

May 10 2022

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 22N-00013

PETITIONER,
VS.

ADMINISTRATOR

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on April 20, 2022 at 11:08 a.m.

APPEARANCES

For Petitioner: [REDACTED] Healthcare Proxy

For Respondent: [REDACTED] Executive Director

STATEMENT OF ISSUE

Petitioner appeals Respondent’s proposed action to discharge him from [REDACTED] [REDACTED] (the “Facility”). Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

On February 24, 2022, Petitioner untimely filed an appeal to challenge Respondent’s action.

██████████ Mother of Petitioner, appeared as Petitioner's witness.

Respondent submitted evidence, it was marked and entered as Respondent Exhibit one ("1").

Petitioner's Position

Petitioner took the position that he was unaware he was being discharged from and believed he was covered under the bed hold policy the two times he was taken to the hospital. Petitioner believes that signing the Discharge notices was protocol.

Respondent's Position

Respondent took the position that Petitioner's needs cannot be met at the Facility due to Petitioner's change in health.

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 was a long-time resident of the Facility. (Hr'g R.)
2. By a written Nursing Home Transfer and Discharge Notice ("Notice"), mailed on October 6, 2021, Respondent informed Petitioner that he was to be discharged from the Facility. The reason stated for discharge or transfer was, "Your needs cannot be met in this facility" due to chest pain. Petitioner's representative signed the form on October 5, 2021. The Notice informed Petitioner that he has a right to appeal the decision within ninety days upon receipt of this discharge notice. (Resp't Ex. 1 at 4-8.)

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

3. The ninetieth day from date the Notice was signed by Petitioner's healthcare proxy was January 3, 2022. Petitioner requested the hearing on February 18, 2022.

(Hr'g R.)

4. By a written Nursing Home Transfer and Discharge Notice ("Notice 2"), mailed on October 12, 2021, Respondent informed Petitioner that he was to be discharged from the Facility. The reason stated for discharge or transfer was "Your needs cannot be met at this facility" due to respiratory issues. Petitioner's representative signed the form on October 12, 2021. The Notice informed Petitioner that he has a right to appeal the decision within ninety days upon receipt of this discharge notice. (Resp't Ex. 1 at 12-

14.)

5. The ninetieth day from date the Notice 2 was signed by Petitioner's representative on January 10, 2022. Petitioner requested the hearing on February 18, 2022. (Hr'g R.)

6. Petitioner acknowledged signing one of the Notices and was not aware that she was agreeing for the patient to be discharged. She believed he was covered by the bed hold policy. Petitioner acknowledged that full amount of the bed hold fee was not covered as the funds to cover it were not available. (*Id.*)

7. Respondent believes they can no longer provide the level of care for Petitioner due to his change in health issues. (*Id.*)

8. On November 29, 2021, Petitioner was made aware that the Facility could no longer hold Petitioner's bed and they held it as long as they could. Petitioner believes that the Facility proceeded to pack up his things and store them at the Facility. (*Id.*)

CONTROLLING LAW

9. 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.

10. 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.

11. 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.

12. Title 42 of the Code of Federal Regulations § 483.15, Admission, transfer and discharge rights, in relevant part states:

(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.

[Emphasis added].

13. Florida Statutes Section 400.0255, Resident transfer or discharge; requirements and procedures; hearings, states in part:

(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...

(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)(a) A resident is entitled to a fair hearing to challenge a facility's proposed transfer or discharge. The resident, or the resident's legal representative or designee, **may request a hearing at any time within 90 days after the resident's receipt of the facility's notice of the proposed discharge or transfer.**

(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.

(c) If the resident fails to request a hearing within 10 days after receipt of the facility notice of the proposed discharge or transfer, the facility may transfer or discharge the resident after 30 days from the date the resident received the notice.

(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.

CONCLUSIONS OF LAW

14. The Facility issued its initial discharge notice based on its belief that Petitioner's needs could not be met in the Facility. This is one of the six reasons provided in the controlling federal regulations for which a nursing facility may involuntarily discharge a resident.

15. 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.

16. 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.

17. The findings show that the Notice mailed on October 6, 2021 was signed by Petitioner's representative on October 5, 2021. The findings show Notice 2 was signed by Petitioner's representative on October 12, 2021.

18. The Facility seeks to involuntarily discharge Petitioner asserting that his needs cannot be met. The findings show Petitioner was made aware of the discharge and signed both Notices that were mailed October 6, 2021, and October 12, 2021. The findings show the Notice's informed Petitioner that he had a right to appeal the decision within ninety days upon receipt of the Notice. The findings further show Petitioner was aware that the Facility on at least November 29, 2021, when she acknowledges the Facility could no longer hold a bed for Petitioner and that his things were being packed up. Petitioner did not file a timely appeal within ninety days of either Notice.

19. Based on the findings, the undersigned concludes that she lacks jurisdiction over this matter as the appeal was not requested timely from the date of the two Notices.

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DISMISSED as non-jurisdictional.

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 10 day of May, 2022,

in Tallahassee, Florida.

Jacqueline Carter

Jacqueline Carter
Hearing Officer
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Copies Furnished To: [REDACTED] Petitioner

[REDACTED] Respondent

Ms. Patricia Cauffman
Agency For Health Care Administration
[REDACTED]