

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

[REDACTED]

APPEAL NO. 10N-00214

PETITIONER,

Vs.

CASE NO.

FILED

April 11, 2011

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

Administrator

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on February 4, 2011, at 8:30 a.m., in [REDACTED], Florida.

APPEARANCES

For the Petitioner: [REDACTED], District Ombudsman
Manager

[REDACTED]

For the Respondent: [REDACTED] nursing home administrator

STATEMENT OF 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 his "health has improved sufficiently so that you no longer need the services provided by this facility" and because the "safety of other individuals in this facility is endangered". The facility has

the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.12 (a) and Section 400.0255, Florida Statutes (2010).

PRELIMINARY STATEMENT

By notice dated December 10, 2010, the respondent informed the petitioner that it was seeking to discharge/transfer him from its facility because his health has improved sufficiently so that he no longer needs the services provided by the facility and because the safety of other individuals in the facility was endangered.

On December 20, 2010, the petitioner timely requested a hearing on the matter and continues to reside at the facility pending the outcome of the hearing.

The petitioner was not present. The long term care ombudsman, [REDACTED], represented the petitioner under the authority granted by F.S. 400.0065 and 400.0069. Testifying on behalf of the petitioner was his father, [REDACTED]. The petitioner entered into evidence one exhibit.

Appearing as witnesses for the respondent was [REDACTED] assistant director of nursing (DON) [REDACTED], DON and [REDACTED], social services director.

The respondent entered into evidence six exhibits.

The hearing record was held open for 14 days or until February 18, 2011 to allow for the submission of proposed orders. The undersigned received a proposed order from the petitioner's representative and the record was closed.

FINDINGS OF FACT

1. The petitioner is a resident of the above named skilled nursing facility. He has been a resident at this facility, since June 24, 2010. The petitioner was

- hospitalized for hip surgeries for periods of time. The petitioner continues to reside at the facility pending the outcome of this appeal.
2. On December 10, 2010, the facility issued the petitioner a Nursing Home Transfer and Discharge Notice (AHCA Form 3120-002 Revised May '01) advising him that the effective date of the transfer was January 9, 2011. The reasons cited were “Your health has improved sufficiently so that you no longer need the services provided by this facility,” and “The safety of other individuals in this facility is endangered.” The section of the Notice entitled, “Brief explanation to support this action, (attach additional documentation if necessary)” is left blank with no entry.
 3. The notice was signed by the Administrator on December 14, 2010 and by the petitioner on December 10, 2010. The Nursing Home Transfer and Discharge Notice was not signed by a physician nor was a physician’s written order attached to it (Respondent’s Exhibit 1).
 4. At the hearing, the respondent submitted documentation to support resident’s independence with activities of daily living, but did not submit any physician’s order or other documentation under a physician’s signature declaring that the resident’s health has improved sufficiently so that he no longer needs the services provided by the facility, or that the safety of other individuals in this facility is endangered. Respondent’s Exhibit 6 is a letter signed by the resident’s orthopedic surgeon on December 23, 2010, which reads in part: “He is six weeks postop on his right hip at this point, and I feel that he is going to need at least another six weeks of guided physical therapy for abductor

- strengthening, balance, gait training, and narcotic weaning, for which I think he needs to be in a supervised environment for this period of time. I have an anticipation that in six weeks he will be more than capable of taking care of himself, and hopefully at that point in time he will be weaned off narcotics and stable with the use of a gait aid.”
5. The respondent’s administrator testified that as a general rule, consulting physician’s recommendations are routinely accepted by the facility’s physician or medical director. The progress notes dated February 1, 2011 indicate that the petitioner “made a comment that today was last day of therapy @ [REDACTED] [REDACTED]...Resident back from therapy holding diploma of finishing his P.T.”
- Petitioner is walking with a cane or uses a rolling walker to ambulate. He is able to do his own Activities of Daily Living (ADL’s) without assistance.
6. It is the respondent’s testimony that the facility is a no-smoking facility. The respondent testimony explained that the reason he had for issuing the discharge notice based on the “safety of individuals in the facility is endangered” was because of reports that the petitioner was smoking in the courtyard. A review of the Licensed Nurses Progress Notes dated October 12, 2010 indicated that the “Resident had gone out on patio courtyard area... I went to the patio and found cigarette butt in the otherwise clean trash can- Note to ADON written re resident smoking on facility grounds. On December 10, 2010 the petitioner was reported by a fellow resident to be smoking in the courtyard. None of the respondent witnesses observed the petitioner’s smoking infraction but relied on the fellow resident’s report. Further review of

the nurse's notes indicate that on several occasions the petitioner's window was open with the heater on. Progress notes dated January 25, 2011 indicated that the petitioner's window screen was bent and "screw holding it in place is loose. Window was easily opened. Right below window there was two cigarette butts..." The notes indicated that the petitioner denied smoking at the facility or in his room. "It's been a long time. I smoked in the courtyard but I have never smoked in my room. But I don't smoke here at all anymore." The respondent asserts that the smoking incident of December 10, 2010, was not the first incident with the petitioner. However, the respondent's witness acknowledged that frequently documentation was not recorded of alleged smoking infractions or actions taken to ameliorate the petitioner's behavior other than a nicotine patch for a period of time. However, the nicotine patch was discontinued as the respondent believed the petitioner continued to smoke. The respondent did not produce documentation in the resident's medical records by the resident's physician or the medical director indicating that the petitioner's actions caused the safety of other individuals in the facility to be endangered.

CONCLUSIONS OF LAW

7. The jurisdiction to conduct this hearing is conveyed to the Department by Federal Regulations appearing at 42 C.F.R. §431.200.
8. Florida Statute 400.0255, Resident transfer or discharge; requirement and procedures; hearing.--, informs at (15) (b) that the burden of proof must be clear and convincing evidence.

9. Federal regulations limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In the instant case, the respondent proposes to discharge the petitioner due to Health has improved sufficiently so no longer need services by facility and Safety of other individuals in facility is endangered.

10. Federal regulations at 42 C.F.R. § 483.12 states in part:

(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.

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

12. Florida Statutes 400.0255, Resident transfer or discharge; requirements and procedures; hearings, states in relevant part:

(3) 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 circumstance, 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; or
- (b) The resident's health or safety or other residents or facility employees would be endangered, and the circumstances are document in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.

13. The respondent's reasons for discharge are "The resident's health has improved sufficiently so the resident no longer needs the services provided by the facility," and "The safety of individuals in the facility is endangered."

These are two of the reasons given in the above federal law to permit discharge from a facility. Federal law is the most restrictive requiring that only the resident's physician can sign for discharge reason (i) and (ii). State law

- conforms to that for reason (i) and is silent of reason (ii). The AHCA form lists a whole host of individuals that can sign off other than the resident's physician or facility medical director. AHCA form has been published in the Florida Administrative Code and therefore can be relied upon as authority for any of these individuals signing the notice.
14. The respondent argues that the petitioner repeatedly violated the facility's no-smoking policy prior to the transfer and discharge notice being issued. However, there was no documentation presented attesting to those events other than a resident's statement. In addition, there was no evidence presented documenting that the resident was aware of the non-smoking policy.
15. The respondent also argues that the resident's health has improved sufficiently so that the resident no longer needs the services provided by the facility. The letter from the resident's orthopedic surgeon written two weeks after the transfer and discharge notice was issued stated that the resident needed six more weeks of "guided physical therapy for abductor strengthening, balance, gait training, and narcotic weaning, for which I think he needs to be in a supervised environment for this period of time." Although the letter does not specifically indicate that the petitioner needs to be in a skilled nursing facility, there was an indication that the petitioner needed addition physical therapy.
16. As of the date of the hearing, the petitioner has completed his physical therapy and is capable of performing his ADL's. However, neither of the

reasons for the discharge have been subscribed to by a physician either on the transfer and discharge notice on in the resident's clinical record as required by law. Therefore, it is determined that the respondent did not meet its burden and the respondent's action to discharge the petitioner cannot be affirmed.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the appeal is granted. The respondent is not permitted to discharge the petitioner pursuant to this discharge action under appeal.

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.

FINAL ORDER (Cont.)

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DONE and ORDERED this _____ day of _____, 2011,
in Tallahassee, Florida.

Linda Garton
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Copies Furnished To:

[REDACTED]