

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

FILED

Nov 03, 2021

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 21N-00043

PETITIONER,

VS.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an in-person nursing home discharge hearing in the above-referenced matter on September 9, 2021, at 10:49 a.m.

APPEARANCES

For the petitioner: [REDACTED] pro se

For the respondent: [REDACTED] Administrator

STATEMENT OF ISSUE

The petitioner appeals the respondent's action to discharge him from the [REDACTED] [REDACTED] (the "Facility"). The respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

Don Rogers, Florida Certified Ombudsman, appeared as the petitioner's witness. [REDACTED] Director of Social Services appeared as a witness for the respondent. The petitioner submitted two (2) exhibits that were entered into evidence and marked as

Petitioner's Composite Exhibits one ("1") and two ("2"). The respondent submitted four (4) exhibits, which were entered into evidence and marked as Respondent's Exhibits one ("1") through four ("4"). The record remained open through the close of business on September 19, 2021, for the respondent to submit the petitioner's care plan and psychological records.

After the hearing, the respondent submitted the petitioner's psychological record and care plan/treatment plan which was accepted into evidence and marked as Respondent's Exhibit five ("5"). The record closed on September 19, 2021.

Two prior continuances were granted to the petitioner for previously scheduled hearings.

No representative from the Agency for Health Care Administration ("AHCA") was present.

After the hearing was completed, the Office of Appeal Hearings ("OAH") received a letter from AHCA stating that it's unannounced visit at [REDACTED] [REDACTED] on September 10, 2021 found violations unrelated to the issue at appeal. This document has no bearing on the merits of the appeal; therefore, it was neither admitted as evidence nor considered in making a final ruling.

Petitioner's Position

The petitioner took the position that the Facility is retaliating against him because he asked for a rebuttal form and started writing things down. The petitioner asserts that the respondent's allegations regarding the incidents that occurred in the Facility are false. The petitioner does not want to leave the facility as he is well known by other residents at the Facility.

Respondent's Position

The respondent's position is that the petitioner is impatient, yells, screams and throws things if his needs are not met immediately which makes and other residents and staff scared that they may be hurt by the petitioner. The respondent believes that the petitioner will do well at an Assisted Living Facility ("ALF") as he functions at a higher level compared to other residents at their facility.

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 initially admitted to the Facility on [REDACTED] 2019. He was admitted as a deaf and confused person. The petitioner is sixty (60) years of age. He suffers from disorders of the prostate, hernia, major depressive disorder, anemia, atrophy, schizoaffective disorder, and has a colostomy. (Pet'r Comp. Ex.1, Resp't Ex. 5 at 2 and Resp't Test. September 9, 2021.)
2. The petitioner's progress notes are parts of the 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. (Hr'g R.)

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.

3. The following incidents led to the respondent issuing a Nursing Home Transfer and Discharge Notice to the petitioner.

4. On January 20, 2020, the petitioner screamed and shouted foul words at the nurse when she went into his room to give him his medication. The petitioner refused to take his medication. He kicked down the blood pressure machine and tried to kick the nurse while she was administering medication to another resident. (Resp't Ex. 4 at 13.)

5. The petitioner believed that he does not suffer from blood pressure and does not need to take medication for blood pressure. Additionally, the blood pressure medication causes him pain. (Pet'r Test. September 9, 2021.)

6. On February 27, 2020, the petitioner was upset that he could not find his cup. He began screaming at staff in the hallway. (Resp't Ex. 4 at 12.)

7. On September 5, 2020, the Facility received a call from [REDACTED] police informing that a resident of room 207 called to report that a resident in [REDACTED] (the petitioner's room) was upset with his dinner and threw his dishes on the floor. The petitioner apologized for his behavior. (Resp't Ex. 4 at 11.)

8. On October 10, 2020, the petitioner went to the medication cart while the nurse was counting narcotics. The nurse asked him to wait, and she wrote on a piece of paper "we are counting narcotics" he snatched the paper, crushed it, and threw it on the floor. He then pushed the nurse. (Resp't Ex. 4 at 10.)

9. On October 12, 2020, the petitioner accused a certified nursing assistant ("CNA") of throwing urine in the sink. The petitioner yelled at her and threw the medication book from the cart on the floor. (Resp't Ex. 4 at 11.)

10. On February 7, 2021, the petitioner could not wait for staff to give him coffee, he started using profanity and threw coffee pots. (Resp't Ex. 4 at 9.)

11. The petitioner explained that the staff was drinking the coffee themselves and by the time the coffee got to him it was cold. He admitted to going to the coffee cart to get coffee but was not allowed to get any. (Pet'r Test. September 9, 2021.)

12. On June 16, 2021, another resident reported to the unit manager that the petitioner adjusted the room temperature. The petitioner became upset and started screaming and banging on the bathroom door. The petitioner's banging of the bathroom door frightened the other resident. The unit manager thought it would be best to move the petitioner and said she would look for another room for him which led to the petitioner being angrier. (Resp't Ex. 3 at 6 and Pet'r Test. September 9, 2021.)

13. The petitioner admitted that the room temperature was an issue for him and his roommate, but he should not be the person who moves as he was in the room first. (Pet'r Test. September 9, 2021, and Pet'r Comp. Ex. 2.)

14. On June 16, 2021, a grievance concern report was created for the above incident. (Resp't Ex. 2.)

15. On June 16, 2021, a Statement Document was completed pertaining to the petitioner screaming and using profanity. (Resp't Ex. 3.)

16. On June 22, 2021, the respondent issued a Nursing Home Transfer and Discharge Notice to the petitioner. (Resp't Ex. 1 at 1.)

17. On June 24, 2021, the petitioner timely requested an appeal to challenge the respondent's action. (Appeal R.)

18. On July 16, 2021, the petitioner went to the Assistant Director of Nursing (“ADON”) office as she wanted to speak with him. The ADON was in an interview and could not speak with the petitioner at that time. He became upset and smacked the door twice and then blocked the door with his body. He then left. (Resp’t Ex. 4 at 11.)

19. In addition to the petitioner’s other medical issues he suffers from severe headaches which causes him unbearable pain. He wants to be treated for his headaches but is not being treated for them. (Pet’r Test. September 9, 2021.)

20. The petitioner does not believe that he was violent or that he endangered any resident or staff. He admitted to being loud as he is deaf. The petitioner believes that the Facility’s staff has no regard for him or his needs. (Pet’r Test. September 9, 2021.)

21. The respondent believes the petitioner is impatient, throws things, yells, and uses profanity which frightens residents and staff. (Resp’t Ex. 5 at 19, and Resp’t Test. September 9, 2021.)

CONTROLLING LAW

22. 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.

23. 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.

24. Title 42 Code of Federal Regulations Section 483.15, Admission, transfer, and discharge rights. sets forth the reasons a facility may involuntarily discharge a resident as follows:

...

(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...

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section...

[Emphasis added.]

25. Title 42 Code of Federal Regulations 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:

26. Title 42 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 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...

27. Section 400.0255, Florida Statutes, 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... 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...

CONCLUSIONS OF LAW

28. The respondent's reason for issuing the petitioner a transfer/discharge notice is, "The safety of other individuals in this facility is endangered." This is one of the reasons listed in the above authority as a valid reason for a transfer/discharge.

29. In accordance with the above authority, the Facility's Administrator and the Facility's Physician signed the petitioner's transfer/discharge notice.

The undersigned reviewed the findings, evidence, and testimony in regard to the safety of other individuals in the Facility being endangered.

30. 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.

31. 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.

32. The Facility seeks to involuntarily discharge the petitioner on the contention that the safety of other individuals in the facility is endangered because of his abusive behavior. The findings show the petitioner has behaved aggressively on several occasions. The findings show that the petitioner’s progress notes were well documented with several scenarios of violent behaviors that put other people at risk.

Incidents occurred on January 20, 2020, February 27, 2020, September 5, 2020, October 10, 2020, October 12, 2020, on February 7, 2021, June 16, 2021, and July 16,

2021, which were documented in the petitioner’s progress notes. A Grievance and Concern Report and a Statement Documents was completed on June 16, 2021. The petitioner was counseled on June 16, 2021, about his behavior and the Facility’s policy.

After several documented incidents, the respondent issued the discharge notice at issue to the petitioner.

33. After careful review, the cumulative evidence demonstrates, and the undersigned concludes the Facility has met the burden of proof in establishing that the safety of other individuals in the Facility is endangered by the petitioner. The undersigned concludes the respondent’s intended action to discharge the 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 the 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 03 day of November, 2021,
in Tallahassee, Florida.



Christiana Gopaul-Narine
Hearing Officer
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