

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

[REDACTED]

APPEAL NO. 11N-00046

PETITIONER,

Vs.

CASE NO.

Administrator

[REDACTED]

FILED

May 27, 2011

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer at 11:05 a.m. on April 5, 2011, at the [REDACTED] [REDACTED] in Apopka, Florida.

APPEARANCES

For the Petitioner: [REDACTED], petitioner's sister and guardian

For the Respondent: [REDACTED], FLNC president

ISSUE

At issue is whether the nursing home's proposed action to discharge/transfer the petitioner is an appropriate action based on the contention that her "needs cannot be met in the facility", "health of other individuals in the facility is endangered" and "safety of other individuals in the facility is endangered".

PRELIMINARY STATEMENT

By notice dated February 24, 2011, the respondent informed the petitioner that they were seeking to discharge/transfer her from the facility. On March 1, 2011 the petitioner timely requested a hearing to challenge the discharge/discharge.

The petitioner's representative and the respondent's representative appeared in person. The petitioner did not appeal. Observing in person for the petitioner was

██████████. Appearing as witnesses in person for the respondent was ██████████
██████████, Administrator and ██████████ Regional Vice President of Operations.

FINDINGS OF FACT

1. The petitioner (76 years of age) is a resident of the above named respondent skilled nursing facility. The petitioner was admitted into the facility on September 26, 2008 and continues to reside at the facility pending the outcome of this appeal.
2. The petitioner's medical condition includes arthritis, dementia, diabetes, paralysis dysphagia, aphasia, does not speak, is confined to a wheelchair and is dependent on others for her care.
3. Respondent Exhibit 17 is the admission agreement between the petitioner and ██████████ dated September 26, 2008 and signed by the petitioner's representative on October 20, 2008. The agreement in part states:

Resident agrees to comply with all rules, regulations, policies and procedures of Facility...

Resident authorizes Facility and its professional staff to render medical care and treatment in accordance with physician orders...

4. On February 24, 2011, the respondent issued the petitioner a Nursing Home Transfer and Discharge Notice which informed her it was the respondent's intention to

discharge her on March 28, 2011. The notice was signed by the nursing home administrator and physician by way of written order. The reasons for the discharge or transfer shown on the notice are "Your needs cannot be met in this facility" "The health of other individuals in this facility is endangered" and "The safety of other individuals in this facility is endangered" (Respondent Exhibit 13).

5. The facility is seeking to discharge or transfer the petitioner due to the petitioner's representative interference with medical orders for the petitioner. Additionally, they believe the petitioner's representative actions and behaviors are affecting the health and safety of other individuals in the facility by creating clinical and infection control issues.

6. The respondent's representative explained the petitioner's representative helps herself to linen rooms/closets, nourishment rooms, refrigerators and items from the medication/treatment carts. This action affects infection control because she continues to violate clean things which results in contamination for others.

7. The respondent's representative testified the petitioner's representative has been harassing staff and other residents did not want to participate as witnesses in this hearing due to fear of retaliation. The petitioner's representative has been seen going into other patients rooms and giving them advice and/or allegedly harassing them. The respondent's representative presented Respondent Exhibit 12, "Reports on Behavior Observed after Discharge Notice for [REDACTED] The report documents numerous incidents involving contact with the petitioner's representative, residents and their families, and staff members. It was alleged some of the contacts with other residents' family members were uncomfortable to them. Staff

reported being very upset with interactions with the petitioner's representative. There were allegations staff felt threatened by her behavior and statements. The report further documented the representative dissatisfaction with the quality of care for the petitioner.

8. It is the respondent's testimony that the petitioner has had seven different attending physicians during her almost three years in the facility. It was alleged that physicians were dismissed by the petitioner's representative because she disagreed with their medical decisions on the petitioner. Additionally, the respondent believes the petitioner's representative has taken the petitioner to undisclosed physicians outside of the facility.

9. The respondent asserted the petitioner's representative deliberately interfered with specific doctor orders, which they believed put the petitioner at significant risk. The physician's notes documented (Respondent Exhibit 4) several incidents where the petitioner's representative brought food from outside of the facility and feed the petitioner. The notes included several incidents where the physician had conversations with the representative and explained his medical orders for the petitioner. The physician notes document attempts by the doctor to have the representative sign refusal of care forms but this option was declined. The notes indicated the representative was dissatisfied with other aspects of the petitioner's care. The notes indicated that physicians believed the representative's behavior was impacting the petitioner's safety.

10. Respondent Exhibit 15, [REDACTED] Nutritional Progress Notes", explains the petitioner's diet as purified nutrients with pudding thick liquids. Page 2 of the same Exhibit show that on September 9, 2009 the petitioner's representative was informed

that noncompliance with the current diet; especially pudding thick liquids can result in aspiration pneumonia and death. Additionally, it states [REDACTED] informed she was observed by Dr. [REDACTED] giving liquids to the petitioner that were not properly thickened by her [REDACTED]).

11. Respondent Exhibit 14 "Refusal of Treatment" forms were refusal of a hand splint and the use of pudding thick liquids for the petitioner. The petitioner's representative refused to sign the refusal forms. The file does not contain any refusal forms signed by the petitioner's representative. Absent a refusal form, facility staff is required to enforce the physician's orders.

12. It is the respondent's testimony that the petitioner's representative continues to remove the petitioner's hand splint, resulting in moisture in the petitioner hand which then creates blisters. A refusal form was provided to the petitioner's representative but she refused to sign the form. This was contrary to physician orders.

13. The respondent assert in an attempt to avoid issuance of the Nursing Home Transfer and Discharge Notice, the respondent requested a court appointed guardianship for the petitioner through the Circuit Court in [REDACTED] county. The court temporarily appointed [REDACTED] from August 26, 2010 through November 11, 2010. Respondent Exhibit 6, "Transcript of Proceedings", reveals Ms. [REDACTED] decline to be appointed guardian. The transcript indicates when asked why, she stated:

After being exposed to the case subsequently, I would have to be out of my mind. Unless there were certain stipulations in which I could protect my ward without any fight, because this will be a battle royale between myself and Ms. [REDACTED].

██████ is interfering...she won't communicate with the staff. She's refused to come to care planning. She's refused to sign waivers. She's refuses to follow doctor's orders.

14. The court gave the petitioner's representative guardianship of the petitioner as a result of Ms. ██████ declining guardianship. The court's position was if the facility feels they can't deal with the situation, then the facility should pursue discharge procedures for the petitioner.

15. The respondent's representative believes ██████ attempts to work with the petitioner's representative to avoid issuance of discharge/transfer has failed. She presented letters the facility sent the petitioner's representative. The letters were sent from July 2009 through February 2011, attempting to resolve issues (Respondent Exhibit 2).

16. The petitioner's representative testified having a BS in nursing, a MS and PhD in guidance and counseling, and a second MS in clinical nurse specialist.

17. The petitioner's representative argued the Nursing Home Transfer and Discharge Notice is erroneous and is offended by the "Instructions for ████████████████████" issued by the facility dated February 23, 2011 (Petitioner Exhibit 2). She argued the petitioner is very familiar with the facilities staff and removing her would be very dramatic.

18. The petitioner's representative denied all allegations stating "if the facility staff is in such fear of me the respondent should have taken me to court and requested a restraining order."

19. The petitioner's representative explained that she always washes her hands while in the facility and if anything she is the one that brings up contamination issues.

20. The petitioner's representative argued that the petitioner's physician erred in prescribing medication for her sister. She further argued [REDACTED] staff falsified the petitioner's medical records and cited examples of the unprofessional care by [REDACTED] staff. The representative did not specifically deny ignoring the physicians orders or interfering with the orders but cited to other problems with care provided to the petitioner.

21. The Agency for Health Care Administration (AHCA), at the request of this hearing officer, reviewed the discharge action initiated by the facility. On April 4, 2011, AHCA sent the undersigned a letter stating "Although at the time of inspection, the representative(s) did not find the facility was violating any laws or rules" (Hearing Officer Exhibit 1).

CONCLUSIONS OF LAW

22. Jurisdictional to conduct this hearing have been assigned to the Department by Federal Regulations appearing at 42 C.F.R. § 431.200. Florida Statute 400.0255 addresses "Resident transfer or discharge; requirement and procedures; hearing..." with section (15) (b) informing that the burden of proof is one of clear and convincing evidence. Federal regulations limit the reason for which discharge may occur and provide for certain emergency discharge procedures.

23. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

24. In accordance with Fla. Admin. Code § 65-2.060 (1), the burden of proof was assigned to the respondent.

25. The Code of Federal Regulations at 42 C.F.R. § 483.12 states:

(a) Transfer and discharge—

(1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

(2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--

(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(ii) 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;

(iii) The safety of individuals in the facility is endangered;

(iv) The health of individuals in the facility would otherwise be endangered;

(v) 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. 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

(vi) The facility ceases to operate.

(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) or paragraph (a)(2)(ii) of this section; and

(ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.

(4) Notice before transfer. Before a facility transfers or discharges a resident, the facility must--

(i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (a)(6) of this section.

(5) Timing of the notice. (i) Except when specified in paragraph

(a)(5)(ii) of this section, the notice of transfer or discharge required under paragraph (a)(4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

- (ii) Notice may be made as soon as practicable before transfer or discharge when--
 - (A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section;
 - (B) The health of individuals in the facility would be endangered, under paragraph (a)(2)(iv) of this section;
 - (C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a)(2)(ii) of this section;
 - (D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a)(2)(i) of this section; or
 - (E) A resident has not resided in the facility for 30 days.
- (6) Contents of the notice. The written notice specified in paragraph (a)(4) 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 that the resident has the right to appeal the action to the State;
 - (v) The name, address and telephone number of the State long term care ombudsman;
 - (vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and
 - (vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.
- (7) Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

26. The above cited authorities set forth the conditions which must exist for a nursing home to involuntarily discharge a resident.

27. The respondent proposes discharging the petitioner due to "needs cannot be met in the facility, "health of other individuals in the facility is endangered" and "safety of other individuals in the facility is endangered".

Health of Other Individuals in the Facility is Endangered

Safety of Other Individuals in the Facility is Endangered

28. The Findings of Fact illustrate serious problems with the petitioner's representative behavior and actions. However, the undersigned can only address issues concerning the petitioner. The respondent may want to seek other legal remedies in this matter. As stated by the petitioner's representative "if the facility staff is in such fear of me the respondent should have taken me to court and requested a restraining order".

29. Upon careful consideration of the evidence presented, the undersigned concludes that the respondent did not present clear and convincing evidence to meet the level of proof to substantiate "health of other individuals in the facility is endangered" or "safety of other individuals is endangered".

Needs Cannot Be Met in This Facility

30. Federal Regulation at 42 C.F.R. § 483.12 explains the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility. The Findings of Fact confirm the petitioner's representative numerous interference with physicians' medical orders. Specifically, the petitioner's representative was repeatedly told of the petitioners nutritional dietary needs requiring pudding thick liquids. She was informed that deviation from this diet can result in aspiration pneumonia and death. The evidence presented verifies that the petitioner's representative has been seen giving the petitioner food and liquids she brings from outside the facility.

31. The petitioner's representative is not a medical doctor; however, she is highly educated and experienced in the nursing medical field. As such, she should be fully aware of the consequences of deviating from physicians' medical orders.

33. The respondent's representative acknowledged that the petitioner's representative had the right to refuse physician's medical orders for the petitioner. However, the petitioner's representative was required to sign "Refusal of Treatment" forms refusing the medical order(s). The Findings of Fact confirm that the petitioner's representative did not sign the refusal forms.

34. The petitioner's representative expressed enormous dissatisfaction with the performance of physician and [REDACTED] staff. She has such intense administrative discontent and displeasure that the welfare of the petitioner is greatly affected. Consequently, the facility has overwhelming obstacles in providing adequate care for the petitioner.

32. After carefully reviewing the testimony, evidence and cited legal authority, the undersigned concludes that the facility's intent to discharge the petitioner based on "needs cannot be met in the facility" is correct and in accordance with federal regulations. The undersigned concludes the respondent met burden of proof.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is denied. Pursuant to 42 C.F.R. § 483.12(7), the "facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility."

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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Copies Furnished To:

[REDACTED]