

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

[REDACTED]

APPEAL NO. 10N-00196

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

FILED  
Feb 9, 2011  
OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN AND FAMILIES

**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on December 10, 2010, at 1:28 p.m., at [REDACTED], in [REDACTED] Florida.

**ISSUE**

The respondent will have the burden to prove by clear and convincing evidence that the petitioner's discharge from the notice November 4, 2010 is in accordance with the requirements of 42 C.F.R. § 483.12(a)(2)(i): "The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility".

**APPEARANCES**

For the Petitioner: [REDACTED] Esq.

For the Respondent: [REDACTED] Esq.

### **PRELIMINARY STATEMENT**

By notice dated November 4, 2010, the facility informed the petitioner that she would be discharge from the facility on December 4, 2010. On November 16, 2010, the petitioner timely requested a hearing to challenge the denial.

Witnesses for petitioner were [REDACTED] registered nurse unit manager, [REDACTED], director of nursing, [REDACTED], social services director, and [REDACTED] certified nursing assistant.

Witnesses for respondent were [REDACTED] the petitioner's husband, and Dr. [REDACTED] the petitioner's son. [REDACTED], administrator, was observing.

The petitioner entered a motion indicating that the notice of discharge was deficient. Motion was denied.

The petitioner entered a Motion in Limine regarding a discharge order dated December 9, 2010. The basis for the motion was the order was the day before the hearing. Motion was denied.

The petitioner entered a Motion for Summary Judgment after the respondent's testimony. Motion was denied, as the decision would be after a review of all evidence and in the form of a written Final Order.

### **FINDINGS OF FACT**

1. The petitioner was admitted to the facility on January 27, 2010.
2. There were reports by the respondent filed in the petitioner's medical record of the petitioner's aggressive behavior on April 24, May 19, and August 4, 2010.

3. On July 24, 2010, the petitioner was seen by [REDACTED] M.D. Dr. [REDACTED] diagnosis of the petitioner was dementia of the Alzheimer's type with episodes of aggression. He noted that the petitioner has no active medical problems. [REDACTED] was adjusting the petitioner's medication due to her aggressive behavior. [REDACTED] opined that if he could get the petitioner stable enough, it may become necessary to place the petitioner in a more specific dementia unit. [REDACTED] saw the petitioner on July 30, 2010 after her return to the facility. He indicated that the medication adjustment may have not changed the behavior. He changed the petitioner's medication.

4. On September 10, 2010, the respondent presented the petitioner's husband, [REDACTED] with a Nursing Home Transfer and Discharge Notice for the petitioner. The petitioner appealed the September 10, 2010 discharge. The appeal was granted.

5. On November 4, 2010, the facility issued a second Nursing Home Transfer and Discharge Notice. The notice was signed by the administrator and [REDACTED] [REDACTED] M.D., the petitioner's treating physician.

6. On November 5, 2010, [REDACTED] signed a physician's order which stated "arrange for discharge".

7. On December 9, 2010, [REDACTED] signed a physician's order for the petitioner to be discharged. [REDACTED] opined that the petitioner's needs could not be met at [REDACTED].

8. The director of nursing asserted as follows. The petitioner has aggressive behavior. The facility has tried to modify the behavior. [REDACTED] does have a general dementia unit. The facility is a licensed nursing facility with specialized services

for early Alzheimer's Care. However, there are insufficient psychiatric services at a level that is need by the petitioner as the psychiatrist is only at the facility on Fridays.

9. The registered nurse unit manager asserted as follows. The facility documented the petitioner aggressive behavior. She has observed the petitioner pinching staff and family members. She observed the incident when the petitioner slapped the director of nursing. Each incident was reported in the petitioner medical record. The facility attempted to address the petitioner's behavior with various levels of supervision and the psychiatrist adjusting the petitioner's medication. After the medication adjustment, the petitioner was not exhibiting aggressive behavior. However, the petitioner appeared to be overmedicated. She opined that the petitioner would benefit from a different program in a dementia unit at another facility with a lower ratio of patients to staff.

10. The petitioner's husband asserted as follows. He is satisfied with the petitioner's care at the facility. The petitioner does pinch him and others. She is belligerent. She did slap one staff member. She was in the hospital once under the Baker Act. She is very active and most people in the facility are not active.

11. The petitioner's son is a medical doctor with experience with psychiatric patients. He is not the petitioner's treating or attending physician. He agreed that the petitioner may have a behavioral problem and she requires one-on-one supervision. He opined that the petitioner's needs could be and are being met at the facility.

12. The respondent opined as follows. The facility cannot meet the petitioner's needs as there is concern for the petitioner's aggressive behavior and the facility's concerns for elopement. The facility has tried to have the psychiatrist adjust the

petitioner's medication. The medication adjustment has not changed the behavior. The facility is now providing one-on-one supervision for the petitioner. This care is not appropriate as the facility must provide care for all of their residents.

13. The petitioner opined as follows. The facility presents that they are facility that provides Alzheimer's care. The medical record was not documented that the petitioner's needs cannot be met. Nothing in the documentation indicated that the petitioner required a lock-down facility.

### **CONCLUSIONS OF LAW**

14. Federal Regulation limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the petitioner was sent notice on November 4, 2010 indicating that she would be discharged from the facility in accordance with 42 C.F.R. § 483.12(a)(2)(i): "The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility". The petitioner position is the signature of the physician on the discharge notice and a telephone order for discharge is not clear and convincing evidence that the petitioner's needs cannot be met, and the facility has not met the burden that the discharge is for the petitioner's welfare and that the facility cannot meet her needs.

15. The regulation at 42 C.F.R. § 483.12(a) sets forth the documentation requirements for a discharge or transfer from a facility:

(3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by--

(i) The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i)...

15. The Florida Statutes at 400.0255, Resident transfer or discharge; requirements and procedures; hearings, states: (8)...A copy of the notice must be placed in the resident's clinical record..."

16. The Notice of Transfer and Discharge was issued on November 4, 2010. The notice was signed by the petitioner's treating physician. The discharge notice becomes part of the petitioner's clinical record at the facility. On November 5, 2010 and December 9, 2010, the treating physician signed orders for discharge that were placed in the petitioner's medical record. The hearing officer concludes that the documentation requirements are met by the treating physician's signature on the discharge notice and two written orders.

17. The reason for discharge was not indicated as the safety of the petitioner or other individuals in the facility was endangered. Therefore, the hearing officer is not developing the incidents where the facility documented the petitioner's aggressive behavior against the other residents, slapped the director of nursing, or pinching staff. The issue is solely that the discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility.

18. Deference is given to the opinion of the treating physician. The treating physician by signing the notice of discharge and two written orders indicated that the petitioner was appropriate for discharge from the facility. Therefore, the hearing officer concludes that the treating physician determined that the petitioner was appropriate for discharge from the facility.

19. The hearing officer did consider the expert opinion of the petitioner's son as a medical doctor with experience with patients with psychiatric issues. He opined that

the petitioner's needs could be and are being met at the facility. He agreed that the petitioner may have a behavioral problem and she requires one-on-one supervision. The hearing officer notes that the facility provided one-on-one supervision but argued that they must provide care for all of their other patients and one-on-one supervision is not appropriate. This facility does not provide constant one-on-one supervision to each and every one of their residents. Therefore if the family's expectation is that the facility can meet the petitioner's needs by providing one-on-one supervision for the petitioner, that level of care exceeds a level of care that can be provided indefinitely. This puts the petitioner's welfare at risk. The hearing officer concludes that the discharge is necessary for the resident's welfare.

20. [REDACTED] diagnosis of the petitioner was dementia of the Alzheimer's type with episodes of aggression. He noted that the petitioner has no active medical problems. No evidence was presented that the petitioner requires skilled medical care. Therefore, the petitioner does not require skilled nursing care at Harborwood. The evidence did demonstrate that the facility even though they present themselves as providing early Alzheimer's care does not have a psychiatrist on staff and only has a visiting psychiatrist on Fridays. The facility is providing one-on-one care which demonstrates that the petitioner requires more care than normally provided by this facility. The evidence demonstrated that the petitioner would benefit from a facility with a lower patient to staff ratio. Therefore, the hearing officer concludes that the facility cannot meet the petitioner's needs.

**DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, this appeal is denied as the facility's action to discharge the petitioner is correct and in accordance with Federal Regulations. The facility may proceed with the discharge.

**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 Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317 Winewood Blvd., Tallahassee, FL 32399-0700. 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 \_\_\_\_\_ day of \_\_\_\_\_, 2011,  
in Tallahassee, Florida.

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Linda Jo Nicholson  
Hearing Officer  
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal\_Hearings@dcf.state.fl.us

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