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on November 2, 2020, at 9:06 a.m.

**APPEARANCES**

For Petitioner: [REDACTED] *pro se*

For Respondent: [REDACTED] Executive Director

**STATEMENT OF ISSUE**

Petitioner appeals Respondent's proposed action to discharge him from [REDACTED] [REDACTED] (the "Facility"). In addition, Petitioner appeals Respondent's action to not allow him to remain in the facility, pending the outcome of the appeal. Respondent carries the burden of proof by clear and convincing evidence.

### **SUMMARY OF PROCEEDINGS**

On September 22, 2020, Petitioner timely filed an appeal to challenge Respondent's action.

██████████ Director of Nursing, appeared as a witness for Respondent.

██████████ Director of Social Services, appeared as a witness for Respondent.

██████████, Long-Term Care Ombudsman, appeared as a witness for Petitioner.

██████████, Long-Term Care Ombudsman, appeared as a witness for Petitioner.

Susan Dixon, with the Office of Appeal Hearings, appeared as an observer.

Respondent submitted evidence marked and entered as Respondent Exhibits "1" through "11." Petitioner was prevented from submitting evidence as he did not have access to his records, which remained in the Facility. The record was left open until close of business on November 10, 2020, to allow Petitioner and Respondent to supplement the record. The record was closed on November 10, 2020.

On November 5, 2020, the undersigned issued an Emergency Order for Petitioner to Return to Facility Pending Outcome of Appeal. The order was a result of the emergency discharge action taken by Respondent, due to "safety of other individuals is endangered."

On November 10, 2020, the undersigned issued a Notice of Ex-Parte Communication due to communications received by the undersigned from both Petitioner and Respondent. The parties were reminded of the requirement to copy the opposing party.

On November 12, 2020, the undersigned issued an additional Notice of Ex-Parte Communication, due to communication received from Petitioner, prior to his receipt of the earlier Notice.

On November 17, 2020, the written discharge notice following the emergency verbal discharge was received from Petitioner and entered into the record as Petitioner Exhibit "1."<sup>1</sup>

### **Petitioner's Position**

Petitioner took the position that his needs can be met at the Facility and the staff were still coming in and treating him even while being recording. Petitioner does not have a record of violence, and he has not been found guilty of the incident that lead to his arrest.

### **Respondent's Position**

Respondent took the position that Petitioner's needs cannot be met at the Facility due to Petitioner's action of recording staff; he may not receive the care that he needs. Respondent also took the position that the health and safety of other individuals in the Facility is endangered, after Petitioner's arrest on [REDACTED] 2020.

### **FINDINGS OF FACT<sup>2</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:

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<sup>1</sup> The undersigned accepted this into the record, after it closed, due to its relevance, and Petitioner could not have anticipated receipt, to request for an enlargement of time, prior to record closing.

<sup>2</sup> Citations within the Findings of Fact, Controlling Law, 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.

1. For the undersigned's findings related to the emergency discharge action, see the Emergency Order issued on November 4, 2020. (Appeal R.)
2. Petitioner became a resident of the Facility on [REDACTED] 2016. Petitioner has missed numerous appointments due to transportation issues. Under previous administrations, Petitioner could use Lyft ride services to get to and from appointments when there were issues with transportation; he was no longer allowed to use Lyft under the new administration. (Hr'g R.)
3. On September 15, 2020, Petitioner posted a notice on his door informing anyone that entered the room that he was recording both visually and audibly and that by entering the room the individual would be consenting to being recorded. (Resp't Ex. 3.)
4. Numerous Facility witness statements, dated September 15, 2020, recorded at the time of incident, state that Petitioner became angry, he began using profanities, racial slurs and hand gestures, after being informed of the company policy and state law regarding recordings. (Resp't Ex. 4-8.)
5. Petitioner filed numerous grievances and attempted to get signatures from staff consenting to being recorded. No signatures were obtained. He was unable to get statements from the Facility staff for this hearing, due to the possibility of retaliation. (Hr'g R.)
6. By a written Nursing Home Transfer and Discharge Notice, dated September 18, 2020, Respondent informed Petitioner that he was to be discharged from the Facility, effective [REDACTED] 2020. The reason stated for discharge or transfer was, "Your needs cannot be met in this facility." The location Petitioner was to be discharged to was shown as [REDACTED] in [REDACTED] Florida. (Resp't Ex. 10.)

7. On October 16, 2020, Ombudsman Ms. [REDACTED] spoke with Petitioner's physician who signed the discharge notice and was informed that Petitioner had no medical or health reasons for discharge. (Pet'r Wit. Test.)

8. To support the discharge reason, the Executive Director believes because Petitioner is recording staff he is creating a toxic environment and the nurses will be afraid of what is going on; she is unsure that he would be getting the same care he was getting prior to recording staff. She was also afraid of what his behavior would be if he again got upset. To explain how a different facility could meet his needs, the Executive Director believes he could get a new start. (Hr'g R.) Director of Social Services believes that not all facilities have the same policies regarding recording, therefore Petitioner may not face the same difficulties with receiving care. (Resp't Wit. Test.)

9. On October 23, 2020, Ombudsman Ms. [REDACTED] participated in a zoom meeting with the Facility that included the Executive Director, Director of Nursing, Regional Vice President, and Regional Clinical. She informed the Facility that there were no documents to show Petitioner's needs could not be met at the Facility. She sought to resolve the issues before the hearing and informed the Facility that Petitioner would sign a document and agree to not record anything or anyone again. She believed they could resolve the underlying issues dealing with transportation. Petitioner was not in this meeting. (Pet'r Wit. Test.)

#### **CONTROLLING LAW**

10. 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.

11. Section 400.0255(15)(b), Florida Statutes, sets forth the burden of proof and requires that it must be met at the clear and convincing evidence threshold.

12. 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;

(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.

13. Title 42 of the Code of Federal Regulations § 483.15, Admission, transfer and discharge rights, in relevant part states:

**(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).** (emphasis added)

(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.

14. 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. 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...

(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.

(c) If the resident fails to request a hearing within 10 days after receipt of the facility notice of the proposed discharge or transfer, the facility may transfer or discharge the resident after 30 days from the date the resident received the notice.

(11) Notwithstanding paragraph (10)(b), an emergency discharge or transfer may be implemented as necessary pursuant to state or federal law during the time after the notice is given and before the time a hearing decision is rendered. Notice of an emergency discharge or transfer to the resident, the resident's legal guardian or representative, and the State Long-Term Care Ombudsman Program or the local ombudsman council if requested pursuant to subsection (9) must be by telephone or in person. This notice shall be given before the transfer, if possible, or as soon thereafter as practicable. The State Long-Term Care Ombudsman Program or a local ombudsman council conducting a review under this subsection shall do so within 24 hours after receipt of the request. The resident's file must be documented to show who was contacted, whether the contact was by telephone or in person, and the date and time of the

contact. If the notice is not given in writing, written notice meeting the requirements of subsection (8) must be given the next working day.

15. Title 42 of the Code of Federal Regulations § 483.40, Behavioral health services, states in relevant part:

Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care. Behavioral health encompasses a resident's whole emotional and mental well-being, which includes, but is not limited to, the prevention and treatment of mental and substance use disorders.

(a) The facility must have sufficient staff who provide direct services to residents with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental and psychosocial wellbeing of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with §483.70(e). These competencies and skills sets include, but are not limited to, knowledge of and appropriate training and supervision for:

(1) Caring for residents with mental and psychosocial disorders, as well as residents with a history of trauma and/or post-traumatic stress disorder, that have been identified in the facility assessment conducted pursuant to §483.70(e), and

(2) Implementing non-pharmacological interventions.

(b) Based on the comprehensive assessment of a resident, the facility must ensure that—

(1) A resident who displays or is diagnosed with mental disorder or psychosocial adjustment difficulty, or who has a history of trauma and/or post-traumatic stress disorder, receives appropriate treatment and services to correct the assessed problem or to attain the highest practicable mental and psychosocial well-being;

16. Title 42 of the Code of Federal Regulations § 483.70, Administration, in part states:

A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest

practicable physical, mental, and psychosocial well-being of each resident...

(e) Facility assessment. The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment. The facility assessment must address or include:

(1) The facility's resident population, including, but not limited to,  
(i) Both the number of residents and the facility's resident capacity;  
(ii) The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;  
(iii) The staff competencies that are necessary to provide the level and types of care needed for the resident population; (emphasis added)  
(iv) The physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and  
(v) Any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including, but not limited to, activities and food and nutrition services...

(i) Residents will be transferred from the facility to the hospital, and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the attending physician or, in an emergency situation, by another practitioner in accordance with facility policy and consistent with state law...

### **CONCLUSIONS OF LAW**

17. The Facility issued its initial discharge notice based on its belief that Petitioner's needs could not be met in the Facility. This is one of the six reasons provided in the controlling federal regulations for which a nursing facility may involuntarily discharge a resident.

18. The Findings show that the initial discharge was addressed in a written notice and was signed by the Facility Executive Director and physician. A 30-day advance notice was given, and a discharge location of [REDACTED] was given.

19. 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 and meets the requirements of the controlling authorities.

20. Any discharge by the Facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration (AHCA) requirements. Should the resident have concerns about the discharge process, he may contact AHCA's health care facility complaint line at (888) 419-3456.

21. The Facility seeks to involuntarily discharge Petitioner asserting that his needs cannot be met. The findings show that because Petitioner began recording staff, it was believed he was creating a toxic environment and the nurses would be afraid of what was going on; she was unsure that he would be getting the same care he was getting prior to recording staff. In addition, the Executive Director was afraid of what his behavior would be, if he again got upset.

22. The controlling authorities require a higher standard of proof in nursing home discharge hearings; there must be substantial and credible evidence at the level of clear and convincing.

23. While the Facility contended that Petitioner's needs cannot be met, there were no findings made or evidence presented to show this; only a hypothetical situation described by the Executive Director. The record is void of Petitioner's medical record

showing 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), as required by the regulation. The only testimony given regarding the receiving facility is that Petitioner would get a new start. Therefore, the undersigned concludes the Facility's evidence does not rise to the level of clear and convincing to support the discharge action under the reason that the resident's needs cannot be met.

### **DECISION**

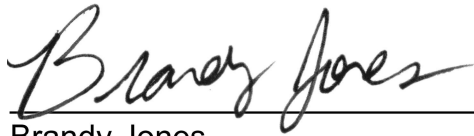
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility was previously ordered under an Emergency Order to allow Petitioner to return to the Facility, pending the outcome of this appeal. The result of the Final Order is also an ORDER for the Facility to immediately readmit Petitioner. In the event of no current availability, the Facility must readmit Petitioner to the first available bed.

### **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   19   day of   November  , 2020,

in Tallahassee, Florida.



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