

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

**FILED**

NOV 13 2015

OFFICE OF APPEAL HEARINGS  
DEPT OF CHILDREN & FAMILIES  
APPEAL NO. 15N-0077

[REDACTED]

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative nursing home discharge hearing was convened before the undersigned on October 20<sup>th</sup>, 2015 at 9:35 a.m. at the [REDACTED] [REDACTED] Florida.

**APPEARANCES**

For the petitioner: [REDACTED] pro se.

For the respondent: Michelle Rousseau, Risk Manager and Certified Patient Safety Officer for the facility.

**STATEMENT OF ISSUE**

The petitioner is appealing the respondent's intention to discharge her from the facility. The petitioner remains as a resident of the facility pending the outcome of the hearing.

**PRELIMINARY STATEMENT**

Appearing as a witness for the petitioner was [REDACTED] Petitioner's friend and Power of Attorney.

Appearing as witnesses for the respondent were Bridgette Wilson, Business Office Manager, and Brenith Delson, Director of Nursing. During the hearing, James Reiss, Administrator of the facility, made a brief appearance.

The hearing was originally scheduled for September 30<sup>th</sup>, 2015. A continuance was granted at the request of the petitioner, and the hearing convened as described above.

Petitioner's Composite Exhibit 1 was moved into evidence.

Respondent's Exhibits 1 through 2 were moved into evidence.

By way of a Nursing Home Transfer and Discharge Notice dated July 15<sup>th</sup>, 2015, the respondent informed the petitioner of its intention to discharge her from the facility effective August 15<sup>th</sup>, 2015. The reason stated on the notice is "Your needs cannot be met in this facility." Notably, the copy of the discharge notice submitted into evidence (Respondent's Exhibit 1) indicates that the notice was signed by the facility and administrator and the attending physician on July 15<sup>th</sup>, 2015, but was not signed by the petitioner.

On July 28<sup>th</sup>, 2015, the petitioner filed a timely appeal to challenge the respondent's action.

**FINDINGS OF FACT**

1. The petitioner was admitted to the facility on March 4<sup>th</sup>, 2015. At the time of her admittance, the petitioner was diagnosed with [REDACTED]  
[REDACTED] The petitioner takes multiple medications; the petitioner was also, and continues to be on [REDACTED]

2. The respondent alleged that the petitioner initially developed a pattern of refusal to take medications as well as a refusal of medical care (dialysis). The respondent alleged that multiple conferences were held to discuss the petitioner's plan of care. These conferences included visits from a physician and a nephrologist to discuss the impact that the petitioner's actions were taking on her health. The petitioner countered that there were medications that she did not wish to take because adverse side effects outweighed the benefits of the medications.

3. At the request of the petitioner, the petitioner's first attending physician, "Dr. M." terminated his services with her. A second physician, "Dr. A." reviewed the petitioner's file, but upon noting the petitioner's refusals described above, declined the petitioner as a patient. The petitioner is currently under the temporary care of the facility's medical director, who had no choice other than to accept the petitioner as a patient while she finds her own physician.

4. The respondent claimed that since the facility's medical director assumed the (temporary) care of the petitioner, the petitioner has been fully compliant in taking her medications and going for dialysis, thereby rendering moot the reason for discharge as issued on the notice of July 15<sup>th</sup>, 2015. The only remaining issue at the time of the

hearing was for the petitioner to find a "permanent" physician to accept her as a patient. The petitioner has not been given any type of official deadline by which to do so.

5. The respondent alleged that since the July 15<sup>th</sup>, 2015 discharge notice was issued, other issues related to the petitioner's conduct have arisen; therefore, discharge is still warranted. However, as no discharge notice has been issued on this matter, the respondent's allegations on this subject will not be addressed.

### **CONCLUSIONS OF LAW**

6. 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 discharge may occur and provide for involuntary and certain emergency discharge procedures.

7. 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...

8. The regulations inform that there are several reasons justifying discharge. In this situation the respondent contends that the petitioner's needs could no longer be met at the facility. Discharge was planned for those reasons.

9. Establishing the 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.

10. The findings show that although the petitioner may have been non-cooperative with her attending physician which resulted in the respondent's decision that it could no longer meet the petitioner's needs, the undisputed testimony is that the petitioner is now fully cooperating with instructions from her current physician (the facility's medical director). Therefore, this reason is no longer applicable. The hearing officer notes the respondent's contention that the medical director's care is only temporary pending the petitioner's finding a permanent physician on her own. However, after review of the regulations cited above, the hearing officer finds that discharge for this reason alone is not justified.

11. In sum, based on a review of the evidence in its totality, the hearing officer concludes that the respondent did not meet its burden of proof in its position that it can

no longer meet the needs of the petitioner, and therefore, the action described in its Nursing Home Transfer and Discharge Notice of July 15<sup>th</sup>, 2015 is not upheld.

12. 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 hereby granted. The respondent may not proceed with its intent to discharge the petitioner based on the above-mentioned notice.

### **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 indigence 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.)  
15N-0077  
PAGE -8

DONE and ORDERED this 13<sup>th</sup> day of November, 2015,

in Tallahassee, Florida.



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Copies Furnished To: [REDACTED] Petitioner  
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Ms. Arlene Mayo-Davis, FO, Agency for Health Care  
Administration