

FILED

May 01, 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. 23N-00014

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 March 29, 2023 at 2:19 p.m.

APPEARANCES

For Petitioner: [REDACTED], *pro se*

For Respondent: [REDACTED], Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging Petitioner from [REDACTED] [REDACTED] (the "Facility"). Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

[REDACTED], Social Services Manager ("SSM") ("Resp't Wit. 1"), and [REDACTED] [REDACTED], Director of Nursing ("DON") ("Resp't Wit. 2"), appeared as witnesses for Respondent.

Respondent submitted two (2) evidence packets, which were marked and entered as Respondent's Exhibits one ("1") and two ("2").

The record was held open until March 30, 2023 to allow Respondent to submit additional evidence. Respondent stated during the hearing that a copy of the evidence presented during the hearing and a copy of the evidence submitted after the hearing would be provided to Petitioner.

Respondent submitted one (1) additional evidence packet, which was marked and entered as Respondent's Exhibits three ("3"). The record was closed on March 30, 2023.

Petitioner's Position

Petitioner took the position that the Facility's DON is on a power trip and is not treating all residents the same.

Respondent's Position

Respondent took the position that Petitioner has verbally and physically assaulted staff at the Facility, and that the safety of its staff and other residents is endangered by her behavior. Respondent also took the position that its facility is a non-smoking facility, and that Petitioner continuously violates the smoking policy. Respondent is seeking to discharge Petitioner to a facility that allows smoking.

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 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.

1. On March 24, 2016, Petitioner was initially admitted into the Facility. (Resp't Ex. 2 at 1; Hr'g R.)

2. The Policies and Procedures, effective April 1, 2017, discussed the Facility's tobacco free policy and states:

Policy:

This Center is designated as a tobacco free Center. The Center is committed to providing an environment that is safe, healthy and promotes wellness. Smoking and the use of other tobacco product including but not limited to: cigarettes, cigars, electronic cigarettes, chewing tobacco, are not permitted on the Center grounds. The Center will assist resident in nicotine replacement alternatives, as ordered by their Physician.

Procedure:

1. Residents will be informed on admission that the Center and Center grounds are tobacco free.
2. Nicotine replacement alternatives will be available to the resident per the physician order.
3. Signs will be posted to alert residents and visitors that the Center is tobacco free.
4. Resident that is found to be using tobacco products will be re-educated on the Center's tobacco free policy.

(Resp't Ex. 3 at 10.)

3. Respondent's witness stated that Petitioner did not sign the Policies and Procedures regarding non-smoking policy but believed she was aware that smoking was not allowed at the Facility. (Resp't Wit. 1 Test.)

4. Respondent's witness stated that Petitioner has been caught smoking on several occasions and that she encourages other residents to smoke. (*Id.*)

5. On October 7, 2022, the Facility's attending physician, [REDACTED], opined on the Physician's Telephone Orders that it was "OK to transfer pt to SNF with smoking privileges per protocol" and was signed by the Facility's attending physician and the Facility's DON. (Resp't Ex. 3 at 23.)

6. On January 27, 2023, Respondent's witness stated that Petitioner ordered two Vape devices that were sent to the Facility. On January 27, 2023, Respondent verbally educated Petitioner on its non-smoking policy and reviewed its policy regarding ordering smoking paraphernalia and vapes that were shipped to the facility. Respondent provided the notes from the verbal review, which was signed by Petitioner and dated January 27, 2023. (*Id.* at 15-16; Resp't Wit. 1 Test.)

7. Respondent's witness stated that the safety of the staff and residents at the Facility are endangered due to the verbally and physically aggressive behaviors exhibited by Petitioner. (Resp't Wit. 1 Test.)

8. Respondent's witness stated that Petitioner sent texts that were verbally aggressive to another resident and provided a copy of the text. The text message did not include the date. (Resp't Wit. 2 Test; Resp't Ex. 3 at 14; Hr'g R.)

9. On February 7, 2023, Respondent's note stated: "[A] nurse from hospice was walked up an [sic] and was talking to me about an [sic] patient...and was asking her questions. [P]etitioner proceeds out her room an [sic] says "Stop antagonizing her an [sic] get my pain pill" then yells "[expletive] you [expletive], I hate you, you can kiss my [expletive]." Respondent's witness stated that when she approached Petitioner to discuss the incident, she backed up her wheelchair in her direction. Respondent's witness stated that she then pushed Petitioner's wheelchair forward to avoid getting her foot run over. Respondent's notes dated February 7, 2023 stated that Petitioner "[t]hen grabs (DON) scrub jacket and trys [sic] to pull her down while yelling an [sic] cursing and calling (DON) out her name." Respondent's witness stated that the [REDACTED] Sheriff's Office was called in response to the incident but that she did not press charges

against Petitioner. Respondent's witness stated that the notes were placed into Petitioner's progress notes when this incident occurred on February 7, 2023.

Respondent provided a copy of the progress notes for February 7, 2023 but the notes were illegible. (Resp't Wit. 1 Test; Resp't Ex. 2 at 9; Resp't Ex. 3 at 24; Hr'g R.)

10. On February 8, 2023, a Nursing Home Transfer and Discharge Notice ("the Notice") was issued with an effective date of March 10, 2023. Respondent is seeking to discharge Petitioner due to: "The safety of other individuals in this facility is endangered." The Notice includes the explanation: "Physical aggression [sic] with staff. [REDACTED] called. Informed call on file. [REDACTED] didn't press charges." The Notice was signed by the Facility's administrator and the Facility's physician/designee, [REDACTED]. [REDACTED]. Petitioner refused to sign the Notice. (Resp't Ex. 1; Hr'g R.)

11. Petitioner stated she was aware of the non-smoking policy and that she believed being a resident at the Facility would motivate her to quit smoking. Petitioner stated that the Facility denied her request for the nicotine patch. Petitioner stated that she gets blamed for the cigarette butts found on the property and stated that not all the butts belong to her. Petitioner stated that other residents at the facility smoke marijuana and are not penalized. Petitioner acknowledged that she is aware that she was not permitted to have smoking paraphernalia in her possession and stated that the DON would not release the items she ordered for the administrator to mail to her family members. Petitioner stated that the items she ordered are now missing and that she contacted the state to report that the missing items. Petitioner stated that she has had her money stolen at the Facility. (Hr'g R.)

12. Petitioner stated that the wheelchair incident happened because she believed the DON approached her in an aggressive manner, so she grabbed the DON by her shirt to show her how it felt to have her space invaded. Petitioner explained that she was only standing her ground. Petitioner stated that another resident was bullying her, but the DON did not do anything about it. (*Id.*)

CONTROLLING LAW

13. 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.

14. 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—

...

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(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.)

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

(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, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.

(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...

CONCLUSIONS OF LAW

16. Respondent's reason for issuing Petitioner the Notice is: "The safety of other individuals in this facility is endangered." This is one of the six reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident.

17. 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.

18. The above controlling authorities explain that the Facility must ensure that the transfer discharge is documented in the resident's medical record when the reasons for transfer discharge are: "The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident."

19. In this case, Respondent seeks to discharge Petitioner due to safety of other individuals in the Facility being endangered. Respondent's witness testified that Petitioner became physically aggressive towards her when attempting to discuss an incident when Petitioner was allegedly verbally aggressive with another staff at the Facility. The findings show that Petitioner acknowledged that she grabbed Respondent's witness's shirt to teach her not to invade her personal space and argued that she was standing her ground. The Facility's administrator and Facility's designee,

██████████, signed the Nursing Home Transfer and Discharge Notice. Based on the evidence presented, the undersigned concludes that the Facility has established that the safety of other individuals in the facility is endangered. This is one of the six reasons provided in federal regulation (42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident.

20. 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.

DECISION

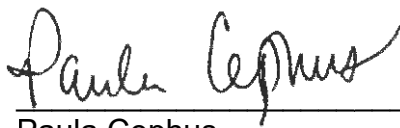
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in accordance 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. Petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. Respondent has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this 01 day of May , 2023,

in Tallahassee, Florida.



Paula Cephus
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], Respondent
Agency for Health Care Administration