

**FILED**

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

Jun 20, 2023

Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]

APPEAL NO. 23N-00028

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 May 23, 2023, at 10:17 a.m.

**APPEARANCES**

For the petitioner: [REDACTED], pro se

For the respondent: [REDACTED], Nursing Home Administrator

**STATEMENT OF ISSUE**

The petitioner appeals the respondent's action to discharge him from [REDACTED] [REDACTED] (the "Facility"). The respondent carries the burden of proof by clear and convincing evidence.

**SUMMARY OF PROCEEDINGS**

[REDACTED] ("LS") resident of the facility appeared as a witness for the petitioner. [REDACTED], Certified Nursing Assistant ("CNA")/Preceptor, appeared as a witness for the respondent. The petitioner did not submit any exhibits. The respondent

submitted two ("2") exhibits, which were entered into evidence and marked as Respondent's Exhibits one ("1") and two ("2"). The Agency for Health Care ("AHCA") complaint letter was entered into evidence and marked as Hearing Office Exhibit one ("1"). The record remained open through the close of business on June 1, 2023, for the respondent to submit the petitioner's progress notes and psychological records.

The respondent submitted an additional evidence packet which was accepted into evidence and marked as Respondent's Exhibits three ("3") through five ("5"). The record closed on June 1, 2023.

A continuance was granted to the petitioner for a previously scheduled hearing on April 13, 2023.

#### **The petitioner's Position**

The petitioner took the position that he is a peaceful and friendly person. He did not block the CNA. Additionally, he stayed away for her when he was told to stay away. The petitioner asserted that the respondent's allegations are false. The petitioner does not want to leave the facility as he is well known by other residents at the Facility.

#### **The respondent's Position**

The respondent's position is that the petitioner exhibits aggressive behavior. He will be better served at a facility which specializes in aggressive behavior. The respondent asserts that it must protect its staff and residents. The CNA at the facility is afraid of the petitioner.

### **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. The petitioner was admitted to the Facility on October 21, 2022. The petitioner is eighty (80) years of age. He suffers from verbal aggression and depression. (Resp't Test and Resp't Ex. 4. )
2. The petitioner's psychotherapy notes, psychiatric progress notes and admission record are parts of the respondent's business record. The record(s) are duplicate copies; made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters and are kept as part of regularly conducted business activity. (Hr'g R.)
3. In October 2022, the petitioner asked the CNA for a hug and for her to be his girlfriend. He became verbally abusive when she refused. On another occasion he barricaded her with his wheelchair so she could not exit the door. (Resp't Wit. Test.)
4. The petitioner's psychiatric progress notes from December 14, 2022, indicated that the petitioner remained obsessed over certain CNA and is upset that she is not his routine caregiver anymore. (Resp't Ex. 3.)
5. The petitioner's psychotherapy notes from December 16, 2022, indicated that he had difficulties with respect for management and showed signs of distress and depression. (*Id.*)

---

<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.

6. On March 2, 2023, the respondent issued a Nursing Home Transfer and Discharge Notice to the petitioner. (Resp't Ex. 1. )

7. The petitioner's psychiatric progress notes from March 5, 2023, indicated that the nursing notes on February 28, 2023, informed of inappropriate obsession regarding staff members. The petitioner continues to remain upset, frustrated and exhibits feelings of being unfairly treated. (*Id.*)

8. The petitioner's psychotherapy notes for March 20, 2023, states, "Patient presenting with feeling of depression as well as notable concern for the potential for physical harm to be done towards any staff member at this facility, especially towards staff members with whom the patient identifies as individuals he particularly likes. Patient discussed how this concerns stemmed from seeing a new [sic] story about an attack against a medical worker at an unspecified facility in New York State..." (Resp't Ex. 3.)

9. The petitioner's psychotherapy notes from April 24, 2023, indicated that he exhibited depressed moods, frustration and agitation of being assigned a particular CNA. The petitioner indicated that staff is attempting to aggravate him. (*Id.*)

10. The petitioner is verbally aggressive which frightens the respondent's staff. (Resp't Test.)

11. On March 3, 2023, the petitioner timely requested an appeal to challenge the respondent's action. (Appeal R.)

12. The petitioner disagrees with the respondent that he was verbally aggressive or that he endangered the facility's staff. He denies the allegations made by the CNA and the respondent. (Pet'r Test.)

13. The petitioner's witness is a resident of the facility who stated that she had not seen any incidents of the petitioner exhibiting aggressive behavior towards any staff.

(Pet'r Wit. Test.)

### CONTROLLING LAW

14. 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.

15. 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.

16. 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.]

17. Title 42 Code of Federal Regulations Section 483.40, Behavioral health services, states in relevant part:

Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care. Behavioral health encompasses a resident's whole emotional and mental well-being, which includes, but is not limited to, the prevention and treatment of mental and substance use disorders.

(a) The facility must have sufficient staff who provide direct services to residents with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental and psychosocial wellbeing of each resident, as determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with §483.70(e). These competencies and skills sets include, but are not limited to, knowledge of and appropriate training and supervision for:

18. Title 42 Code of Federal Regulations Section 483.70, Administration, in part states:

A facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident...

(e) Facility assessment. The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a substantial modification to any part of this assessment. The facility assessment must address or include:

- (1) The facility's resident population, including, but not limited to,
  - (i) Both the number of residents and the facility's resident capacity;
  - (ii) The care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;
  - (iii) The staff competencies that are necessary to provide the level and types of care needed for the resident population; (emphasis added)
  - (iv) The physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and
  - (v) Any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including, but not limited to, activities and food and nutrition services...

(i) Residents will be transferred from the facility to the hospital, and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the attending physician or, in an emergency situation, by another practitioner in accordance with facility policy and consistent with state law...

19. Section 400.0255, Florida Statutes, 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...

### **CONCLUSIONS OF LAW**

20. The respondent's reason for issuing the petitioner a transfer/discharge 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.

21. In accordance with the above authority, the Facility's Administrator and the Facility's Physician signed the petitioner's transfer/discharge notice. The undersigned reviewed the findings, evidence, and testimony regarding the safety of other individuals in the Facility being endangered.

22. 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.

23. 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.

24. The Facility seeks to involuntarily discharge the petitioner on the contention that the safety of other individuals in the facility is endangered because of his aggressive and abusive behavior. The findings show the petitioner has behaved aggressively. The findings show that the petitioner's psychiatric progress notes, psychotherapy notes and

witness testimony provided well documented scenarios of aggressive behaviors that put the staff at risk.

25. After careful review, the cumulative evidence demonstrates, and the undersigned concludes the Facility has met the burden of proof in establishing that the safety of other individuals in the Facility is endangered by the petitioner. The undersigned concludes the respondent's intended action to discharge the petitioner is proper.

### **DECISION**

Based on the foregoing Findings of Fact, Controlling Law, and Conclusions of Law, this appeal is DENIED. The Facility's action to discharge the 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 20 day of June, 2023,  
in Tallahassee, Florida.

*Christiana Gopaul Narine*

Christiana Gopaul-Narine  
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]  
Agency for Health Care Administration