

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

FILED

Oct 20, 2021

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 21N-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 at 1:37 p.m. on August 19, 2021, at 10:34 a.m. on August 31, 2021 and at 1:05 p.m. on September 3, 2021.

APPEARANCES

For Petitioner: [REDACTED] pro se

For Respondent: [REDACTED] Administrator

STATEMENT OF ISSUE

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

SUMMARY OF PROCEEDINGS

The hearing originally convened on August 19, 2021 and continued to August 31, 2021 with the final hearing held on September 3, 2021.

Appearing as witnesses for Respondent from the Facility were: [REDACTED] [REDACTED] Director of Nursing ("Wit. 1"), [REDACTED] Social Service Director ("Wit. 2"), [REDACTED] MDS Coordinator ("Wit. 3"), [REDACTED] ARNP ("Wit 4"), [REDACTED] [REDACTED] Medical Director ("Wit. 5"), [REDACTED] Attending Physician ("Wit. 6"), [REDACTED] Wound Physician ("Wit. 7"), [REDACTED] CNA ("Wit 8"), [REDACTED] LPN, ("Wit. 9"), [REDACTED] Nursing Assistant ("Wit. 10") and [REDACTED] former RN ("Wit. 11"). Appearing as witnesses for Petitioner were, [REDACTED] [REDACTED], Florida Certified Ombudsman ("Wit. 12"), [REDACTED], friend, ("Wit. 13") and [REDACTED] ("Wit. 14").

Respondent submitted twenty-nine (29) exhibits, which were entered into evidence and marked as Respondent's Exhibits one ("1") through twenty-nine ("29"). Petitioner submitted two (2) exhibits, which were entered into evidence and marked as Petitioner's Exhibits one ("1") and two ("2"). The record remained open through end of business September 8, 2021, for parties to submit a written document identifying which of their exhibits supports each reason listed on the Transfer Discharge notice. Both parties submitted the requested document. The record closed on September 8, 2021.

Petitioner's Position

Petitioner's position is that he has been discriminated, stereotyped, harassed, and verbally abused by the Facility's staff. Petitioner's position is that he has the right to refuse medication, not take the COVID-19 vaccine or be tested for COVID-19.

Respondent's Position

Respondent took the position that Petitioner is manipulative, disruptive, disrespectful, rebellious, retaliatory and threatening towards staff, management and

residents. Respondent's position is that Petitioner refuses to be tested for COVID-19, take the COVID-19 vaccine and wear face masks, despite the risks it imposes to residents and staff.

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, date of birth [REDACTED] 1981, was admitted to the Facility on [REDACTED] 2018, from [REDACTED]. His medical diagnoses were, urinary tract infection, muscle weakness, paraplegia, constipation, other muscle spasm and osteomyelitis. (Resp't Ex. 2.)
2. Petitioner has been a paraplegic since age eighteen (18). Petitioner's upper body is strong; his lower body is weak, he is unable to walk and uses a wheelchair. (Hr'g R.)
3. On May 18, 2020, Petitioner was provided with a new Facility's Admission Agreement ("Agreement"), due to the Facility being purchased by [REDACTED]. A letter was included with the Agreement that identified contrabands not permitted in resident's room, which include lighters. The letter notified Petitioner that if contrabands were found in his room it may result in discharge from the Facility. (Resp't Ex. 19, at 33.)
4. On May 26, 2021, Petitioner used his lighter to burn incense in his room. (Resp't Ex. 9 at 39.)
5. In May 2021, Facility staff members reported finding: 1) a methadone pill on the floor in the therapy room that Petitioner had been in; 2) oxycodone and lorazepam pills on

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.

the floor in Petitioner's room and: 3) a cup full of unidentified pills in Petitioner's room.

(Resp't Ex. 5 at 1-5; Resp't Ex. 7 at 1-4.)

6. Petitioner is the only resident in the Facility taking methadone by pill form; other resident's take methadone in liquid form. (Wit. 1 Test.)

7. On May 11, 2021, for the safety of Petitioner and other residents, Petitioner's methadone was changed from pill form to liquid form and oxycodone and lorazepam were changed from whole pills to crushed. (Wit. 6 Test.; Resp't Ex. 9 at 50; Resp't Ex. 20 at 3.)

8. On four (4) different occasions, Petitioner verbally threatened Facility staff. (Resp't Ex. 6; Resp't Ex. 7; Resp't Ex. 8; Resp't Ex. 9.)

9. Petitioner endangers Facility staff and residents by refusing to take the COVID-19 vaccine and be tested for COVID-19. (Wit 5 Test.; Resp't Ex. 9.)

10. The Facility's wound doctor examined Petitioner for two large wounds, Sacrum and right Ischium, also known ulcers, a few times when he was first admitted to the Facility. Petitioner was belligerent and did not want to follow directions, which resulted in Petitioner seeing another wound doctor outside of the Facility. (Wit. 7 Test.)

11. Petitioner made/issued many Facility complaints/grievance reports. (Pet'r Ex. 1.)

12. All of Petitioner's complaint/grievance reports were resolved and/or referred to the Agency for Health Care Administration ("AHCA"). (Resp't Ex. 11; Resp't Ex. 12.)

13. Petitioner requires assistance getting in and out of vehicles and has leg spasms. (Wit. 13 Test.; Wit. 14 Test.)

14. Petitioner takes the city bus without anyone's assistance. (Wit. 1 Test.)

15. Petitioner required some assistance with his activities of daily living (“ADL’s”) when he was admitted to the Facility. Petitioner’s ADL’s have improved significantly; he takes care of his ADL’s. (Wit. 3 Test.; Resp’t Ex. 27; Resp’t Ex. 28; Resp’t Ex. 30.)

16. Petitioner has exhibited that he is safe to go out to the community and be independent; he cares for his wounds and his ADL’s. Petitioner did not display any problems when methadone was changed from pill form to liquid form; or when the other narcotics changed from pill form to crushed form. Petitioner now only takes the narcotics on as at needed. (Wit. 6 Test.)

17. The Facility provided Petitioner with nursing skills when he entered the Facility. Petitioner no longer requires nursing skills, he is capable of caring for himself. The Facility now only provides Petitioner with medication as needed, food and shelter. Petitioner has a support system outside the Facility and will do well in the community. (Wit. 5 Test.)

18. On July 12, 2021, the Facility issued Petitioner a Nursing Home Transfer Discharge Notice, listing the following reasons: 1) Your needs cannot be met in this facility; 2) Your health has improved sufficiently so that you no longer need the services provided by this facility; 3) The health of other individuals in this facility is endangered; 4) The safety of other individuals in this facility is endangered. The notice was signed by the Facility Administrator, (“PB”), Physician and Petitioner. (Resp’t Ex. 3.)

19. At Petitioner’s request, he was again seen by the Facility’s wound physician, regarding his wounds on August 18, 2021 and September 1, 2021. Petitioner reported that he had a new wound. A dry dressing was applied to Petitioner’s new minor right ankle wound. Petitioner’s wounds have improved and reduced in size since he was

admitted to the Facility. Petitioner successfully applies the dressings to his wounds himself, without assistance. (Wit. 7 Test.; Resp't Ex. 10.)

CONTROLLING LAW

20. 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.

21. 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.]

22. Section 400.0255, F.S., 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...

15)(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

23. Respondent's reasons for issuing Petitioner a Transfer Discharge Notice include: 1)

Your needs cannot be met in this facility; 2) Your health has improved sufficiently so

that you no longer need the services provided by this facility; 3) The health of other

individuals in this facility is endangered; 4) The safety of other individuals in this facility

is endangered. These are four (4) of the reasons listed in the above authority as a valid reason for a Transfer Discharge.

24. In accordance with the above authority, the Facility Administrator and PB, Physician, signed the Transfer Discharge Notice.

25. The evidence established that on May 18, 2020, Petitioner was notified that a lighter is considered a contraband and having a lighter in his room may result in discharge from the Facility. On May 26, 2021, a lighter was found in Petitioner's room when he was burning incense.

26. The evidence established that Petitioner's narcotics were found in the therapy room floor where Petitioner had been; and on the floor of his room. Additionally, a cup full of unidentified pills were found in Petitioner's room.

27. The evidence established that Petitioner verbally threatened Facility staff on four different occasions.

28. The evidence established that Petitioner's wounds have decreased in size since he was admitted to the Facility. And Petitioner is capable of taking care of his wounds.

29. The evidence established that Petitioner's ADL's have significantly improved since he was admitted to the Facility.

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 as these issues are governed by

the AHCA. The undersigned only considered whether the discharge is for a lawful reason.

31. After careful review of the evidence and cited authorities, the undersigned concludes that Respondent met its burden of proof by clear and convincing evidence that Petitioner's Transfer Discharge reasons are in accordance with the above cited authority.

32. 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

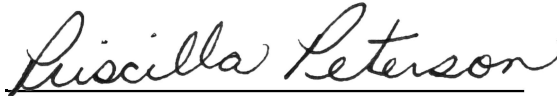
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to transfer/discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in accordance with all applicable AHCA 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. 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 20 day of October, 2021,

in Tallahassee, Florida.



Priscilla Peterson
Hearing Officer
Suite I, Room 129
2415 North Monroe Street
Tallahassee, FL 32303-4190
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED] Petitioner
[REDACTED] Respondent
[REDACTED]
Agency for Health Care Administration