

██████████ Petitioner's sister-in-law appeared as an observer. Respondent had no objection to the observer. ██████████ Social Services Director appeared as Respondent's witness.

Petitioner submitted an evidence packet, which was marked and entered as Petitioner's Exhibits one ("1") through four ("4"). Respondent submitted an evidence packet, which was marked and entered as Respondent's Exhibit one ("1").

Petitioner's Position

Petitioner took the position that he is legally blind and prone to falling. He wishes to remain at the Facility and receive care for his conditions. He took the position he did not commit the actions alleged by Respondent. He wishes to remain at the Facility and receive care for his conditions.

Respondent's Position

Respondent took the position that the safety of other individuals in the Facility is endangered by Petitioner, and he should be discharge to a more appropriate setting. Petitioner has a repetitive desire to seek female companionship from a specific resident who no longer has the cognitive ability to consent to being touched.

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, age sixty-five (65), was last admitted to the Facility on ██████████ 2021. Petitioner's original admission date was ██████████ 2019. Petitioner has

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.

multiple diagnoses including, but not limited to, congestive heart failure, repeated falls, generalized muscle weakness, hypertension, poor eyesight and major depressive disorder. (Pet'r Ex. 1 at 6-9.)

2. Respondent believes Petitioner had a close relationship with a female resident prior to January 2022. (Hr'g R.)

3. Prior to January 11, 2022, Respondent believes they informed Petitioner that the female resident's condition had deteriorated, and she lacked the capacity to make decisions for herself or consent to being touched. (*Id.*)

4. On January 11, 2022, there was an incident between Petitioner and the female resident. The allegation is that Petitioner touched the female resident, who lacks the capacity to consent to being touched. (*Id.*)

5. After the January 11, 2022 incident, the Facility was required to supervise Petitioner one-on-one to insure he no longer approached or touched the female resident or any other incapacitated residents. (*Id.*)

6. The Facility believes Petitioner continued to approach the female resident following the January 11, 2022 incident. (*Id.*)

7. The Facility has now moved Petitioner to another wing of the building and lifted the one-on-one supervision. Respondent completes fifteen (15) minute checks on Petitioner. (*Id.*)

8. Immediately after the January 22, 2022 incident, the Facility made a report of abuse to the Agency for Health Care Administration ("AHCA"), as required by law. (*Id.*)

9. Petitioner believes the Facility wrongly accused him of touching a female resident's breast. Petitioner believes he moved a female resident's arm, and a Facility employee mistook that action. (*Id.*)

10. Petitioner wishes to stay at the Facility. He has friends there and it will be hard to start over at a different Facility. Petitioner has fallen multiple times and has a fracture in his back. (*Id.*)

11. Respondent did not provide testimony or documentation including the details of the allegations surrounding the January 11, 2022 incident. (*Id.*)

12. On January 24, 2022, 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, "Res. Has had 2 reportable incidents (1 in 2020 & 1 in 2022) involving touching of female residents who lack capacity to consent. Res has a BIMS of 15 & is his own RP. Res. has been educated about appropriate social contact. Facility wishes to seek placement @ locations such as ALF's where resident could be around other residents with same cognitive level as self." ² The notice was signed by the Facility Administrator, and Dr. [REDACTED]. (Resp't Ex. 1 at 2-3.)

13. "BIMS" is an acronym for "Brief Interview of Mental Status". It is a simplified test interpreting an individual's orientation to time and place. A score of fifteen (15) is the highest score. A score below nine (9) is borderline memory loss, a score of five (5) or below is considered cognitively impaired. (Hr'g R.)

² "Res" indicates "Resident", "RP" indicates Responsible Party, "ALF's" indicates Assisted Living Facilities.

14. During its research of the January 11, 2022 incident, the Facility became aware of a previous incident in 2020 involving Petitioner and a different female resident. The Facility believes this was an incident involving Petitioner inappropriately touching a female resident with a BIMS score of less than five (5). (*Id.*)

15. Portions of Petitioner's Care Plan Review dated November 8, 2019 states "Needs assistance w/...direction at times due to poor eyesight." (Pet'r Ex. 1 at 13.)

16. Portions of Petitioner's Care Plan Review dated February 24, 2020 states "Robert needs monitoring to maintain social distance from female residents." (*Id.* at 15.)

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

CONTROLLING LAW

18. 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.

19. 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.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to § 431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to § 431.220(a)(3) of this chapter, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(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.

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the resident's discharge summary, consistent with § 483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

(3) *Notice before transfer.* Before a facility transfers or discharges a resident, the facility must -

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section;

...

[Emphasis added].

20. 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."

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

22. Section 90.803(6), F.S., Hearsay exceptions states:

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.

...

23. 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].

24. Florida Administrative Code Rule 28-106.213(3) sets forth that "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."

CONCLUSIONS OF LAW

25. Respondent's reason for issuing Petitioner a 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.

26. In accordance with the above authority, the Facility Administrator and Dr. ██████████ signed the Notice.

27. 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."

28. The findings show that there were no medical records submitted documenting the reason the Facility is requesting a transfer discharge. Respondent's Notice to Petitioner makes note of two (2) reportable incidents involving Petitioner touching female residents who lack the capacity to consent.

29. There was no testimony to validate the Facility's allegation of the incident on January 11, 2022. Respondent's testimony indicated there was an "incident" on January 11, 2022. The incident involved Petitioner touching a female resident who lacks the capacity to consent to being touched. Respondent provided no other details or information surrounding the incident on January 11, 2022. There was no witness testimony regarding the incident. Any testimony from individuals who did not witness the incident are hearsay. Absent testimony from a qualified witness, the undersigned cannot rely on this hearsay evidence.

30. 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."

31. 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.

32. 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 is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

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 19 day of April, 2022,

in Tallahassee, Florida.



Judith Schneider
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