

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

[REDACTED]

APPEAL NO. 11N-00160

PETITIONER,

Vs.

CASE NO.

Administrator

FILED

Dec 08 2011

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN AND FAMILIES

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice an administrative hearing convened before the undersigned at 1:05 p.m. on November 11, 2011 at [REDACTED] in [REDACTED] Florida.

**APPEARANCES**

For the Petitioner: [REDACTED], petitioner's sister in law

For the Respondent: [REDACTED], social service director

**ISSUE**

At issue was whether intent to discharge was correct based on "needs cannot be met in this facility" and "safety of other individuals in this facility is endangered".

**PRELIMINARY STATEMENT**

On September 12, 2011, the respondent issued a Nursing Home Transfer and Discharge Notice to be effective on October 12, 2011. Reasons given were "needs cannot be met in this facility" and "safety of other individuals in this facility is endangered". The respondent intended to discharge the petitioner to [REDACTED].

On September 13, 2011 an appeal was requested to challenge the transfer and discharge notice.

██████████ Certified Ombudsman appeared as a witness for the petitioner. Appearing as witnesses for the respondent were: ██████████, risk manager, ██████████ ██████████ director of nursing and ██████████, LPN nurse manager. The record was left open for the respondent to provide a written statement from the facility administrator as to whether the petitioner could remain in the facility until an opening became available at ██████████ Health and Rehabilitation Center. On December 2, 2011 an email was received from ██████████, administrator and submitted into evidence as Respondent Exhibit 14.

A letter dated October 14, 2011 from The Florida Agency for Health Care Administration stating the representative(s) did not find the facility was violating any laws or rules was submitted as Hearing Officer Exhibit 1.

#### **FINDINGS OF FACT**

1. The petitioner (age 54) was admitted to the respondent's facility on November 28, 2008. The petitioner has dementia and is unable to make health care decisions for himself.
2. The Nurse's Progress Notes and Social Progress Notes contain entries between July 2011 and October 2011 documenting the petitioner's aggressive behaviors including: kicking and hitting facility residents, roaming the facility, removing his clothing and inappropriate sexual behavior with himself (Respondent Exhibits 7 and 8). The respondent explained the petitioner's aggressive behavior started in November 2010; however, they only presented evidence starting in July 2011.

3. The petitioner was evaluated by a psychologist from Geratric Psychological Specialist (GPS), on July 5, 2011. The evaluation revealed the petitioner had aggression, agitation and continued inappropriate sexual behavior (Respondent Exhibit 2).
4. Also on July 5, 2011, as a result of hitting another resident the petitioner was admitted to [REDACTED] Regional Hospital and was Baker Acted at the hospital (Respondent Exhibit 9). The petitioner returned back to the facility on July 16, 2011 from [REDACTED] Regional.
5. On July 25, 2011 the petitioner's medical chart was reviewed by an independent registered nurse from [REDACTED] (Respondent Exhibit 3). The registered nurse determination summary report reads in part:

For the patient's safety, as well as the safety of the other residents, it is recommended that the patient is places in a structured, secure unit that specializes in providing care to individuals with dementia.
6. As a result of the petitioner's continued aggressive behavior, he was assigned to one-one supervision (within arm reach of a nursing assistant) between August 17, 2011 and October 5, 2011.
7. The petitioner was then assigned to Q15 supervision (monitored every 15 minutes, 24 hours a day, seven days a week) on October 6, 2011 through current (Respondent Exhibit 4).
8. The facility contacted the petitioner's family each time an incident occurred; informing them of his continued aggressive behavior and requesting he either be place in their home or at a facility that has behavioral or lock units.

9. On September 12, 2011, the respondent issued the petitioner a notice of intent to discharge him to [REDACTED] as “needs cannot be met in this facility” and “safety of other individuals in this facility is endangered”.

10. The petitioner’s representative explained her husband, the petitioner’s brother, was caring for his brother prior to being placed at the facility. However, due to his own illness he no longer can care for him. She believes the petitioner’s behavioral problems are as a result of his treatment by the facility. The petitioner’s representative explained she received phone calls from the facility on June 27, 2011 and July 31, 2011 notifying her they had dropped the petitioner.

11. The respondent’s witness explained they are required to inform the petitioner’s family every time the petitioner has an incident. She further explained the facility records show that on June 27, 2011 the petitioner was sitting in a chair in the shower and the chair tipped; however, the assistance caught him and lowered him to the floor. On July 31, 2011 they found the petitioner laying on the floor, they did not know why he was on the floor because he transfers himself from the bed (Respondent Exhibit 13).

12. The petitioner’s witness questioned if the petitioner or his family signed the transfer and discharge notice as required.

13. The respondent’s representative explained the transfer and discharge notice was sent by registered mail to the petitioner’s representative and was not returned.

14. The petitioner’s representative acknowledged receiving the transfer and discharge notice.

15. The petitioner’s witness explained the petitioner is currently on a waiting list at [REDACTED] Health and Rehabilitation Center in [REDACTED], Florida. She requested the

petitioner remain at [REDACTED] until [REDACTED] Health and Rehabilitation Center has an opening for the petitioner.

16. The respondent's representative explained the facility administrator (not present) was the only person that could make that decision and agreed to notify all parties in writing by November 16, 2011 of his decision.

17. On December 2, 2011 an email (Respondent Exhibit 13) was received from the facility's administrator that reads:

Due to Mr. [REDACTED] behavior history and FS Chapter 415, it is in the best interest of the facility to deny the request of the Ombudsman and proceed with transferring Mr. [REDACTED] to a Behavioral Unit.

#### **CONCLUSIONS OF LAW**

18. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to s. 400.0255(15), Fla. Stat. In accordance with that section this order is the final administrative decision of the Department of Children and Families. The burden of proof is clear and convincing evidence and is assigned to the respondent.

19. Federal Regulations appearing 42 C.F.R. § 483.12, sets forth the reasons a facility may involuntarily discharge a resident as follows: Admission, transfer and discharge rights.

(a)(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.

20. Based on the evidence presented, the nursing facility has established that the

(i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility; and (iii) The safety of individuals in the facility is endangered. These are two of the six reasons provided in federal regulation (42 C.F.R. § 483.12) for which a nursing facility may involuntarily discharge a resident.

21. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The nursing home must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

22. Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

**DECISION**

Based upon the forgoing Findings of Fact and Conclusions, the appeal is denied.

**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] Petitioner  
[REDACTED], Respondent  
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Agency for Health Care Administration  
[REDACTED]