

FILED

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

Sep 10, 2021
Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 21N-00028

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 August 10, 2021 at 9:32 a.m.

APPEARANCES

For Petitioner: [REDACTED] Petitioner's son

For Respondent: Kristen Over, Esq.

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 was continued twice per the parties' requests. The hearing was convened on July 12, 2021 at 10:00 a.m. and was rescheduled due to a power outage in the undersigned's office.

██████████ ("Resp't Wit. 1"), Nursing Home Administrator ("NHA") and ██████████ ("Resp't Wit. 2"), Registered Nurse ("RN"), appeared as witnesses for Respondent in both hearings. ██████████ ("Resp't Wit. 3"), Director of Nursing ("DON") and ██████████ ("Resp't Wit. 4"), Licensed Practical Nurse ("LPN") appeared as witnesses for Respondent during the August 10, 2021 hearing. ██████████, Certified Long-Term Care Ombudsman, appeared as a witness for Petitioner in both hearings.

Petitioner did not submit any exhibits. Respondent submitted evidence, which were admitted into evidence and marked as Respondent's Exhibits one ("1") through ten ("10").

No representative from the Agency for Health Care Administration ("AHCA") was present. At the request of the undersigned, AHCA conducted an on-site inspection of the facility on July 15, 2021 and found no violations. The AHCA report was marked as Hearing Officer's Exhibit one ("1").

Petitioner's Position

Petitioner took the position that Respondent's allegations regarding the incidents that occurred in the Facility are not totally accurate. Petitioner believes he is just being territorial and only acts out when someone invades his personal space. He does not understand why Respondent cannot keep other residents away from him. Petitioner has

not physically harmed anyone in the Facility. He gets along well with others and wants to remain in the Facility.

Respondent's Position

Respondent took the position that Petitioner's behavior is alarming and concerning and has become a safety hazard for other residents and staff members. Respondent also took the position that the health and safety of other individuals in the Facility is endangered due to Petitioner's unprovoked aggressive and combative behavior.

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. On [REDACTED] 2010, the Facility admitted Petitioner for long term services.

Starting in late 2019, Petitioner began displaying erratic and aggressive behaviors towards staff members and other residents, putting their health and safety in danger.

(Resp't Wit. 1 Test.)

2. Petitioner's progress notes are parts of Respondent's business record. The attached record(s) are duplicate copies; made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters; are kept in the course of the regularly conducted activity of our business and were made as a regular practice in the course of the regularly conducted activity of our business. (Hrg R.)

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.

3. On October 8, 2019, Petitioner was involved in an altercation with his roommate after finding him in his bed returning from the bathroom. Petitioner hit his roommate and staff with a back scratcher in the process. Petitioner's son was notified of the incident. Law enforcement and Department of Children and Families were also made aware of the incident. The incident was reported to AHCA, which investigated found the allegation substantiated. (Resp't Ex. 5.).

4. On October 9, 2019, Petitioner was seen by a psychiatrist who diagnosed him with unspecified dementia without behavioral disturbance, other schizoaffective disorders, and major depressive disorder. (Resp't Ex. 4.)

5. On March 9, 2020, Petitioner was observed in the dining room physically attacking a female resident causing injury to her right inner forearm. Patient was seen swinging his arm and hitting the other patient and then threw water on her. Both residents were immediately removed for safety. AHCA investigated the incident and found the allegation substantiated. (Resp't Ex. 6.)

6. On August 17, 2020, Petitioner was involved in an altercation with his roommate, he was found sitting in his bed. The roommate had left frontal hematoma and trace of bleeding under his left eye. AHCA investigated the incident and found the allegation substantiated. (Resp't Ex. 7.)

7. On March 29, 2021, Petitioner spit and stumped on a CNA who was changing him. Petitioner would have outburst for no apparent reasons and act aggressively toward staff and other residents (Resp't Ex. 2 at 7; Resp't Wit. 4 Test.)

8. On March 30, 2021, Petitioner continued to have outbursts, unpredictable physical behavior toward staff, refusing care on and off. Petitioner was spoken with

about way to control behaviors and how to react in different situation, he shook head in yes understanding. Petitioner has been aggressive on many occasions. The inter-disciplinary team had to intervene several times without much success. (Resp't Ex. 2 at 7; Resp't Wit. 3 Test.)

9. Petitioner has been violent towards staff for a while. He often acts unprovoked and has grabbed female staff without warning. (Resp't Ex. 9)

10. On April 18, 2021, a CNA approached Petitioner and asked if he was ready to get washed up and dressed. In response, Petitioner attempted to kick the CNA's head, almost knocking her glasses off. No physical contact made. (Resp't Ex. 2 at 4; Resp't Wit. 2 Test.)

11. On April 20, 2021, Petitioner continued to be physically aggressive, combative, and verbally abusive towards staff. Petitioner displayed poor impulse control, labile mood swings and unpredictable behaviors. Petitioner was put under close monitoring. (Resp't Ex. 2 at 4; Resp't Wit. 4 Test.)

12. On May 7, 2021, while a CNA was attempting to prepare Petitioner for his visit with his son, he became aggressive and grabbed a razor from the CNA. Petitioner tried to kick and hit CNA. Another CNA took over and dressed and washed him without incident. (Resp't Ex. 2 at 2; Resp't Wit. 2 Test.)

13. On June 11, 2021, a caregiver was setting up Petitioner's tray to assist him with feeding, Petitioner suddenly grabbed the spoon from her hand and pushed her. He then started coughing. (Resp't Ex. 3 at 1.)

14. On April 5, 2021, the Facility issued a Nursing Home Transfer and Discharge Notice to Petitioner informing him of its intent to discharge Petitioner from the Facility effective [REDACTED] 2021, signed by the Administrator and Physician, citing:

- 1) "The health of other individuals in this facility is endangered."
 - 2) "The safety of other individuals in this facility is endangered."
- In the explanation section of the Discharge Notices the comment "Resident's aggressive behaviors put other residents and staff at risk for both safety and health."

(Resp't Ex. 1 at 1-2).

15. On April 19, 2021, Petitioner timely filed an appeal to challenge Respondent's action. (Hr'g R.)

16. Petitioner underwent an eye surgery in July 2021 and has become a little more aggressive than usual, but he is not violent. Petitioner will not adjust well to a new environment and can be better served staying in the Facility. Petitioner is very satisfied the services he is receiving in the Facility. (Pet'r Wit. Test.)

17. As of the day of this hearing, Petitioner remains in the Facility pending a hearing decision. (Hr'g R.)

CONTROLLING LAW

18. Section 400.0255(15), Florida Statutes ("F.S."), 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.

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

20. Title 42 Code of Federal Regulations (C.F.R.) 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.

[Emphasis added].

21. Title 42 C.F.R. Section 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).

...

(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.

...

[Emphasis added].

22. Title 42 C.F.R. Section 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:

23. Title 42 C.F.R. Section 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...

24. Section 400.0255 F.S., 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, 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.

(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.

...

(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.

CONCLUSIONS OF LAW

25. Based on the evidence presented, the Facility has established 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.

26. The findings show that the discharge was addressed in a written notice and was signed by the Facility Administrator and physician. A 30-day advance notice was given. In accordance with the above federal regulation and statute, 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.

27. 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.

28. 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.

29. The Facility seeks to involuntarily discharge Petitioner on the contention that the health and safety of other individuals in the facility are endangered because of his aggressive behavior. The findings show Petitioner has behaved aggressively on several occasions. The findings show that Petitioner’s clinical records were well documented with several scenarios of aggressive behaviors that put other people at risk. After several documented incidents, Respondent issued the discharge notice at issue to Petitioner.

30. 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.

31. After careful review, the cumulative evidence demonstrates, and the undersigned concludes the Facility has met the burden of proof in establishing that the health and safety of other individuals in the Facility are endangered by Petitioner. The undersigned concludes Respondent’s intended action to discharge 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, Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190. 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 10 day of September , 2021,

in Tallahassee, Florida.



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