

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

FILED

AUG 07 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09N-00088

PETITIONER,
Vs.

RESPONDENT.
_____ /

FINAL ORDER

An administrative hearing was convened at the _____, before the undersigned at 8:38 a.m. on July 2, 2009. The petitioner was not present, but was represented by his daughters, _____ and _____ His granddaughter, _____, also attended. The respondent was represented by _____, nursing home administrator (NHA); with testimony available from _____, RN, unit manager and _____ RN, minimum data set coordinator.

ISSUE

At issue was whether intent to discharge was correct based upon safety endangerment of other individuals at the facility. The respondent had the burden of proof.

FINDINGS OF FACT

1. The petitioner has serious health problems and requires nursing care.

That is undisputed.

2. He has been residing in a specialized care unit for individuals with Alzheimer's – type disorders.

3. He has received nursing and psychiatric medical treatment at the facility, since at least August 2008. There have been several medication modifications since August 2008. Sedation medication has been used. In November 2008, Ativan was increased to assist with increased anxiety and agitation. Other medications included Restoril, Seroquel, and Zypexa.

4. Since January 2009, progress notes showed repeated episodes of combative behavior such as attempts at hitting staff members. On January 31, 2009, he kicked a staff member. On February 9, 2009, he scratched a caregiver. On April 15, 2009, nursing records showed he hit another resident in the face. Nursing notes during 2009 showed repeated episodes of physical confrontations between the petitioner and staff as well as other residents. The majority of the incidents involved staff. Nursing and psychiatric notes showed repeated episodes of combative behavior with staff having increasing difficulty redirecting the negative behavior.

5. On May 7, 2009, he pushed a caregiver (certified nursing assistant - CNA) down and she was taken by ambulance to an emergency room. Police were called. The petitioner was not admitted to a psychiatric care facility.

6. On May 8, 2009, the respondent issued to the petitioner notice of intent to discharge effective June 8, 2009 due to "safety of other individuals in this facility is endangered." A physician/designee signed the discharge notice. Another nursing facility in _____ Florida was the location for discharge.

7. The family has seen that facility. They are not satisfied with that location. They believe the petitioner would be better served at a smaller facility closer to them. They would like more time to make arrangements that are more suitable.

CONCLUSIONS OF LAW

Regulations at 42 C.F.R. § 483.12 address nursing facility

Admission, transfer and discharge rights for residents, in relevant part as follows:

(a) Transfer and discharge--

...

(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--

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

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

(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...

The petitioner's family has reasonable concerns about the petitioner's health, welfare, and location. They want him to live in the best possible environment. The respondent's representative has reasonable concerns about the safety of other individuals in the facility.

After careful review of all evidence, regulations, the family's wishes, and governing criteria, it must be concluded that safety of others in the facility has been endangered. At the point of hearing and at the time discharge notice was issued, clinical records repeatedly support allegations of safety endangerment. Despite psychiatric treatment, modifications, and staff efforts at redirection of negative behavior, the situation has not improved. It is accurate to describe the situation as one of safety endangerment of others in the current facility. Although the situation is remarkably unfortunate, the intent to discharge to another facility has been justified.

DECISION

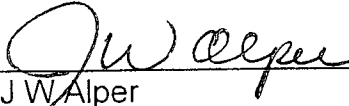
The appeal is denied and the respondent's action is affirmed.

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 7th day of August 2009, in

Tallahassee, Florida.



J.W. Alper
Hearing Officer
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Copies Furnished To: