

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

FILED
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OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

PETITIONER,
Vs. APPEAL NO. 09N-00190
CASE NO.

RESPONDENT.
_____ /

FINAL ORDER

Pursuant to notice, the undersigned hearing officer convened an administrative hearing in the above-referenced matter on December 23, 2010, at 10:06 a.m. in _____, Florida. The petitioner did not appear.

_____, ombudsman, appeared and represented the petitioner.
_____, director of social services, appeared and represented the respondent-facility. _____, director of nursing, and _____, facility administrator, appeared as witnesses for the respondent.

ISSUE

At issue is the respondent's action of November 16, 2009, intending to discharge the petitioner effective December 16, 2009, due to the petitioner's needs not being able to be met in the facility. The respondent bears the burden of proof in this appeal.

FINDINGS OF FACT

1. The petitioner was admitted to the facility in 2003. His medical diagnoses include: chronic obstructive pulmonary disease (COPD), hypertension, esophageal reflux, muscle spasms, anxiety, allergic rhinitis, and GERD. He also uses a wheelchair.
2. On February 26, 2009, the petitioner expressed the desire to be discharged to an independent living facility. Facility staff began looking into apartments to assist him with this process. He also expressed this desire on April 22, 2009, and May 4, 2009. Facility staff continued to try and assist with this process but nothing ever came to fruition. The petitioner remained in the facility's care.
3. On March 27, 2009, the petitioner had a verbal altercation with facility staff about a box of nicotine patches. The staff person explained that the box needed to be given to the nurse so that he/she could properly distribute to the petitioner for future doses. The petitioner informed the staff person that "you just try to take my patches, you are in my house and I say what goes." The nurse was later finally able to persuade the petitioner to comply. This episode was documented in the petitioner's nursing notes.
4. The petitioner has refused personal care (hygiene, etc.) on several occasions which are documented in his medical record.
5. On September 3, 2009, staff observed the petitioner yelling and threatening his roommate. Although the petitioner is wheelchair bound, the staff person saw him getting into bed and his roommate was in his

own bed, half uncovered, shaking and upset, and had red and purple marks on him. The roommate implied that the petitioner had attacked him. The petitioner was heard using profanity, yelling at the roommate, just prior to staff walking in on this scene. Staff that observed this event stated that the petitioner has commented in the past "get him out of here before I hit him."

6. The petitioner has had several documented conflicts with his roommates. On September 30, 2009, he refused to allow his roommate to turn the light on. On October 3, 2009, he threatened staff that he would take his roommate's family member's cell phones away and throw them in the garbage if they came into the room with them and tried to use them.
7. Because of his continued refusal to comply with his plan of care (including personal care) and abusive and threatening behavior toward others (including staff, fellow patients and their families), the respondent issued a thirty-day notice of discharge on November 16, 2009. The notice included a discharge location and was effective December 16, 2009. The reason listed on the discharge notice was "Your needs cannot be met in this facility." The facility's attending physician signed the discharge notice.
8. The petitioner appeals.
9. At the hearing, the respondent stated that the petitioner's negative and non-compliant behaviors have been going on for the last two years and have increasingly become worse. The facility has given him six different roommates in the last eight months. Each patient requested to be moved

because the petitioner has been abusive or difficult to live with. The facility's physician informed staff that the petitioner alluded to having a gun in his locker which is in his room but refused to let staff search the locker. He makes veiled threats to facility staff. A CNA found a bottle of vodka in the petitioner's room. Residents are not allowed to have alcohol unless prescribed by the doctor and no such doctor's order exists in the petitioner's file. The facility's ARNP (advanced registered nurse practitioner) has spoken to the petitioner about complying with his plan of care but the petitioner constantly refuses.

10. The respondent discussed discharge planning and orientation with the petitioner.

CONCLUSIONS OF LAW

Jurisdictional boundaries to conduct this hearing have been assigned to the department by Federal Regulations appearing at 42 C.F.R. § 431.200.

Regarding transfer and discharge rights from a facility, 42 C.F.R. § 483.12 states in relevant part:

... (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;

...
(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.
- (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...
- (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.

The evidence shows that the notice of discharge is dated properly and lists a location with address. The notice lists one of the reasons allowed for discharge in the regulation and is signed by the facility's physician. The hearing officer finds the notice is legally sufficient for discharge purposes. The respondent documented that discharge planning and orientation was discussed with the petitioner.

The basis for the discharge is that the petitioner's needs can no longer be met at the facility. The petitioner argued that he just began psychotropic medication which has had a positive affect on him mentally and as a result, he will begin to comply with his plan of care (bathing, etc.) He denied having a gun in his room but stated that he has one in a storage shed located off of facility property. He denied making threats and the abusive episodes of behavior. He does not want to leave the facility.

The respondent argued that the petitioner's chart shows no new medication, i.e. psychotropic medication, is being administered to the petitioner. He is taking a muscle relaxer now at a more frequent dose but no other changes. The respondent argued that the petitioner's behavior has forced it into placing his roommates into other rooms, virtually leaving him in a "private" room setting. The facility is not equipped for patients to have "private" rooms. Because the petitioner is difficult to deal with and is affecting other patients, their families, and staff, the facility has no choice but to discharge him as it can no longer meet his needs.

Based on the evidence, the hearing officer concludes that there are enough episodes of negative behavior displayed by the petitioner that the facility is unable to properly do its job in rendering him the care he needs. This behavior is also affecting the facility's ability to effectively deliver its services to other patients, specifically any roommate placed with the petitioner, by providing a safe and caring environment to reside in. As a result, the facility has grounds to complete the discharge.

DECISION

The appeal is denied. The respondent's action is affirmed. The respondent 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 3rd day of February, 2010,

in Tallahassee, Florida.



Jeannette Estes
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To