

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

[REDACTED]

APPEAL NO. 11N-00165

PETITIONER,  
Vs.

Administrator

[REDACTED]

FILED  
Dec 12 2011  
OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN AND FAMILIES

RESPONDENT.  
\_\_\_\_\_  
/

**FINAL ORDER**

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on November 8, 2011, at 1:46 p.m., at the [REDACTED] Nursing and Rehabilitation Center in [REDACTED] Florida.

**APPEARANCES**

For the Petitioner: [REDACTED], husband to the petitioner.

For the Respondent: [REDACTED], facility administrator.

**ISSUE**

At issue is whether or not the nursing home's action to transfer and discharge the petitioner is an appropriate action based on the federal regulations at 42 C. F. R. § 483.12. The nursing home is seeking to discharge the petitioner because the "safety of other individuals in this facility is endangered."

The respondent will have the burden to prove by clear and convincing evidence that the petitioner's discharge is in accordance with the requirements of the Code of

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Federal Regulations at 42 C.F.R. §483.12(a) and Section 400.0255, Florida Statutes (2009).

**PRELIMINARY STATEMENT**

By notice dated September 13, 2011, the facility informed the petitioner that she was to be discharged from the facility on October 13, 2011. On September 16, 2011, the petitioner timely requested a hearing to challenge the discharge.

The petitioner was not present.

The respondent's representative appeared in person. Witnesses for respondent were [REDACTED], social services director, [REDACTED], director of nursing, [REDACTED] [REDACTED] unit manager, [REDACTED], administrator in training.

A letter dated October 6, 2011 from the Agency for Health Care Administration (AHCA) was sent to the undersigned and it stated that the representative(s) did not find the facility in violation of any laws or rules. This was submitted as Hearing Officer Exhibit 1.

An Order to Supplement Record was issued on December 5, 2011 to allow the respondent to submit evidence to support their testimony.

Evidence was received and entered as the Respondent Exhibit 2.

The Respondent Exhibit 2 included a letter from the facility's administrator stating there were new incidents that have occurred since the hearing. The undersigned will consider in this decision only the incidents that were presented during the respondent's testimony as it related to the discharge notice under challenge.

**FINDINGS OF FACT**

1. The petitioner (age 51) was admitted to the respondent's facility on June 11, 2009. The petitioner received a brain injury that required her to receive care from a skilled nursing facility.
2. The Abuse QA & A Log contains entries between May 12, 2011 and May 16, 2011 documenting the petitioner's aggressive behaviors which include hitting facility residents (Respondent Exhibit 2). The SHC Abuse Report includes reports of alleged abuse, neglect, and exploitation (Respondent Exhibit 2). The abuse report dated August 16, 2011 documents facility staff observing the petitioner rolling over to a resident and striking the victim. The "Proactive/Corrective measures taken or to be taken" section of the abuse report notates that "██████████ was transferred for evaluation and review to ██████████ in Jacksonville, FL, returning the same date with a dx of Bronchitis". The abuse report dated September 29, 2011, records the observation by a nursing home employee of the petitioner rolling over to a resident and kicking her in her left leg. The corrective measurements that took place were, "Resident ██████████ immediately sent to ██████████ hospital for evaluation and review. Resident was sent back to the facility on the same day". It is further noted that the petitioner was "Currently on 1-1 supervision until alternate placement can be made".
3. On September 13, 2011, the respondent issued the petitioner a notice of intent to discharge her to ██████████ Manor as "the safety of other individuals in this facility is endangered".

4. The petitioner's husband explained that his home is not an appropriate discharge location because he works on a full-time basis and cannot be there to supervise the petitioner. The petitioner's husband argues that the facility where the petitioner is to be discharged is long distance and he would not be able to visit his wife on a regular basis due to his work schedule.

5. Petitioner's husband asserts that the physical aggressiveness is not his wife's normal behavior but rather her brain injury, which impairs her ability to respond properly when facing certain situations. The petitioner's husband believes the petitioner has a loving and caring attitude when she receives the proper care and attention that she deserves. The petitioner's husband does not deny that the petitioner has episodes of physical altercations but they are the result of pain that occurs due to physical illnesses that she suffers. The petitioner's husband asserts that the petitioner is unable to communicate when she is hurting and will be aggressive because she cannot articulate her pain. The petitioner's husband believes that the nursing home should send the petitioner to receive medical attention and redirect her to other interests when she behaves inappropriately. Petitioner's husband asserts that other residents love the petitioner when she is receiving the proper care and attention and when she is on her medications. The petitioner's husband asserts that he has tried to find other facilities able to care for his wife.

6. The respondent asserts that family members have expressed concern over the incidents of physical abuse committed by the petitioner and have requested to have their residents removed from the wing where the petitioner lives. The respondent

understands the petitioner's actions do not occur out of malice yet it has an obligation to consider the safety of the employees and residents of the facility. The respondent asserts that the petitioner was put on one-on-one care on October 1, 2011 but cannot continue doing so as other family members will expect the same treatment for their residents. The respondent asserts that the incidents have been an ongoing problem, but the facility has been dealing with the petitioner's behavior issues. The respondent asserts that the petitioner needs care that the facility cannot provide.

### **CONCLUSIONS OF LAW**

7. 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.

8. Federal Regulations appearing 42 C.F.R. § 483.12, sets forth the reasons a facility may involuntary 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.

9. Based on the evidence presented, the nursing facility has established that the safety of individuals in the facility is endangered. This is one of the six reasons provided in federal regulation (42 C.F.R. § 483.12) for which a nursing facility may involuntarily discharge a resident.

10. 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.

11. 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 and the facility may proceed with its proposed discharge in accordance with the Agency for Health Care Administration's rules and regulations.

**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 First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The party 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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Hearing Officer  
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Copies Furnished To: [REDACTED], Petitioner  
[REDACTED], Respondent

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Agency for Health Care Administration Quality Assurance

