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

[redacted]

PETITIONER,

APPEAL NO. 15N-0065

VS.

ADMINISTRATOR
[redacted]

RESPONDENT.
_____/

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on August 21st, 2015 at 10:10 a.m. in [redacted] Florida. The hearing reconvened on November 6th, 2015 at 1:35 p.m. in [redacted] Florida.

APPEARANCES

August 21st, 2015: For the petitioner: [redacted] pro se.

For the respondent: Maria Mayor, Administrator for the facility.

November 6th, 2015: For the petitioner: [redacted] pro se, by telephone.

For the respondent: Laura Llorente, Esq. and Laura Wade, Esq.

STATEMENT OF ISSUE

The petitioner is appealing the respondent's intention to discharge him from the facility.

PRELIMINARY STATEMENT

Appearing as a witness for the petitioner on both hearing dates was [redacted] District Ombudsman Manager. Appearing as a witness for the petitioner on November 6th, 2015 was [redacted] the petitioner's mother.

Appearing as witnesses for the respondent on August 21st, 2015 were Laverne Jeremiah, Associate Director of Nursing/Risk Manager; Jim Dorvil, Admissions Counselor; Elaine Sangster, Nurse Manager; Yuvonne Martin, Advanced Registered Nurse Practitioner, and Lynn Hernandez, Social Worker.

Appearing as witnesses for the respondent on November 6th, 2015 were Maria Mayor, Administrator for the facility; Lynn Hernandez, Social Worker; Laverne Jeremiah, Associate Director of Nursing/Risk Manager, and Idel Benjamin, Director of Patient Care Services.

Diane Moore, Supervisor for Long-Term Care, with the Agency for Health Care Administration appeared as a non-testifying witness at both hearings.

Respondent's Exhibits 1 was admitted into evidence on August 21st, 2015. Petitioner's objection was noted. Respondent's Exhibits 2 through 14 (tabbed as 1-13) were admitted into evidence on November 6th, 2015.

On August 21st, 2015, partial testimony from the respondent was taken. The hearing was adjourned because after going on record, the petitioner expressed his wish to have his mother present as a witness, and she was not available on that date. The hearing was scheduled to reconvene on September 16th, 2015. However, the petitioner claimed that he did not receive the Notice of Hearing; consequently, neither he nor the district ombudsman was aware of the hearing date. The hearing was rescheduled for

October 20th, 2015. However, on October 15th, 2015, the hearing officer was apprised of the fact that the petitioner had been transferred to [redacted] Hospital due to an involuntary commission under the Baker Act, and that the hearing would need to be conducted there. The hearing was necessarily rescheduled in order to allow ample notice informing the parties of the change of venue.

The record was left open until November 20th, 2015 in order to allow counsel for the respondent to submit a Proposed Final Order. This was received within the allowed time frame and the record was closed.

By way of Notice of Discharge dated June 18th, 2015, the respondent informed the petitioner of its intention to effectuate a discharge on July 18th, 2015. The two reasons stated on the notice are "Your needs cannot be met in this facility" and "The safety of other individuals in this facility is endangered." (See Respondent's Exhibit 4.) On June 22nd, 2015, the petitioner filed a timely appeal to challenge the respondent's action.

FINDINGS OF FACT

1. The petitioner, 32 years of age, was admitted to the facility on June 11th, 2014 due to incomplete quadriplegia with impaired physical functioning (spinal cord injuries). The petitioner also arrived with a history of recurring ulcers.

2. From at least January 2015 through March 2015, the facility documented various incidents of the petitioner's behavior (much of which the petitioner denied) which included disrespectful demeanor toward staff and other resident's, violations of the facility's smoking policy (i.e. smoking in non-designated areas), disturbing other residents with loud and offensive music, and violation of residents' pass privileges. As a

result of this, the facility initiated a Nursing Home Discharge procedure on February 23rd, 2015; the petitioner filed an appeal to challenge this action, and a fair hearing was scheduled for April 8th, 2015.

3. However, on March 19th, 2015, the petitioner signed an agreement wherein the petitioner agreed to comply with the facilities requirements. Such included, in part, the petitioner's agreement to: seek the appropriate permission (pass) to leave the facility; to use STS (Special Transportation Services) when leaving the facility; to return to the facility at the designated time; to advise the facility in the event that STS causes a delay in the petitioner's designated return time (which was 8:00 p.m., a policy recently-established for all residents due to an incident from earlier in the year where a resident, away with a pass, was fatally injured in an accident); to refrain from the use of illegal drugs; to refrain from the use of profanity toward staff during when care is rendered; address his concerns with a respective tone, and to play his music in such a way that it does not disturb other residents. Visitors would be allowed to visit the petitioner upon providing proper identification.

4. The facility, in turn, rescinded its intention to discharge the petitioner, and on May 6th, 2015, the appeal was duly dismissed.

5. The facility administrator asserted that during the weekend of May 16th, 2015, she was contacted by facility security at her home after hours. It was reported that the petitioner was not in compliance with the facility's curfew requirement. The petitioner countered that he was denied access to the facility when he tried to return.

6. On June 10th, 2015, the petitioner signed a refusal of care for a wound. Specifically, he refused to remain on bed rest to allow a wound to heal. The respondent

asserted that the petitioner not only refused to remain on bed rest, but also he remained in his wheelchair for three consecutive days, causing his wound to worsen.

7. The Advanced Registered Nurse Practitioner asserted that during a visit from the petitioner's mother in June 2015, the petitioner displayed suicidal tendencies. The petitioner's mother expressed concern to the ARNP about this. The ARNP was obligated to follow up on this allegation. Consequently, the petitioner was committed under the Baker Act and transferred to [redacted] Hospital, where the results of lab work performed on June 12th, 2015 showed a finding of "presumptive" to tests of "cocaine and metabolites, alcohol, cannabinoid, and benzodiazepine class." (See Respondent's Exhibit 13, 1st page of the report.) The petitioner denied the use of any illegal drugs except for one occasion "a long time ago." There was no expert witness or qualified custodian of records available at either hearing to attest to the validity of the report, or the results contained therein.

8. Upon receipt of this report, the facility requested that the petitioner agree (upon return to the facility) to random drug-testing, as the petitioner takes multiple prescribed medications that, if combined with illegal drugs, could lead to cardiac arrest. The petitioner refused consent to random drug-testing. The petitioner did not dispute this at the hearing.

9. The petitioner's social worker asserted that during a discussion with the petitioner on July 22nd, 2015, the petitioner became aggressive and threatened that he would have the staff's eyes "looking like fifty-cent pieces." The petitioner did not dispute this, but stated that he did not mean anything harmful or threatening by the remark.

10. On or around July 24th, 2015, residents of the facility reported to staff that they had seen the petitioner rolling marijuana on the facility grounds. The petitioner admitted that he "smoked pot".

11. On Friday, August 14th, 2015, the facility administrator received a telephone call from the facility security at 12:15 a.m. The petitioner had left the facility without authorization, and had yet to return. The administrator instructed the staff to contact the police; however, no police report could be filed, as the petitioner had not been gone for 24 hours. The petitioner admitted that on the preceding Thursday, he left the facility without authorization to join a cousin at a tattoo shop for an appointment that had been made for after shop hours (to minimize the time away from the facility). The petitioner was unable to return to the facility until 3:30 a.m. on that Friday due to transportation issues.

12. The respondent alleged that in addition to the above-mentioned incident, the petitioner left the grounds without authorization on numerous occasions, supposedly to visit family members and friends, but did not provide specific details regarding the dates and circumstances of these incidents.

13. The respondent's intention is to transfer the petitioner to a facility further away, where the petitioner will not be as easily exposed to the "external elements" that are detrimental to his well-being.

CONCLUSIONS OF LAW

14. Jurisdictional boundaries to conduct this hearing have been assigned to the Department by Federal Regulations appearing at 42 C.F.R. § 431.200. Florida Statute

400.0255 addresses "Resident transfer or discharge; requirement and procedures; hearing..." with section (15) (b) informing that the burden of proof is one of clear and convincing evidence. Federal regulations limit the reason for which a discharge may occur and provide for involuntary and certain emergency discharge procedures.

15. Additional regulations at 42 C.F.R. § 483.12(a) address nursing facility "Admission, transfer and discharge rights" for residents, in relevant part as follows:

> (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…

16. The regulations inform that there are several reasons justifying discharge, including safety endangerment of other individuals. In this situation, the respondent contends that the petitioner's needs cannot be met at the facility, and that the safety of other individuals at the facility is endangered. Discharge was planned for those reasons.

17. Hearsay is defined by § 90.801(1)(c), Fla. Stat. as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

18. Fla. Stat. § 120.57(1)(c) states in pertinent part:

"[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

19. Florida Statutes 90.803 addresses hearsay exceptions, and states in relative part:

> (6) RECORDS OF REGULARLY CONDUCTED BUSINESS ACTIVITY.- (a) a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.901(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

20. The respondent's position that a lab report from June 2015 indicated that the petitioner tested "presumptive" for cocaine and metabolites, alcohol, cannabinoid, and benzodiazepine class is considered hearsay, as there was no expert witness (or in the absence thereof, a certification of authenticity) to define this result, or to address the petitioner's rebuttal to this result. Therefore, the hearing officer cannot afford any consideration to this report.

21. Nonetheless, the hearing officer recognizes that the respondent must afford serious consideration to this result. Therefore, the hearing officer affirms the respondent's request that the petitioner submit to random drug-testing while at the facility. The (possible) use of illegal drugs, in combination with prescribed medications, places the petitioner's health at great risk. The petitioner's refusal to submit to random

drug-testing only serves to greatly reduce the respondent's ability to monitor the petitioner's health.

22. The findings show that the facility has a policy that residents who wish to leave the grounds may only do so with an authorized pass. The findings show that the petitioner signed an agreement on March 19th, 2015 to follow this policy. The findings also show that the facility has a curfew policy of 8:00 p.m. which was implemented for the safety of the residents as established above.

23. The findings show that the petitioner violated these policies on at least one occasion (August 13th, 2015), the petitioner left the grounds without a pass, and did not return until 3:00 a.m. on Friday, August 14th, 2015.

24. The findings show that the petitioner signed an agreement on March 19th, 2015, to refrain from using any illegal drugs while on facility grounds. The findings show that the petitioner admitted to smoking pot on the facility grounds on at least one occasion (on or around July 24th, 2015).

25. The findings show that on at least one occasion (July 22nd, 2015), the petitioner made what was construed to be a threatening remark to the facility staff. The petitioner's argument regarding the innocence of the meaning of his remark was noted, but not persuasive.

26. The hearing officer notes that the above-mentioned incidents, with the exception of the request that the petitioner submit to random drug-testing, post-date the Nursing Home Transfer and Discharge Notice of June 18th, 2015 (which is the notice

that prompted the hearing request). (Allegations of other incidents that pre-date this notice were unsubstantiated.) Therefore, the hearing officer concludes that notice to discharge for these reasons was premature.

27. However, based on the petitioner's refusal in June 2015 to submit to random drug-testing in order to allow the respondent to properly monitor the effects of his prescription drugs, the hearing officer concludes that the respondent met its burden of proof that discharge is justified, as the respondent is no longer able to meet the petitioner's needs.

28. Establishing that reason for discharge is lawful is just one step in the discharge process. The nursing facility 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.

29. 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 AHCA health care facility complaint line at (888) 419-3456.

DECISION

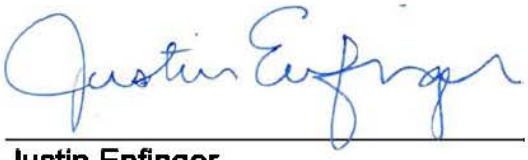
Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is denied. The respondent's intention to discharge the petitioner is upheld.

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 18 day of December, 2015,

in Tallahassee, Florida.



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