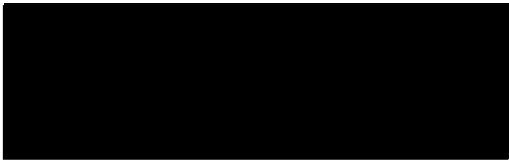


STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGS

**FILED**

MAR 06 2015

OFFICE OF APPEAL HEARINGS  
DEPT. OF CHILDREN & FAMILIES



APPEAL NO. 14N-00175

PETITIONER,

Vs.

Administrator



RESPONDENT.

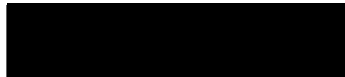
\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing telephonically in the above-referenced matter on February 9, 2015 at 2:49pm.

**APPEARANCES**

For the Petitioner:



For the Respondent:

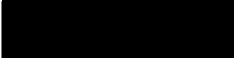


facility administrator

**STATEMENT OF ISSUE**

Petitioner is appealing the Nursing Home Transfer and Discharge Notice issued by the respondent on December 8, 2014. The petitioner also appeals the amended Discharge Notice signed on December 17, 2014.

**PRELIMINARY STATEMENT**

Appearing as witness for the respondent was  Social Services Director. Karla Beasley, Registered Nurse Consultant, appeared for the Agency for

Health Care Administration (AHCA). Larry LaBelle, Hearing Officer, was present as an observer.

The respondent submitted evidence during the hearing which was entered as Respondent's Exhibits 1 and 2.

AHCA's representative reported the surveyor's letter was not issued prior to the hearing. Based on the AHCA surveyor's notes, there were no deficient practices found. It was noted that the effective date is incorrect on the second notice. AHCA reported a Quality Assurance review was in progress at the time of the hearing and the letter would be issued within a few days.

#### **FINDINGS OF FACT**

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The petitioner is a 43 year old female with both a physical and mental health diagnosis. She has resided at the respondent's facility since at least July 2014.
2. The respondent first presented evidence regarding the Transfer and Discharge Notice dated December 8, 2014. The reason listed on this notice was: "The safety of other individuals in this facility is endangered." The discharge notice contains the signature of the facility administrator. The petitioner refused to sign the notice. The notice is not signed by a physician or designee. Separate physician discharge orders were not offered into evidence.
3. The respondent presented a summary of the petitioner's actions regarding use of alcohol or drugs in the facility dating back to August 6, 2014.

4. The respondent presented a copy of the Behavior Contract that was discussed and signed by the petitioner on August 7, 2014. The contract states in part:

I understand that I am not permitted to have alcohol in the facility and by signing below, I agree that I will not have alcohol in the facility or use alcohol in the facility. I further understand that by being intoxicated, my subsequent behavior infringes on the rights of others, and so, I agree that I will not become intoxicated while I am a resident here.

...  
I agree to stop all of these behaviors immediately. If any of these behaviors continue, I understand that St. James will issue a 30 Day Notice of Transfer and Discharge and I will be discharged from this facility.

5. The petitioner is an alcoholic. She is not allowed to leave the facility. However, she stated she had a roommate who would bring alcohol back to the facility and would share with her. The petitioner admits possession and use of alcohol in the facility after signing the contract.

6. The petitioner stated a staff member gave her marijuana while in the facility. She admits possession and use of the marijuana.

7. The respondent followed its facility policy regarding Managing Alcohol and Illegal Drug/Unauthorized Substances dated August 2008 and contacted law enforcement upon discovery of marijuana in the petitioner's room on December 5, 2014.

8. The respondent addressed the issue reported on the Transfer and Discharge Notice dated December 17, 2014. The reason selected was "Your health has improved sufficiently so that you no longer need the services provided by this facility." The discharge notice contains the signature of the facility administrator. The petitioner refused to sign the notice. The notice is not signed by a physician or designee. Separate physician discharge orders were not offered into evidence.

9. The respondent did not provide any written physician notes to support the claim the petitioner's health has improved. The respondent did not have a physician present to testify as to the petitioner's improved health and ability to thrive in another setting.

10. The petitioner believes some of her problems came with changes in her medications that affected both her physical and mental health issues. She believes her physical health has worsened since arriving in the facility due to adjusting her medications. However, she believes that her physical health remains unchanged as her diagnosis is terminal.

#### **CONCLUSIONS OF LAW**

11. 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.

12. 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.

13. 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 and requirements of the controlling authorities have been met.

14. 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.

(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

15. The above cited authority sets forth the conditions which must exist for a nursing home to involuntarily discharge a resident. The undersigned concludes both reasons provided by the respondent are included in the authority as valid reasons for involuntary discharge.

16. Fla. Stat. § 400.0255 Resident transfer or discharge; requirements and procedures; hearings, states in relevant part:

(3) When a discharge or transfer is initiated by the nursing home, the nursing home administrator employed by the nursing home that is discharging or transferring the resident, or an individual employed by the nursing home who is designated by the nursing home administrator to act on behalf of the administration, must sign the notice of discharge or transfer. **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 circumstances, 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 health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.**

(emphasis added)

17. On the December 8, 2014 Discharge and Transfer Notice, the respondent indicated the reason for discharge was: "The safety of other individuals in this facility is endangered." On the December 17, 2014 the respondent indicated the reason for discharge was: "Your health has improved sufficiently so that you no longer need the services provided by this facility."

18. According to the controlling *state law*, the discharge reason due to the safety of other individuals in the facility being endangered requires either the resident's

physician or medical director's signature. In the absence of a physician's signature, a physician's written order must be shown. In this case, there was no evidence of a physician's approval of the proposed discharge under this reason.

19. According to the controlling *federal law*, the discharge reason related to the resident's improved health requires the resident's physician's signature as proof of approval of the discharge. In this case, there was no evidence of such under this reason.

20. The AHCA "Nursing Home Transfer and Discharge Notice" form is published in Fla. Admin. Code 59A-1.106 and includes additional individuals who can sign the discharge form indicating approval. For both of the discharge reasons at issue in this appeal, AHCA requires a physician, nurse practitioner or physician's assistance as a physician designee for approval of the discharge. In this case, there was no evidence of any of these designated individuals approving the discharge action.

21. Based on the evidence presented, the respondent's proposed discharge action does not adhere to the controlling legal authorities.

### **DECISION**

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is granted. The facility is not allowed to discharge the resident under the notices at issue.

**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 6<sup>th</sup> day of March, 2015,

in Tallahassee, Florida.



Melissa Roedel  
Hearing Officer  
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal\_Hearings@dcf.state.fl.us

Copies Furnished To: [REDACTED] Petitioner  
[REDACTED] Respondent  
Ms. Donna Heiberg, AHCA