

FILED

Aug 12, 2022

Office of Appeal Hearings
Dept. of Children and Families

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

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APPEAL NO. 22N-00024

PETITIONER,

Vs.

ADMINISTRATOR

██
██
██

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter at 2:06 p.m. on April 28, 2022, at 2:00 p.m. on May 26, 2022, and at 1:00 p.m. on June 20, 2022

APPEARANCES

For Petitioner: ██████████, Petitioner's daughter

For Respondent: ██████████, Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging him from ██████████
██████████ (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

Petitioner appeared and did not testify. Appearing as witnesses for Respondent from the Facility were [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] ("Wit. 5"), appeared as Petitioner's witness. Only the individuals identified as Wit. testified.

Respondent submitted the Nursing Home Transfer and Discharge Notice ("Notice") and forty-two (42) pages of exhibits. However, it only addressed the Notice and pages three (3) through seven (7), ten (10) through twelve (12) and twenty-one (21). Respondent's Exhibits were entered into evidence and marked as Respondent's Exhibits ("1") through ("5"). Petitioner submitted one (1) exhibit, which was entered and marked as Petitioner's Exhibit ("1").

Petitioner's Position

Petitioner took the position that the "Facility failed to look at the antecedence behind each of the alleged incidents." Petitioner's position is that he considers the Facility his home and staff members his family. And being labeled as aggressive and a danger puts his family in an undue burden and makes it difficult to find him another Facility.

Respondent's Position

Respondent took the position that due to Petitioner's three (3) incidents of aggressive behavior toward others and unpredictable pattern without notice, it is in the

best interest of the other residents that Petitioner be transferred to another Facility. Respondent's position is that "Petitioner received numerous Facility interventions without success."

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], was originally admitted to the Facility in June 2020 for a few months. Petitioner was readmitted on October 1, 2020, from [REDACTED], assisted living facility, due to requiring rehabilitation services.

(Hr'g R.)

2. The Facility's Progress Notes are medical records under the category of Progress Notes that allows its staff to enter notes regarding residents. (Hr'g R.)

3. Petitioner suffers from cerebrovascular disease, pulmonary fibrosis, type 2 diabetes, hyperlipidemia, restless legs syndrome, atherosclerotic heart disease, gout, traumatic brain injury, among other illness. (Resp't Ex. 2.)

4. On August 16, 2021, at 7:00 p.m. a staff member entered the Facility's day room and put his bag on a chair. Petitioner asked the staff member not to put his bag on the chair because residents use the chair and his bag was taking up a seat. The staff member did not remove his bag and Petitioner grabbed the staff member around the neck. (Wit. 1 Test.)

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.

5. The August 16, 2021, alleged incident was not documented in the Facility's Progress Notes. Wit. 1 was not present and did not witness the August 16, 2021, alleged incident. (Hr'g R.)
6. The Facility's investigation and intervention of the August 16, 2021, incident included educating staff to communication in the work-place with residents and co-workers. It also completed Petitioner's labs, a UA, psychological evaluation and reassessment of a activities. (Wit. 2 Test.)
7. The reassessment of activities was to work with Petitioner on his tablet and phone. (Wit. 3 Test.)
8. Progress Note, dated August 5, 2021, which was prior to the August 16, 2021, incident states that Wit 3 had agreed to work with Petitioner on his tablet and phone. (Resp't Ex. 2 at 1.)
9. Progress Note dated August 19, 2021, states "I have been working with [REDACTED] for a week on his phone and I-pad. After the week he said he does not need me to come back because he really doesn't want to use the I-pad and he can use his phone to talk with his family and friends." (Resp't Ex. 2 at 2; Wit. 3 Test.)
10. The August 16, 2021, incident investigation was not documented in the Facility's Progress Notes. (Hr'g R.)
11. On August 17, 2021, the Facility completed a care plan meeting with Petitioner and his daughter regarding the August 16, 2021, incident. (Resp't Ex. 2 at 2; Wit. 4 Test.)
12. On October 5, 2021, Petitioner contracted COVID-19 and was ill with COVID-19 until October 15, 2021. (Hr'g R.)

13. Progress Notes dated November 12, 2021, written by [REDACTED],

Licensed Practical Nurse, states:

At 17:40 cna was taking his roommate [REDACTED] to the bathroom and Mr. [REDACTED] started coughing. [REDACTED] reached out and grabbed his arm and tried to slap him per the cna. [REDACTED] said that he was, "coughing on me on purpose." This nurse attempted to redirect him with poor results. [REDACTED] notified and PCP. Orders received for labs and u/a with c/s in am.

(Resp't Ex. 3)

14. As part of the November 12, 2021, intervention [REDACTED] was moved to a separate room. (Wit. 1 Test.)

15. On November 16, 2021, a care plan meeting was completed with Petitioner and his daughter to discuss the November 12, 2021, incident. (Resp't Ex. 3 at 2; Wit. 2 Test.)

16. Progress Notes dated March 19, 2022, written by [REDACTED]

Licensed Practical Nurse, states:

At approximately 19:15, resident became agitated with another resident on the unit. He started yelling at him about sitting outside his door, and then grabbed the other resident by the upper right arm. Staff intervened, and resident was able to calm himself. Resident was redirected and taken to his room, where I could talk with him. Resident stated, "He's always sitting right there, and I can't get out of my room." I explained to resident that instead of getting angry, he could say "excuse me?", and resolve the issue without violence. Resident agreed, and advised he'll try to be more cordial in the future. I called the MD, left a message to call facility at his first convenience. Daughter was also notified.

(Resp't Ex. 4.)

17. As part of the Facility's intervention for the March 19, 2022, incident Petitioner was moved to a different room. (Wit. 1 Test.)

18. On March 25, 2022, the Facility issued Petitioner a Notice, the reason for discharge or transfer is "The safety of other individuals in this facility is endangered." Under "Brief

explanation to support this action”, it states, “The resident has unpredictable aggressive behavior with no pattern of offense. He has inappropriately touched other residents and staff. [REDACTED] has received numerous facility interventions without success. The facility cannot assure the safety of other residents based on [REDACTED] pattern of behavior.” (Resp’t Ex. 1.)

19. On March 29, 2022, the Facility discussed the March 19, 2022, incident and the March 25, 2022, Notice with Petitioner’s daughter. (Resp’t Ex. 4 at 3.)

20. On April 1, 2022, the Ombudsman met with Petitioner regarding the Notice and alleged incidents. Petitioner stated that he looks after other residents that cannot stand up for themselves. Petitioner became emotional, raised his hand, clenched his fist and almost broke into tears. (Wit.5 Test.)

21. Petitioner’s daughter resides in Vermont and did not witness any of the alleged incidents. Petitioner’s daughter submitted written documentation of the three (3) alleged incidents as were reported to her by the Facility and her explanations as to the reason(s) the alleged incidents may have occurred. (Pet’r Ex. 1.)

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. 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.]

24. 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.

25. 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."

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

27. 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.

28. 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

29. 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.

30. In accordance with the above authority, the Facility Administrator and [REDACTED] signed the Notice.

31. The evidence established that the alleged August 16, 2021, incident, investigation and intervention were not documented in the Facility's Progress Notes.

32. The Findings established that Respondent's Wit. 1 testified of what transpired during the August 16, 2021, alleged incident; however, Wit. 1 did not witness the alleged incident.

33. In accordance with the above authorities, the August 16, 2021, alleged incident is hearsay and does not meet an exception.

34. The Findings established that Petitioner was ill with COVID-19 from October 5 through October 15, 2021.

35. The evidence established that on November 12, 2021, Petitioner grabbed his roommate's arm and tried to slap him for coughing on him.

36. The evidence established that on March 19, 2021, Petitioner yelled at another resident for sitting outside his door and grabbed him by the arm.

37. 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.

38. Respondent's evidence regarding the November 12, 2021, and March 19, 2022, incidents do not rise to the level of clear and convincing that "The safety of other individuals in this facility is endangered."

39. Respondent's evidence shows that it is possible that the two incidents indicate that the safety of other individuals in the facility are endangered. 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 the Facility's allegations are correct is required to meet the clear and convincing standard.

40. 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 12 day of August, 2022,

in Tallahassee, Florida.



Hearing Officer
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