

Jun 07, 2024

Office of Appeal Hearings  
Dept. of Children and Families

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

[REDACTED]  
[REDACTED]  
[REDACTED]

APPEAL NO. 24N-00013

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]  
[REDACTED]  
[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter at 9:03 a.m., on April 19, 2024.

**APPEARANCES**

For the petitioner: [REDACTED], *pro se*

For the respondent: [REDACTED], Esq.,  
Counsel for the respondent,  
[REDACTED]

**STATEMENT OF ISSUE**

The petitioner appeals the respondent's action discharging him from [REDACTED] [REDACTED] (the "Facility") due to "Your needs cannot be met in this facility" and "The safety of other individuals in this facility is endangered". The respondent carries the burden of proof by clear and convincing evidence.

### **SUMMARY OF PROCEEDINGS**

██████████, Administrator, ██████████ (“GW”), Business Office Manager, ██████████ (“BW”), Director of Social Work, and ██████████, Director of Nursing, all with ██████████ Nursing Center, appeared as witnesses for the respondent.

The petitioner did not submit exhibits. The respondent submitted documents, which were entered into evidence and marked as Respondent’s Exhibits one (“1”) through eight (“8”). The record remained open through April 24, 2024 for the respondent to provide the smoking policy for the facility and the report for the incident that took place on February 2, 2024. The respondent submitted documents on April 22, 2024 that were entered into evidence and marked as Respondent’s Exhibits nine (“9”) and ten (“10”). The record was closed on April 24, 2024.

#### **The Petitioner’s Position**

The petitioner took the position that he has not received his Social Security income for the first nine months in the Facility. He has not received medical treatment from the Facility. The Facility billed Medicaid for services they did not provide him. The physical therapy provided by the Facility was inconsistent. He was not physical with anyone during the February 2, 2024 incident.

#### **The Respondent’s Position**

The respondent took the position that the petitioner is a danger to other residents in the facility. The petitioner has been consoled by the staff on many occasions, but has smoked within the Facility, has lit incense and candles in his room. The petitioner leaves the candles lit in his room after he leaves the room. These actions are fire

hazards, since other residents use oxygen, and it has warned the petitioner about these actions. The petitioner was verbally abusing staff and was uncooperative for his care.

The petitioner was Baker Acted due to an incident on February 2, 2024, where the petitioner became physically aggressive with a nurse and psychiatrist who are employed by the Facility.

### **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 entered the Facility on December 17, 2022 initially for rehabilitation and the petitioner remained in the Facility for long term care. (GW Test.)

2. The Facility is non-smoking facility. The Facility smoking policy states “all visitors, vendors, physicians, and employees, the use of tobacco products is strictly prohibited inside or outside the facility, including the parking areas.” (Resp’t Ex. 9.)

3. The facility has on many occasions explained the smoking policy to the petitioner, and explained the lighting incense and candles in his room is a fire hazard. (GW Test.)

4. On February 2, 2024, the petitioner became verbally aggressive with a nurse and a psychiatrist. The psychiatrist Baker Acted the petitioner and Miami-Dade police officers escorted the petitioner to the psychiatric unit at ██████████ Hospital. (Resp’t Ex. 10.)

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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.

5. On April 18, 2024, the petitioner was smoking in his room and had lit a candle.

(BW Test.)

6. The petitioner admitted to smoking twice in the Facility. (Pet'r Test.)

7. The petitioner admitted to lighting incense in his room once. (Pet'r Test.)

8. The petitioner does light candles in his room for health reasons. (Pet'r Test.)

9. The petitioner was unwilling to work with the facilities staff when it came to his medical care. (Resp't Test.)

### **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.**

...

**(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...**

(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 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...

(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:

**(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician, or**

**(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.** (emphasis added)

(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.

...

(12) After receipt of any notice required under this section, the State Long-Term Care Ombudsman Program or local ombudsman council may request a private informal conversation with a resident to whom the notice is directed, and, if known, a family member or the resident's legal guardian or designee, to ensure that the facility is proceeding with the discharge or transfer in accordance with this section. If requested, the State Long-Term Care Ombudsman Program or the local ombudsman council shall assist the resident with filing an appeal of the proposed discharge or transfer.

...

(15) (a) The department's Office of Appeals Hearings shall conduct hearings under this section...

(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**

13. The respondent's reason for issuing the petitioner a transfer/discharge notice is, "The safety of other individuals in this facility is endangered" and "Your needs cannot be met in this facility." These are reasons listed in the above authority as a valid reason for a transfer/discharge.

14. Establishing that the reason for a discharge as 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.

15. The above controlling authorities requires a higher standard of proof in nursing home hearings; there must be substantial and credible evidence at the level of clear and convincing. The findings show that the petitioner has smoked in the Facility, burn incense and lit candles in his room, even after being educated by the staff of the safety hazards. The petitioner admitted during his testimony to these actions. The findings show that the petitioner became verbally aggressive with a nurse and a psychiatrist, which lead to the petitioner to be Baker Acted, removed from the Facility, and spent time in the [REDACTED] Hospital.

16. The undersigned considered the respondent's arguments that the petitioner was unwilling to work with the facility when it came to his medical needs and therefore the petitioner's needs could not be met by the facility. The undersigned concludes that the respondent did not meet its burden of proof by clear and convincing evidence in this regard.

17. After careful review of the evidence and cited authorities, the undersigned concludes that the respondent has met its burden of proof by clear and convincing evidence that the safety and health of others individuals in the Facility are endangered and that's its discharge/transfer reason, is proper.

18. Any discharge by the Facility must comply with all applicable Federal Regulations, Florida Statutes, and the 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.

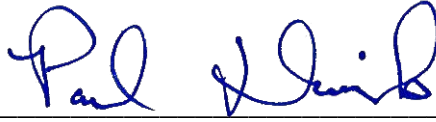
### **DECISION**

Based on the foregoing Findings of Fact 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.

### **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 07 day of June, 2024,  
in Tallahassee, Florida.



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Paul Daniocek  
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Agency for Health Care ADMINISTRATION