

Jul 01, 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. 24N-00030

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 29, 2024, at 2:14 p.m.

**APPEARANCES**

For Petitioner: [REDACTED], daughter

For Respondent: [REDACTED], Administrator

**STATEMENT OF ISSUE**

Petitioner appeals Respondent's action discharging Petitioner from [REDACTED] [REDACTED] (the "Facility") because his needs cannot be met. Respondent carries the burden of proof by clear and convincing evidence.

### **SUMMARY OF PROCEEDINGS**

██████████ appeared as a witness 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 June 4, 2024 to allow Respondent to provide additional evidence. Respondent did not submit additional evidence. The record was closed on June 4, 2024.

### **Petitioner's Position**

Petitioner's daughter took the position that Petitioner was taken off his medication, which may be the cause for the changes in his behavior.

### **Respondent's Position**

Respondent took the position that Petitioner should be admitted to a Memory Care Unit where he can get the specialized care he needs.

### **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. On November 21, 2023, Petitioner (90) was admitted into the Facility as a patient with dementia. The Facility provides skilled nursing services, but it does not have a secured and locked memory care unit. (Hr'g R.)

2. Around April 1, 2024, Petitioner's mental capacity began declining and he began exhibiting more exit-seeking behaviors. Petitioner became more aggressive and

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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.

would hit doors when exhibiting exit-seeking behaviors. Petitioner was placed on one-on-one supervision due to his exit-seeking behaviors. (Resp't Wit. Test.)

3. On April 1, 2024, the Nursing Home Transfer and Discharge Notice ("Notice") was issued to Petitioner with an effective date May 1, 2024. The reason for the discharge was "Your needs cannot be met in this facility." The Notice was signed by [REDACTED], the Facility's medical director. (Resp't Ex. 1 at 1-2.)

4. On April 24, 2024, Progress Notes indicate that Petitioner underwent a mental evaluation where the clinical psychologist, [REDACTED], Psy.D, noted that Petitioner was alert with confusion and poor orientation. The Progress Notes show that Petitioner was being evaluated due to his frequent behavior problems, which include wandering and going into the other residents' rooms. The Progress Notes indicate that Petitioner's dementia has not improved since his last evaluation in November 2023 and that his behavior problems have increased since then. The Progress Notes indicate that the clinical psychologist recommended placing Petitioner in a memory care unit as soon as possible. (Resp't Ex. 2 at 12-13; Resp't Wit. Test.)

5. On April 29, 2024, Progress Notes show that Petitioner was "agitated, exit seeking, wandering through out facility, in other residents [sic] room. Staff attempted to redirect by taking to activity outside when resident started kicking glass door and sticking out at staff when they tried to move him away." (*Id.* at 9; Hr'g R.)

6. On April 29, 2024, Progress Notes read as follows: "Resident observed going to south unit door, kicking door repeatedly and yelling 'I want out! I want to go.' Attempted to redirect resident, offered resident an activity in courtyard with activities and

resident yelled 'NO' and pushed Wheelchair forward toward writer, shaking fist up in air..." (*Id.* at 8; Hr'g R.)

7. On May 6, 2024, the Facility's medical director, [REDACTED], wrote a letter which states: "Due to (Petitioner's) Dementia, exit seeking behaviors and lack of awareness this patient requires a memory care unit that can meet his needs." (*Id.* at 10; Hr'g R.)

8. Petitioner was admitted into [REDACTED] due to a urinary tract infection. The hospital suggested for Petitioner to be admitted into the Facility for rehabilitation and eventually to be admitted for long-term care. Petitioner was on Seroquel prior to being admitted to the Facility but was taken off before the medication had a chance to work. Petitioner's behaviors may improve if he is placed back on Seroquel and given time for the medication to work. (Pet. Wit. Test.)

9. The Facility tried using Seroquel, but its side effects caused Petitioner to have more falls and his condition worsened. Seroquel takes only one week to take effect. The Facility wants Petitioner to be safe and does not want him to be over medicated. Respondent's medical director recommended for Petitioner to discharge to a memory care unit that has the expertise to care for patients with dementia, and where his mental condition can possibly improve. The Facility does not have the resources to care for patients such as Petitioner, who has worsening dementia symptoms. (Resp't Wit. Test.)

### **CONTROLLING LAW**

10. 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.

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;

(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).

...

(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; and  
(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) Timing of the notice.

(i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made

by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when—

...

**(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;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 et seq.); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

12. Section 400.0255, Florida Statutes, Resident transfer or discharge;

requirements and procedures; hearings in 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, 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:**

**(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;**

...

(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 above cited authority establishes that a Discharge Notice lists six (6) reasons a resident may be involuntarily discharged from a Nursing Facility. The authority also establishes that when a Facility issues a Discharge Notice, thirty (30) days' notice must be given before Petitioner is transferred or discharged unless it meets specific circumstances outlined.

14. The findings show that Petitioner suffers with dementia that is worsening. The Facility does not have a Memory Care Unit, therefore, the medical director and psychologist recommend Petitioner to be transferred to a facility with a secured memory care unit, as it would be better suited for his needs.

15. In review of the evidence, testimony, and cited authority, the undersigned concludes the Facility has established that Petitioner's needs cannot be met at its facility. This is one of the six reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident.

16. 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 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.

17. 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 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.

18. After careful review of the cumulative evidence and authorities, the undersigned concludes the Facility has met the burden of proof in establishing that Petitioner’s needs cannot be met at the facility. The undersigned concludes Respondent’s intended action to discharge Petitioner is proper.

### **DECISION**

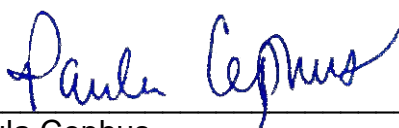
Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility’s action to discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in accordance 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 July, 2024,

in Tallahassee, Florida.



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Paula Cephus  
Hearing Officer  
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Copies Furnished To: [REDACTED], Petitioner

[REDACTED]  
Respondent

[REDACTED]  
Agency for Health Care Administration  
[REDACTED]

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

[REDACTED]

PETITIONER,

APPEAL NO. 24N-00030

Vs.

FLORIDA DEPT OF CHILDREN AND FAMILIES  
CIRCUIT: [REDACTED]

CASE NO.

RESPONDENT.

**CERTIFICATE OF SERVICE**

This is to certify that a copy of the attached notice or order was provided to Petitioner at the above address and to the following individuals by either regular U.S. or electronic mail:

[REDACTED]

**I HEREBY CERTIFY** that these copies were furnished on July 01, 2024.

[REDACTED]

Agency Clerk, Office of Appeal Hearings  
Department of Children and Families  
Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190