

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

FILED

Jul 16, 2021

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 21N-00035

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 30, 2021 at 9:53 a.m.

APPEARANCES

For Petitioner: [REDACTED] Petitioner's daughter

For Respondent: [REDACTED] Nursing Home Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging Petitioner from [REDACTED] [REDACTED] (the "Facility"). Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

Petitioner was not present; he was represented by [REDACTED]

Witnesses for Respondent were [REDACTED] Nursing Home Director ("Resp't Wit. 1"), [REDACTED] Social Worker ("Resp't Wit. 2"), [REDACTED] Unit Manager ("Resp't Wit. 3"), [REDACTED] Executive Director ("Resp't Wit. 4") and [REDACTED] Social Worker ("Resp't Wit. 5").

On May 25, 2021, Respondent provided a copy of the *Nursing Home Transfer and Discharge Notice* ("Notice") issued on April 23, 2021 with an effective date of [REDACTED] 2021. The notice did not include a physician's signature or a physician order. On May 27, 2021, the undersigned issued a *Preliminary Order of Dismissal* due to the Notice was facially defective, as it lacks the signature from a physician, or an attached written physician order. On June 9, 2021, Respondent provided a copy of the Notice issued June 4, 2021 with an effective date of [REDACTED] 2021 that included a physician signature.

On record, Respondent rescinded the Notice dated April 27, 2021 and explained the correct date of the Notice is June 4, 2021. Petitioner's representative wished to challenge the June 4, 2021 Discharge Notice.

Petitioner did not submit any exhibits. Respondent's evidence was marked and entered as Respondent's Exhibit one ("1").

Petitioner's Position

Petitioner's representative took the position that removing Petitioner from the Facility would be traumatic as it is in Petitioner's best interest for him to stay at the Facility. She became aware of some of the incidences that occurred in the Facility regarding Petitioner's aggressive behaviors during her telephone calls and visits. She does not understand why the Facility cannot meet his needs or that Petitioner was a

safety or health risk to anyone at the Facility. The Facility should be able to provide appropriate care for Petitioner. She has requested medical records from the Facility. The Facility has not sent any medical documentations to Petitioner's representative.

Respondent's Position

Respondent took the position that Petitioner refuses to take his medication and difficult to redirect him back to his unit. Petitioner is an exit seeker who is disruptive by yelling at the staff. Petitioner would uninvitingly enter other patient's room and becomes combative when redirected back to his unit. Respondent has requested that Petitioner be discharged on the basis that his needs cannot be met at the Facility, the health of other individuals in the facility are endangered, and the safety of other individuals in the facility are endangered.

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. Petitioner is 90 years old and currently resides in the Facility, which is a skilled nursing facility. (Hr'g R.)
2. Petitioner suffers from Alzheimer dementia, agitated behaviors and bi-polar. Petitioner presents an elopement risk as he displays exit-seeking behaviors by attempting to open the Facility doors. (Hr'g R. & Resp't Wit. 3 and 5 Test.)
3. Petitioner refuses to take his medications. (Hr'g R.) However, the social worker clarified the issue is not the medication, Petitioner's issues are exit seeker, issues with

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

redirecting him to his unit, territorial behavior and inappropriate hand contact.

Petitioner's representative was invited to attend the care conference meeting. (Resp't Wit. 3 Test.)

4. On August 14, 2020, December 10, 2020, January 12, 2021, March 6, 2021, and May 19, 2021, Petitioner was yelling, verbally combative, displaying aggressive behavior and attempting to injure a staff member. (Hr'g R and Resp't Wit. 3 Test.)

5. The Facility contacted Petitioner's representative to discuss Petitioner's behavior and an appropriate discharge plans to another Facility. (Resp't Wit. 5 Test.)

6. Facility is a secure unit with locked doors, which required door codes to enter. Petitioner does not meet the criteria to be in the secure unit. (Hr'g R.)

7. The Administrator and the physician attendee had frequent meetings to discuss Petitioner's behavior. No specific dates were given. Based on the physician's findings from the medical record, the physician agreed with Petitioner's discharge. No testimony from the physician was provided during the hearing to address the medical records findings. (*Id.*)

8. On June 4, 2021, Respondent issued a Notice to Petitioner informing him that he was to be discharged from the facility effective [REDACTED] 2021. The reasons cited were: (1) "Your needs cannot be met in this facility" and (3) "The safety of other individuals in this facility is endangered." The notice was signed by Dr. [REDACTED]. A brief explanation to support the facility's action indicates the following: See attached letter. (Resp't Ex. 1 at 2 – 3.)

9. Dr. [REDACTED] signed a Physician Please Sign & Return on June 4, 2021 and ordered "Ok to discharge home with family". (*Id.* at 7.)

10. The psychiatric progress evaluations dated March 2021 through June 2021 from [REDACTED], ARNP address Petitioner's behavior reported by staff was agitated. (*Id.* at 9 – 16.)

11. The Physician Please Sign & Return and psychiatric progress evaluations does not include Petitioner's documentations from the doctor that Petitioner's needs could not be met by the Facility. (Hr'g R.)

CONTROLLING LAW

12. 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.

13. 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.

...

(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—

(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]

14. Florida Statutes, Title 29, Section 400.0255, Resident transfer, or discharge

requirements and procedures; hearings, in relevant 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)...

...

(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.

(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. The office shall notify the facility of a resident's request for a hearing.

(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. A hearing decision must be rendered within 90 days after receipt of the request for hearing.

(c) If the hearing decision is favorable to the resident who has been transferred or discharged, the resident must be readmitted to the facility's first available bed.

(d) The decision of the hearing officer shall be final. Any aggrieved party may appeal the decision to the district court of appeal in the appellate district where the facility is located. Review procedures shall be conducted in accordance with the Florida Rules of Appellate Procedure. [Emphasis added]

15. Title 42 of the Code of Federal Regulations Section 483.40, Behavioral health services, states in 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 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 facilitywide 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;

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;

(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. Based on the evidence presented, the nursing facility has established that the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility and the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident. These are two of the six reasons provided in 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 not signed by a physician or attendee. Respondent rescinded the initial discharge notice. The findings show that on June 4, 2021, the Facility issued a notice of discharge to Petitioner, citing two reasons for the discharge as follows: (1) Petitioner's needs cannot be met at the Facility and (2) the safety of other individuals in the Facility is endangered.

19. In accordance with the above cited authorities, the Notice was signed by the Facility administrator and physician, including the reason for discharge and effective date of the discharge and appeal rights.

20. 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.

21. 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.

22. The Facility seeks to involuntarily discharge Petitioner, asserting that his needs cannot be met due to Petitioner's non-compliance on medication management and his aggressive combative behavior. Respondent testified that care conference meetings were discussed with the physician regarding Petitioner's behavior, and that Respondent contacted Petitioner's representative telephonic and during her visits to discuss Petitioner's behavior. While physician did sign the notice, no testimony was given by the physician during the hearing regarding the evidence to substantiate and support the facts that Petitioner's needs cannot be met.

23. Respondent's witness testified that Petitioner is an endangerment to himself and others as Petitioner is an exit seeker, territorial, belligerent, combative behavior to anyone at the Facility. Respondent's witness testified the Facility has a secure unit for Alzheimer/ dementia patients, however; further states that Petitioner does not meet the criteria in being placed in the secure unit. No medical record or care plan assessments were presented to support Respondent's assertion that Petitioner endangers the safety of other individuals in the Facility.

24. 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.

25. After careful review of the evidence and testimony, the undersigned

concludes that Respondent has not met its burden of proof regarding the first and second condition indicated on the Notice. Respondent's action to discharge Petitioner is solely based on their contention and not supported with documentations from the Facility's medical records nor testimony by the Facility's physician or the medical director. This does not meet one of the six requirements allowable under regulation for discharge.

26. Based on the evidence, testimony, and cited authorities, the undersigned concludes that Respondent's decision to discharge Petitioner was not within rule of the program.

DECISION

Based upon the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility is ORDERED to not discharge Petitioner, if he has not yet been discharged. If Petitioner has already been discharged, Respondent is ordered to readmit him to the Facility 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, 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. Petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. Department has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.




DONE and ORDERED this 16 day of July, 2021,

in Tallahassee, Florida.



Cassandra Perez
Hearing Officer
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Copies Furnished To:

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