

FILED

Jan 08, 2024

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-00087

PETITIONER,
VS.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

AMENDED FINAL ORDER

The *Final Order* issued on January 3, 2024 contained a scrivener error; therefore, this Amended Final Order is being issued to correct said error to correct the done and ordered year.

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on November 6, 2023 at 11:17 a.m.

APPEARANCES

For Petitioner: [REDACTED], Attorney

For Respondent: [REDACTED], Executive Director of [REDACTED]

STATEMENT OF ISSUE

Petitioner appeals Respondent's action to discharge him from [REDACTED] [REDACTED] (the "Facility") due to his needs cannot be met at the Facility and the safety of other individuals in the Facility are endangered. Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

The appeal was initially assigned to Hearing Officer Melissa Roedel. The appeal was initially scheduled on September 18, 2023, it was rescheduled per Petitioner's request. The hearing was rescheduled for October 5, 2023.

On September 15, 2023, Petitioner requested an in-person hearing. The hearing was reassigned to the undersigned to schedule for an in-person hearing.

On September 25, 2023, the undersigned issued an Order Transferring Hearing Officer to notify the parties that the undersigned who be hearing the appeal.

██████████ (Resp't Wit. 1.), Assistant Director of Nursing; ██████████ (Resp't Wit. 2.), Director of Quality Assurance; ██████████ (Resp't Wit. 3.), appeared in-person for Respondent. ██████████ (Resp't Wit. 4.), Director of Quality Assurance, appeared telephonically as Respondent's witness.

██████████ Attorney, ██████████ Legal Services, appeared on behalf of Petitioner.

Petitioner did not receive Respondent's evidence that was emailed. Petitioner agreed to continue with the hearing and Respondent's evidence was sent again after the hearing.

On July 18, 2023, the Facility issued a *Nursing Home Transfer and Discharge Notice* ("Notice") informing Petitioner of its intent to discharge him from the Facility effective August 16, 2023. The reasons listed were his needs not able to be met at the Facility; and the safety of other individuals in the Facility is endangered.

Petitioner submitted evidence, which were marked and entered into the record after the conclusion of the hearing as Petitioner's Exhibit one ("1").

The record was left open through close-of-business on December 11, 2023 for both parties submit additional evidence into the record. This evidence was reviewed however, not entered into the record.

Petitioner's Position

Petitioner took the position that the Discharge Notices issued by the Facility was defective. Petitioner believes that Petitioner's actions can be explained through his medical history and medications he takes.

Respondent's Position

Respondent took the position Petitioner's needs at the Facility cannot be met. Respondent believes that Petitioner is never satisfied and interferes in providing him proper care. Respondent believes that Petitioner's behavior has been verbally abusive and sexually inappropriate along with foul language and excessive calls to the police.

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. On January 23, 2019, Petitioner entered the Facility. (Hr'g R.)
2. On July 18, 2023, the Facility issued a *Nursing Home Transfer and Discharge Notice* ("Notice") informing Petitioner of its intent to discharge him from the Facility.

The location to which Petitioner was to be discharged was left blank with a note of "[f]inalizing [p]lacement". The Notice was not signed by a physician. The Notice

¹ Citations within the Findings of Fact 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.

informed Petitioner the reason for his discharge was that “your needs cannot be met at this facility” and “the safety of other individuals in this facility is endangered.” A note from Petitioner’s doctor was included. (Resp’t Ex. 1 at 5-6.)

3. The Notice informed Petitioner that he had “the right to request review of this notice by the Local Long-Term Care Ombudsman Program. They are available to assist you with any questions about this notice or the appeal process (see below). If you wish to request a review of this notice or request assistance from the Local Long-Term Care Ombudsman, call the Ombudsman Office tollfree at (888) 831-0404.” (*Id.*)

4. On July 19, 2023, Petitioner timely requested an appeal to challenge Respondent’s action. (Hr’g R.)

5. Petitioner is being accused of inappropriate behavior with staff. Many reports and statements have been documented by the Facility outlining this behavior. The Facility reported that Petitioner is sexually inappropriate during bath time, when serving him food and in front of the police. The Facility believes Petitioner needs a new set of eyes in another facility to better fit his needs. The Facility has tried to accommodate Petitioner with his medical issues and overall complaints to no avail. (*Id.*)

6. Petitioner acknowledged having complaints with staff and overall treatment, however he does not want to leave the Facility as it is his home. Petitioner denies being sexually inappropriate with staff, that he just uses terms of endearment and informed the staff how to assist in properly bathing himself. (*Id.*)

7. Petitioner is still in the Facility pending a hearing decision. (*Id.*)

CONTROLLING LAW

8. 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.

9. Section 400.0255(15)(b), F.S., sets forth the burden of proof and requires that it must be met at the clear and convincing evidence threshold.

10. Title 42 Code of Federal Regulations (“C.F.R.”) 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;

...

(C) The safety of individual in the facility is endangered due to the clinical of 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.

(5) Contents of the notice. The written notice specified in paragraph (c)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged...

[Emphasis added].

11. Section 400.0255, F.S. addresses Resident transfer or discharge; requirements and procedures; hearings and 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, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

...

(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.

...

CONCLUSIONS OF LAW

12. On July 18, 2023, Respondent issued a discharge notice to Petitioner informing him that he was to be discharged from the Facility effective August 16, 2023 due to his needs cannot be met in this Facility and the safety of other individuals in this Facility is endangered. This is one of the six reasons provided in the controlling federal regulations for which a nursing facility may involuntarily discharge a resident.

13. 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 that the requirements of the controlling authorities have been met.

14. 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.

15. The findings show that the discharge was in writing and signed by the executive Director and Petitioner. The findings show the Notice includes the reason and effective date of the discharge, and Petitioner's appeal rights along with other required assistance information. A copy was provided to Petitioner. The findings show the notices did not include a discharge location.

16. The above authorities governing admission, transfer, and discharge rights for residents of long-term care facilities provided authority to transfer or discharge a resident when any the of the six allowable reasons is established.

17. The Facility seeks to involuntarily discharge Petitioner on the contention that Petitioner's needs cannot be met and the safety of other individuals in this Facility is endangered.

18. Based on the evidence presented, the undersigned concludes that the Facility has given two of the six reasons provided in federal regulations (Title 42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident. However, the undersigned also concludes that Respondent did not follow the proper procedures outlined in federal regulations and provided an inadequate notice to Petitioner due to its failure to list the discharge location.

19. The controlling authorities require a higher standard of proof in nursing home discharge hearings; there must be substantial and credible evidence at the level of clear and convincing. Therefore, the undersigned concludes Respondent's notice is faulty.

20. After careful review of the evidence and testimony, the undersigned concludes that Respondent has not met its burden of proof in establishing that its proposed action to discharge Petitioner from the Facility. Therefore, the undersigned concludes that Respondent may NOT discharge Petitioner from Facility based on the discharge notice at issue.

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility's action to discharge Petitioner is NOT in accordance with Federal Regulations. The Facility may NOT proceed with its proposed discharge action. If Petitioner has been discharged, the Facility is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

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 08 day of January, 2024,

in Tallahassee, Florida.

Jacqueline Carter

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