

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

[REDACTED]

APPEAL NO. 11N-00023

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

_____ /

FILED
May 24, 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 April 8, 2011, at the facility.

[REDACTED]

For the Petitioner:

[REDACTED]

Ombudsman Program

For the Respondent:

[REDACTED]

Administrator

STATEMENT OF ISSUE

At issue is the proposed discharge of the petitioner from the facility based on the contention that the resident's needs cannot be met in the facility.

PRELIMINARY STATEMENT

By Nursing Home Transfer and Discharge Notice dated February 1, 2011, the respondent notified the petitioner she was to be discharged from the respondent facility effective March 2, 2011 because “Your needs cannot be met in this facility”.

On February 11, 2011, the petitioner’s “significant other” and holder of a “Durable Power of Attorney” (DPOA) timely requested a hearing on behalf of the petitioner to challenge the respondent’s action.

Appearing as witness for the petitioner was [REDACTED] DPOA. Observing the proceeding was [REDACTED] Ombudsman, [REDACTED]

Appearing as a witness for the respondent was [REDACTED] Director of Nursing, for the facility.

The petitioner moved for a directed verdict based on the lack of a specific location to which the resident was to be transferred or discharged. The undersigned denied the motion and the petitioner subsequently objected to the undersigned ruling.

The record was held open for 14 days or until April 22, 2011 so that both parties could submit proposed orders.

FINDINGS OF FACT

1. The petitioner is a resident of a nursing facility under Hospice. She has been a resident at this facility since November 2, 2010. The petitioner has been diagnosed with “Alzheimer’s” dementia with psychosis, psychotic disorder and Type II diabetes.

2. In support of the facility's contention that the resident's needs cannot be met in their facility, the respondent submitted documentation consisting of various nurses' notes, exception reports, pharmacist's medication review dated January 10, 2011, a letter from the petitioner's Durable Power of Attorney (DPOA) dated December 24, 2010 and Petitioner's DPOA agenda notes for interim care plan meeting on December 30, 2010 (Respondent's Exhibit 2).

3. Respondent noted various incidents of petitioner's falls, restlessness, aggression and bouts of agitation. Per nurse's notes dated January 6, 2011, resident stopped and began to crouch down on knees, then lie down on floor...laid there for ...2 mins then raised her body up on all fours, reached out to space in front of her as if picking up an object....resident resists being assisted off the floor by 1 person..scalp is intact no sign of injury. Significant other phone et notified:

The notes continue to describe the DPOA's discontent with the quality of care provided to the petitioner.

4. Other nurse's notes dated January 3, 2011 described petitioner's aggressive behavior toward CNAs, striking them and throwing chairs on the floor, grabbing a resident around neck and arms and "Risk manager...began to try & redirect res. Res. Began to kick at her...Caregiver called and Notified of Res. Behavior."

5. After the January 3, 2011 incident, the administrator, Director of Nursing, Risk manager, nurse consultant and DPOA discussed petitioner's escalating behavior and aggression toward residents. Also discussed concerns with medication issues. Other incidents of aggression were recorded on January 8, 2011.

6. There were also incidents involving injuries to the petitioner and staff as a result of a fall (January 30, 2011); a skin tear to the back of her left hand (January 24, 2011) due to combative behavior when dressing resident; January 13, 2011, resident observed with head on floor, pad and legs over bed: kicking CNA in left leg unexpectedly (January 13, 2011) and January 12, 2011, resident lied down on the floor in hallway and banged her head on the floor. She was receiving one to one supervision.

7. The respondent has taken action to meet with the family (DPOA) and conducted a case plan meeting to discuss what steps could be taken to prevent injuries to the petitioner and other residents and staff. What they can do to provide care for the petitioner is limited by the family. The family has expressed concern with the use of antipsychotic drugs. After speaking with a physician, the petitioner's dosage of [REDACTED] was reduced to a low dose and titrated. The DPOA believes the medication causes problems with falling. The respondent asserts that they are unable to anticipate accidents and other actions involving the petitioner due to her unpredictability. In an effort to ameliorate the petitioner's behavior and provide a quieter environment, the facility tried changing rooms so that she would be with less mobile residents. However, despite their efforts, including one on one care, the family has indicated she is "not happy or comfortable with the care" provided to the petitioner.

8. On February 1, 2011, the facility issued a Nursing Home Transfer and discharge Notice (AHCA Form 3120-002 Revised May '01) to the DPOA citing "Your needs cannot be met in this facility". A brief explanation to support the proposed

discharge action was resident “needs a smaller, closed unit preferably with a quieter environment to decrease her overstimulation that leads to aggression. [REDACTED]

[REDACTED] has 4 bed wards.” The resident’s treating physician at the nursing facility and the nursing home administrator signed the notice of discharge.

9. The respondent acknowledged that incidents of falls, restlessness and bouts of agitation displayed by the petitioner are common among residents suffering from Alzheimer’s dementia. The petitioner is ambulatory and spends long periods of time during her waking hours walking in the hallways and corridors of the facility. She has walked into other residents’ rooms and there were recorded incidents regarding aggression to other residents and the nursing staff.

10. The respondent affirmed the DPOA’s active role in monitoring and directing petitioner’s care at the facility is not inappropriate nor was she acting outside the scope of her authority. The facility acknowledged that the DPOA voiced her dissatisfaction with the quality of care the petitioner was receiving at the facility. It is their assertion that they are unable to provide the care and attention to the petitioner according to the desires of the DPOA. Further, the respondent acknowledged the petitioner or her DPOA does have the right to reject medications or treatments and be involved in the care provided to the petitioner.

11. The February 1, 2011 Nursing Home Transfer and Discharge Notice listed the location to which the petitioner was to be discharged as “location to be determined by family and accepting facilities”. The petitioner contends that the facility’s failure to state a specific place of transfer or discharge in the notice violates the petitioner’s procedural due process, rights of effective notice and severely harms

the petitioner's ability to show that the current facility is equal or better suited to meet the petitioner's specific needs as opposed to a specific facility to which the petitioner is to be transferred or discharged. Moreover, it is the petitioner's contention that without identifying a specific facility for the proposed transfer or discharge, all discussion relative to another facility's ability to meet the specific needs of the petitioner is hypothetical.

12. The respondent acknowledged that there are currently no facilities willing or able to accept the petitioner or that can provide for a smaller, secure unit. However, the respondent will make arrangements to safely discharge the petitioner to another facility that can provide for the petitioner's need for a quieter environment that would decrease overstimulation leading to her aggressive behavior and would provide a safer, more secure environment to meet her needs.

13. The petitioner further contends that the facility has not done all that it could to meet the needs of the resident. The representative believes the lack of appropriate completion of the section of the report requesting "What new measures were put into place to prevent recurrence?" shows the facility's failure to provide analysis and evaluation of the incidents or documentation to show the petitioner's care plan was altered accordingly. Finally, the petitioner's representative argued that the facility represents itself as an Alzheimer's care provider. She also believes the facility can provide additional training to its staff so that they may better provide for the care of residents with Alzheimer's.

CONCLUSIONS OF LAW

14. Jurisdiction to conduct this hearing is conveyed to the Department by Federal Regulations appearing at 42 C.F.R. §431.200.

15. Florida Statute 400.0255, Resident transfer or discharge; requirement and procedures; hearing --, informs at (15)(b) that the burden of proof is clear and convincing evidence.

16. 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 discharging the petitioner from the facility due to the contention that “needs cannot be met in this facility”. Federal regulations do permit a discharge for this reason, as set forth at 42 C.F.R. §483.12(a)(2)(i) and (3) which 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; ...

17. The ombudsman argued the petitioner was harmed by the respondent's failure to list a specific location to which the petitioner was to be transferred. The statute at 400.0255 (7) requires that the notice be sent to both the resident and family member or the resident's legal guardian or representative except under emergency situations. This is a procedural due process issue. Procedural due process includes many requirements such as:

- An unbiased tribunal
- Notice of the proposed action and the grounds asserted for it
- Opportunity to present reasons why the proposed action should not be taken
- The right to present evidence, including the right to call witnesses
- The right to know opposing evidence
- The right to cross-examine adverse witnesses
- A decision based exclusively on the evidence presented
- Opportunity to be represented by counsel
- Requirement that the tribunal prepare a record of the evidence presented
- Requirement that the tribunal prepare written findings of fact and reasons for its decision

18. All of these rights were afforded the petitioner. A notice was provided to a family member who was her power-of-attorney. Based on that notice, the petitioner's representative requested a hearing. Evidence was presented by both sides; the hearing officer, based on that evidence, can make a proper ruling on the case. There is the allegation the petitioner was harmed by the facility's failure to list a specific nursing home location to which the petitioner could be transferred with the requested remedy that the undersigned rule for the petitioner in spite of evidence that the respondent facility cannot meet the petitioner's need for care and the physician's signature indicating the transfer is necessary for the resident's welfare.

Inability to meet the needs of an individual in the facility is grounds for discharge. The facility has agreed to transfer the petitioner to an appropriate facility that can provide for the petitioner's needs for a smaller unit offering less stimulation and a more secure environment. The undersigned considered the fact that the resident's treating physician at the nursing facility signed and approved the notice of discharge, and therefore concludes that the facility has met its burden of proof and the proposed discharge is for one of the reasons cited in the federal regulation and is within the controlling federal and state authorities.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the appeal is denied. The respondent may proceed with the proposed discharge in accordance with the Agency for Health Care Administration's applicable rules.

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.

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