

Apr 03, 2023

Office of Appeal Hearings  
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 22N-00115

PETITIONER,

VS.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on February 15, 2023 at 11:10 a.m.

**APPEARANCES**

For Petitioner: [REDACTED] Petitioner’s son, and Power of Attorney (“POA”)

For Respondent: [REDACTED] Administrator

**STATEMENT OF ISSUE**

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

**SUMMARY OF PROCEEDINGS**

On December 27, 2022, Petitioner timely requested a Fair Hearing regarding a Nursing Home discharge. Petitioner is a resident of the Facility but did not appear.

██████████ (“Resp’t. Wit. 1”), Housekeeper; ██████████ (“Resp’t Wit. 2”), Quality and Risk Manager; ██████████ (“Resp’t Wit. 3”), Director of Social Services; ██████████ (“Resp’t Wit. 4”), Unit Manager second floor; ██████████ (“Resp’t Wit. 5”), Director of Nursing; and ██████████ (“Resp’t Wit. 6”), Psychiatric Nurse Practitioner, appeared as Respondent’s witnesses.

Petitioner submitted portions of an evidence packet, which were marked and entered into the record as Petitioner’s Exhibits one (“1”). Respondent submitted an evidence packet, which was marked and entered into the record as Respondent’s Exhibit one (“1”) through five (“5”).

The record was held open for fourteen days to allow Petitioner to submit additional evidence into the record. The additional evidence was received March 7, 2023, after the deadline date for submission and therefore will not be admitted into the record or a basis for my decision. The record was closed on March 1, 2023.

#### **Petitioner’s Position**

Petitioner took the position that he wishes to remain at the Facility. Petitioner believes that with his age, it would be detrimental to his health to be transferred to a different facility.

#### **Respondent’s Position**

Respondent took the position that the safety of the staff and residents are endangered by Petitioner; his inappropriate behaviors require one-on-one supervision at the Facility, which the Facility is not equipped to do, and he should be discharged to a more appropriate setting.

**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 is currently in the Facility on the second floor which is an area for those suffering from dementia. (Hr'g R.)
2. On November 30, 2022, a report was filed with the State of Florida on Petitioner due to an incident in the Facility. Petitioner removed his briefs and took another female resident's ("Jane Doe") hand and placed it on his genitals. (Hr'g R.) Jane Doe was taken to a nurse after assisting in separating the residents. (Pet'r Wit. 1 Test.)
3. Jane Doe is a seventy-seven-year-old female who suffers from dementia. Based on evaluations of Jane Doe, it is stated she lacks capacity to make health care decisions or provide informed consent. (Resp't Wit. 5 Test.)
4. After the incident, law enforcement and Petitioner's son was contacted. Petitioner was placed on one-on-one supervision. (Hr'g R.)
5. Respondent believes Petitioner needs one-on-one supervision as he is a risk to himself, and others and the Facility cannot be sure he will not touch another resident again. His medication was adjusted to lower his libido and he continues to make highly sexual remarks and suggestions to staff. (Resp't Wit. 6 Test.)
6. On January 14, 2023, Petitioner reached out to a staff member and asked her to have sex with him. Petitioner was informed not to speak in that way, but he repeated the statement. (Resp't Ex. 4; Hr'g R.)

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<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.

7. On January 17, 2023, Petitioner asked a staff member to perform sexual acts on him and offered to perform sexual acts on her. (*Id.*)

8. Respondent believes that the Facility is not equipped to provide one-on-one supervision for Petitioner. Respondent feels even with medication adjustment, Petitioner continues to make highly sexual comments and the Facility fears he is a danger to himself and other residents. (Hr'g R.)

9. The Facility did not handle Petitioner correctly. Petitioner's son was only informed of the first incident and not the other two. Intervention with a medication adjustment should have happened after the first incident. The medication is working now, and Petitioner is less sexually aggressive as he has received less complaints. Petitioner's son is unable to afford a sitter to sit with his father. These incidents are a common occurrence at any nursing facility and for a man his age. Petitioner is a hardworking holocaust survivor who has never been in trouble and moving Petitioner to another facility will be detrimental to his health. (*Id.*)

#### **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 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].

12. 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."

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

14. 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.

...

15. 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

16. Respondent's reasons for issuing Petitioner the Notice are, 1) Your needs cannot be met in this facility, 2) The health of other individuals in this facility is endangered, and 3) The safety of other individuals in this facility is endangered. These are all included in the reasons listed in the above authority as a valid reason for a transfer discharge.

17. 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.

18. Regarding Respondent's discharge reasons that the health and safety of others in the Facility being endangered, Respondent offered direct witness testimony to the

event with another resident that prompted the Facility to discharge Petitioner.

Respondent's testimony provided specific dates of other incidents and statements made by Petitioner along with supportive witnesses and documentation. The Facility cannot continue to provide one-on-one supervision for Petitioner and cannot risk Petitioner assaulting another resident again or having Petitioner being assaulted if a resident physically responds to Petitioner's sexual aggressiveness.

19. The undersign sympathizes with the burden of relocating Petitioner but have to consider the safety of Petitioner and other residents. Through the evidence and testimony, the undersigned understands the necessity to provide one-on-one care that is needed for Petitioner and how this is not something the Facility can provide long term.

20. 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.

21. 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.

22. In careful review of the cited authorities and evidence, the undersigned concludes Respondent meet its burden to prove by clear and convincing evidence that the discharge of Petitioner is correct.

**DECISION**

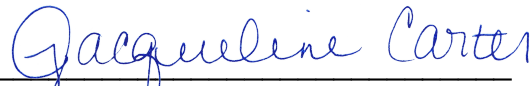
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in accordance with all applicable Agency for Health Care Administration 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. 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 03 day of April, 2023,

in Tallahassee, Florida.



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