

**FILED**

Dec 20, 2021

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

Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]

APPEAL NO. 21N-00078

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 9:11 a.m. on November 5, 2021.

**APPEARANCES**

For Petitioner: [REDACTED], Ombudsman  
District Manager

For Respondent: [REDACTED] Administrator

**STATEMENT OF ISSUE**

Petitioner appeals Respondent's action discharging him from [REDACTED] [REDACTED] (the "Facility") due to "The safety of other individuals in this facility is endangered." Respondent carries the burden of proof by clear and convincing evidence.

### **SUMMARY OF PROCEEDINGS**

This hearing was originally scheduled to convene on October 27, 2021. On October 25, 2021, the Office of Appeals Hearing received Petitioner's continuance request. The continuance was granted. The hearing was rescheduled for November 5, 2021.

Petitioner appeared and provided testimony. [REDACTED] Social Service Director, appeared as Respondent's witness. Respondent submitted two (2) exhibits, which were entered into evidence and marked as Respondent's Exhibits one ("1") and ("2"). Respondent's second (2<sup>nd</sup>) exhibit includes twenty-three (23) pages; however, Respondent only addressed and submitted the witness statement into the record. Petitioner submitted one (1) exhibit, which was entered and marked as Petitioner's Exhibit one ("1").

#### **Petitioner's Position**

Petitioner took the position that he does not endanger anyone in the Facility. Petitioner's position is that he is very well liked and respected by the residents, which is the reason that the residents elected him to be president of the patient resident counsel.

#### **Respondent's Position**

Respondent took the position that the Facility "has had a lot of complaints from staff and former roommates that they were not able to provide/receive care, safely in the room." Respondent's position is that the Facility was not able to redirect Petitioner with education; therefore, it asked staff to submit complaints in writing.

**FINDINGS OF FACT<sup>1</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:

1. Petitioner, date of birth [REDACTED] 1955, was admitted to the Facility on [REDACTED] [REDACTED] 2019, from [REDACTED] Hospital, due to requiring rehabilitation treatment on his back.

(Hr'g R.)

2. On September 7, 2021, [REDACTED], therapist, wrote the following statement:

Rm 102A – Seeing [REDACTED] for ot tx & [REDACTED] reports he needs to use the toilet. I proceed to prepare his wheelchair for mobility to commode. When [REDACTED] tells me the CNA just took him to the bathroom. I explained to [REDACTED] that [REDACTED] needs to use it. So, I'm going to need to get into the bathroom. [REDACTED] explained to me he just cleaned & organized the table right next to the commode & just cleaned the sink. I said, "no problem" we won't touch the table. [REDACTED] [REDACTED] proceeded to physically block the door into the bathroom. Fortunately, a CNA happened to come into the room & I told her [REDACTED] [REDACTED] will not allow us to enter the bathroom. She distracted him enough so that we could enter the bathroom & [REDACTED] was safely able to use the commode. Oh yeah, one more thing... [REDACTED] would not let me close the door – the CNA distracted him & I was able to give [REDACTED] privacy while he voiden standing up in front of the commode. [REDACTED] was arguing with the CNA after we came out. I took [REDACTED] to the common area to watch T.V.

(Resp't Ex. 2.)

3. A Plan of Care is a medical record that documents resident's medical symptoms, physical symptoms and mental and social wellbeing. (Hr'g R.)

4. Petitioner's Plan of Care dated September 15, 2021 (Pet'r Ex. 1 at 2.), July 20, 2021 (*Id.* at 6.), May 11, 2021 (*Id.* at 11.), and March 23, 2021 (*Id.* at 15.) under REVIEW OF SYSTEMS, Other Symptoms, states that Petitioner is Intrusive at times.

---

<sup>1</sup> 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.

5. The Facility did not provide evidence that it addressed/educated Petitioner on his intrusiveness. (Hr'g R.)

6. The Social Plan section of Plan of Care, under Interventions, dated September 5, 2021, in part states, "[REDACTED] preferred activities are: ice cream social, helping others...Provide a program of activities that is of interest and empowers him by encouraging/allowing choice, self-expression and responsibility." (Pet'r Ex. 1 at 38-39.)

7. On September 17, 2021, the Facility issued Petitioner a Nursing Home Transfer Discharge Notice ("Notice"), listing the following reason for discharge or transfer, "The safety of other individuals in this facility is endangered." Under *Brief explanation to support this action*, it states, "[REDACTED] has had increase in actions toward roommates and others that prevent care from being provided. [REDACTED] is his own RP & refuses to accept education on appropriate behavior toward others." The notice was signed by the Facility Administrator, and [REDACTED] Medical Director. (Resp't Ex. 1 at 2-3.)

8. Petitioner's Admission Record was included with the Notice. (*Id.* at 4-5.)

9. Petitioner's Medical records regarding the Notice were not provided. (Hr'g R.)

### **CONTROLLING LAW**

10. 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.

11. 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.]

12. Florida Administrative Code Rule 28-106.213, addresses evidentiary standards for use at administrative hearings and in relevant part states:

(3) Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Sections 90.801-805, F.S.

13. Section 90.801(c), F.S. defines hearsay as "... a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

14. Section 90.802, F.S. states that, "[e]xcept as provided by statute, hearsay evidence is inadmissible."

15. Section 90.803, F.S., Hearsay exceptions states:

Hearsay exceptions; availability of declarant immaterial.—The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarant is available as a witness:

(6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY. —  
(a) A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

16. 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.**

[Emphasis added.]

### CONCLUSIONS OF LAW

17. Respondent's reason for issuing Petitioner a Notice is, "The safety of other individuals in this facility is endangered." This is one (1) of the reasons listed in the above authority as a valid reason for a transfer discharge.

18. In accordance with the above authority, the Facility Administrator and [REDACTED]

[REDACTED] Medical Director signed the Notice.

19. The above authority explains that the Facility must ensure that the transfer discharge is documented in the resident's medical record when the reason for transfer discharge is "The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident."

20. The evidence established that Respondent did not submit Petitioner's medical records documenting the reason it is requesting a transfer discharge.

21. The September 7, 2021 written statement from the Facility's therapist that Petitioner allegedly blocked her and Petitioner's roommate from entering the bathroom is hearsay evidence. Absent testimony from a qualified witness authenticating the letter, the undersigned cannot rely on this hearsay evidence.

22. No other non-hearsay evidence, or hearsay evidence that falls under an exception to the hearsay rule, was submitted that establishes that “The safety of other individuals in this facility is endangered.”

23. The above controlling authority requires a higher standard of proof in nursing home hearings; there must be substantial and credible evidence at the level of clear and convincing.

24. Respondent’s evidence does not rise to the level of clear and convincing.

25. Respondent’s evidence shows that it is possible that one (1) incident of blocking entrance to the bathroom occurred in the two (2) years that Petitioner has been a resident at the Facility. This level of proof is sufficient in fair hearings in which the standard of proof is preponderance of the evidence; it is not sufficient proof in nursing home discharge hearings. Reasonable certainty that Respondents allegations are correct is required to meet the clear and convincing standard.

26. In careful review of the cited authorities and evidence, the undersigned concludes Respondent did NOT meet its burden of proof by clear and convincing evidence that The safety of other individuals in the Facility are endangered.

### **DECISION**

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility’s action to transfer discharge Petitioner is NOT in accordance with Federal Regulations. The Facility may NOT proceed with its proposed discharge action.

**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 December, 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]  
Agency for Health Care Administration  
[REDACTED]