

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

FILED

Dec 04, 2015

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 15N-00088

PETITIONER,

Vs.

Administrator

[REDACTED]
[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned at 2:29 p.m. on October 22, 2015 at the [REDACTED] at [REDACTED] in [REDACTED] Florida.

APPEARANCES

For the Petitioner: The petitioner was present and was represented by her son,

[REDACTED]

For the Respondent: Larry Lake, administrator for the [REDACTED]

[REDACTED]

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. The nursing home is seeking to discharge the petitioner because her "needs cannot be met in this facility."

The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.12 (a) and Section 400.0255, Florida Statutes.

PRELIMINARY STATEMENT

By notice dated August 27, 2015, the respondent informed the petitioner that it was seeking to discharge/transfer her from its facility because her needs could not be met in the facility. The petitioner timely requested a hearing on the matter. The notice was signed by the attending physician.

Present as a witnesses for the petitioner were [REDACTED] North Regional manager for Long Term Care Ombudsmen Council, and caretaker, [REDACTED]

Present as witnesses for the respondent were Lynda Hezel, LPN unit manager, Sharon Arsenault, social services coordinator, Michelle Yorio Greenier, director of admissions, Anne Guenther, vice president of operations and assistant administrator, and Linda Fitzpatrick, director of nursing.

Kelley Foster, Registered Nurse consultant, appeared by telephone as a witness for the Agency for Health Care Administration (AHCA).

A letter dated October 6, 2015 from the AHCA indicated that it found the facility in violation. This was entered as the Hearing Officer Exhibit I. The administrator requested for the undersigned to make note that there was a follow-up letter to the original letter from AHCA. The Respondent Exhibit 4 includes the follow-up letter from AHCA with a report of the status of the review completed regarding the correction of the deficiencies of the Nursing Home Transfer and Discharge Notice. The follow-up letter

states that the facility has corrected the deficiencies of the Nursing Home Transfer and Discharge Notice.

The AHCA representative explained that the facility failed to include location upon discharge of the facility and believes the notice was premature; AHCA opined that the facility would be required to complete another notice to allow the petitioner an additional 30 days notification. The plan of correction was accepted as the facility rehabilitated the Nursing Home Transfer and Discharge Notice by adding a discharge location.

The facility's administrator objected to the AHCA representative's opinion that an additional 30 days be given in this case. The undersigned concludes that an additional 30 days was not required in this case as the facility rehabilitated its notice and there appears to be no harm as petitioner remains in the facility.

A notice was provided to the petitioner and the petitioner's representative. Based on that notice the petitioner representative requested a hearing. Evidence was presented by both sides for the hearing officer to make a proper ruling on the case based on the evidence. The ombudsman argues that the Nursing Home Transfer and Discharge Notice was deficient and believes due to the deficiency, the hearing should not have taken place; he believes the petitioner was not allowed due process due to the deficient notice. The facility supplemented the Notice Home and Discharge Notice on October 21, 2015 with a location for the petitioner's discharge. Therefore, the hearing officer cannot conclude the petitioner was harmed by the notice not including the discharge location.

The record was held open until 5:00 p.m. on October 27, 2015 to allow the petitioner to submit additional evidence.

On October 27, 2015, the ombudsmen submitted the Notice of Supplemental Authority and requested for the undersigned to take judicial notice of a decision made by the administrative law judge (ALJ) in Docket No. 1293 A-211, Washington State Office of the Administrative Hearings for the Department of Social and Health Services. In this case, the ALJ ruled that the facility was able to meet the petitioner's needs and did not allow the discharge action sought by the facility. The ombudsman also requested for the undersigned to take judicial notice on a Final Order made under Appeal Number 11N-0024 from the Office of Appeal Hearings for the Department of Children and Families, in which the hearing officer concluded that the facility did not provide clear and convincing evidence that it could not meet the petitioner's needs. The undersigned concludes that the petitioner's situation in this case is similar to the residents' situations in the cases provided by the ombudsman. For this reason, Judicial Notice has been taken by the undersigned.

FINDINGS OF FACT

1. The petitioner, 88, has been a resident in the facility since May 2015 when she suffered a stroke. The petitioner was admitted as a short term rehabilitation patient until she was further assessed and admitted for long term care.

2. The respondent contends that its facility is unable to meet the petitioner's needs due to her attention-seeking behaviors; its medical director, Dr. Carames, recommended discharge and included explanation on the Nursing Home Transfer and

Discharge Notice which states, [REDACTED] exacerbated by environmental factors would benefit from a decreased sensory input environment, i.e. a small facility.”

Dr. Carames signed the discharge notice.

3. The facility’s management team concluded that the petitioner’s needs cannot be sufficiently met in the facility. The respondent contends that the petitioner has behavioral problems and the facility cannot provide the proper care to her. The facility’s administrator contends that the facility’s physician believes the petitioner needs a facility that is better able to handle the particular behavioral problems.

4. The facility’s business records included in Respondent Exhibits 2 and 3 contain entries dated between July 21, 2015 and October 19, 2015 documenting the petitioner’s attention seeking behaviors.

5. On July 21, 2015, the “Skilled Daily Nurses Note” reports that the petitioner was “sitting in hallway yelling and screaming...yelling for Xanax” and that the petitioner yelled, “I’ll cont to yell unless someone is stilling right here with me.” The notes state one on one was provided by a supervisor and the petitioner was quiet until the supervisor left; the notes state the petitioner began screaming again. The notes state the staff was unable to satisfy and that one-on-one supervision was provided by another staff member.

6. On July 25, 2015, the “Skilled Daily Nurses Note” reports that the petitioner was “up to wheelchair waiting to go to bed...pt was yelling “I want to go to bed now.” The notes also report that the petitioner cursed at the nurse administering her medication. The “Skilled Daily Nurses Note” entry dated July 27, 2015 include notes

stating the petitioner was in the dining room eating her lunch and yelled that the food was too stringy and refused to eat.

7. The respondent contends that the petitioner called 9-1-1 on October 19, 2015 to report that she did not have her call light (Respondent Exhibit 5). The respondent believes that the petitioner's attention seeking behaviors cause other residents to become agitated, especially when she yells in the dining room where other residents are trying to eat. The respondent contends that the petitioner's behavior causes other residents to no longer want to eat.

8. The respondent explained that prior to the discharge notice being issued, the interdisciplinary team met with the petitioner's family, and the petitioner's Medicaid case manager with United Healthcare and all agreed that the petitioner was not doing well in the current facility. The respondent believes the meeting concluded with all parties being in agreement that a new environment with new staff would be in the petitioner's best interest.

9. The facility's physician opines that the petitioner's stay at the current facility exacerbates her behavioral problems and is not conducive to the patient's care.

10. The facility contends that its staff has observed significant shifts in the petitioner's behavior; sometimes the petitioner is very cordial, charming and easy to get along with but can change rather rapidly into someone being very difficult. The respondent contends that the petitioner is sometimes not compliant with dietary orders which lead to a significant risk for choking.

11. The respondent referred to the page "Chart Documentation" included in the Respondent Exhibit 5, which indicates some of the behaviors displayed by the petitioner beginning on September 16, 2015 through October 18, 2015 taken directly from the "Nurses Notes" to indicate that the petitioner has extreme behavior problems.

12. The respondent believes that the petitioner's condition has deteriorated since the Discharge Notice has been issued. The respondent contends that others who normally do not get involved in the petitioner's care have assisted in her care. The respondent contends that the family seems to not be satisfied in the petitioner's care that has been provided. The respondent contends that it has also paid for one on one care but does not seem to make any difference.

13. The respondent believes petitioner has attention seeking behaviors which cause other residents in the facility to not receive the proper care. The respondent contends that the facility provided care to the petitioner but her behavior affects the care of others, as more attention is given to the petitioner and care is taken away from other residents. The respondent believes for the petitioner's needs to be met by this facility, the care to other residents will be negatively impacted. The respondent contends that its records indicate that there were 27 entries in one shift which shows the number of times staff tended to the petitioner's needs. The petitioner's care takes away from other patients and impacts the petitioner and others around her. The director of nursing contends that the staff tries to redirect the petitioner and remove her to a different location in order to appease the other residents, but it does not appear to improve the petitioner's behavior.

14. The respondent contends that the petitioner has not worked out in the facility and the facility cannot meet the petitioner's needs.

15. The ombudsman argues that the petitioner cannot be discharged for not working out in the facility, and that he believes the current facility can meet her needs.

16. The respondent explained that it cannot answer the petitioner's call light every three minutes. The respondent argues that its records indicate that the petitioner and her family requested for one on one to be removed because it invaded her privacy. The respondent contends that even with one on one, the petitioner's needs were not met because the petitioner was not satisfied with how the care was provided and was not satisfied with the staff member providing care; she would then ring the call button again with a staff member in the room with her.

17. The petitioner's son believes his mother's behavior is common and is also displayed in other patients residing in other facilities. The petitioner's son acknowledges that there have been bad feelings between his mother and the director of nursing and that his mother has been very vocal. The petitioner's son acknowledges his mother can be very difficult to deal with at time but believes she has made progress.

18. The petitioner's son believes the facility should work with his mother which will improve the quality of care the facility provides. The petitioner's son believes if his mother can play the piano for other residents and staff in the facility, she will have something to look forward to, which will cause an improvement in her behavior. The petitioner's son contends that his mother does get frustrated at times but is able to calm herself within minutes.

19. The petitioner's caretaker believes there is a barrier to communication between shifts because staff is not aware of the care to be provided to the petitioner. The petitioner's caretaker believes a behavior modification care plan was not established as recommended by the psychologist and it was agreed upon by all the members attending the meeting (consistency, give her rewards and not punishment, etc.).

20. The petitioner's caretaker contends that the psychologist recommended for the staff to give her rewards and not punishment. The petitioner's caretaker argues that the petitioner's dining room privilege was taken away from her and believes that is not the proper action for behavior modification. The petitioner's caretaker argues that the facility staff writes on the petitioner's chart the times when she has inappropriate behaviors; she believes that the petitioner's inappropriate behaviors should not be written on the chart on the wall since it upsets the petitioner.

21. The respondent acknowledges that there are other residents who exhibit similar behaviors as the petitioner's but believes the other residents are unaware of their behaviors. The respondent believes the petitioner is aware of what she says and does. The respondent points out that the petitioner's family has acknowledged the behavior issues and has asked the petitioner to behave herself.

22. The respondent also referred to an incident that happened in the dining room on September 16, 2015 when the petitioner removed her colostomy bag, which posed a safety risk to the other residents.

23. The petitioner's son acknowledges that the petitioner has removed her colostomy bag on occasion but that has not happened recently.

24. The ombudsman argues that the Nursing Home Transfer and Discharge Notice for the petitioner does not include, "the health and safety of other individuals in this facility is endangered" as a reason for discharge and should not be addressed.

25. The respondent contends that the documentation in the chart indicate that the petitioner stated on a few occasions that she did not want to reside in the facility but it fluctuates dependent on the day and the happenings. The director of nursing contends that the petitioner stated she is not happy at the current facility; she believes another type of staff may be able to understand her condition a little better. The respondent does not understand why the petitioner would want to stay at the facility if she is unhappy with the director of nursing and the other staff.

26. The petitioner's son explained that his mother was happy while residing in her home with an assisted living aide coming into her home three times a week but is now unable to do so after having a stroke. The petitioner's son believes, in general, no one wants to live in a nursing home and that his mother's statement that she does not want to reside in the facility is not to be taken personally by the facility.

27. The petitioner expressed during the hearing that she does not wish to leave the facility.

28. The respondent further explained that the petitioner is somewhat younger and higher functioning in some ways than some of the other residents. The discharge/new facility accepts patients from 53 and older and accepts patients with

behavioral disturbances and complex behaviors. The respondent believes that the petitioner and her family prefers a non-locked unit based on its records. The new facility does not have a locked unit and protects with a wander-guard system throughout the facility.

29. The respondent explained that the petitioner is not in a locked, certified dementia unit for elopement purposes; she is there because that's where an available bed was located for long term care. The respondent contends that the petitioner has been in the locked unit since her arrival in May 2015; long term unit is on the second floor and the short term rehabilitation is on the first floor. The petitioner would have to enter a code to leave the floor. The petitioner was initially admitted into the facility for short-term rehabilitative services but when she was assessed further, she was admitted for long term care as new medical conditions had arisen.

30. The petitioner expressed during the hearing that she likes living on the second floor.

31. The petitioner's son questions if another facility will be able to provide better care than the current facility is providing. The petitioner's son questioned if the new facility will be able to meet her needs with a lower health grade than the current facility. The petitioner's son believes it is not a good thing to remove the petitioner from the current facility away from her friends and support system.

32. The respondent believes the facility's duty is to also meet the emotional, and psychosocial needs and not only the medical needs of every patient. The facility's staff has concern for the psychological well-being of a resident when a patient expresses

dissatisfaction, frustration, and dislike in the majority of the staff members providing his or her care and questions if the facility is a good fit for the particular resident. The respondent was unable to answer the question as to whether or not the new facility would be able to meet the petitioner's needs and believes the petitioner would need to be placed in the new facility to know for sure.

CONCLUSIONS OF LAW

33. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to § 400.0255(15), Fla. Stat. In accordance with said authority, this order is the final administrative decision of the Department of Children and Families.

34. 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.

35. Florida Statute 400.0255 "Resident transfer or discharge; requirements and procedures; hearings.—" states in relevant part, "(7)(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; ..."

36. 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.

37. 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.

38. The respondent bears the burden of proof, by clear and convincing evidence, to show that the facility is unable to meet the petitioner's needs. The undersigned concludes that the respondent's position that the petitioner has an

excessive need for attention that cannot be met at its facility does not, in and of itself appear to meet the intent of the allowable discharge reasons in the Federal Regulations, specifically that a discharge is necessary due to the facility's inability to meet her needs. The federal regulation is clear the intent of a discharge under this stated reason is when the transfer or discharge is necessary for the resident's welfare **and** the resident's needs cannot be met in the facility.

39. Although the physician signed the Nursing Home Transfer and Discharge Notice indicating a smaller facility would resolve the issue, the respondent did not provide any evidence to show that another facility would be more suitable to meet the petitioner's needs (i.e., is there a smaller facility with a decreased input sensory environment that could improve one's behavior) or that the discharge is necessary for the resident's welfare. This is both a federal and state law requirement.

40. Based upon the evidence presented, the undersigned concludes that the nursing facility has failed to establish by clear and convincing evidence that the petitioner's needs cannot be met **and** the discharge is necessary for the petitioner's welfare. The undersigned concludes that the respondent's intent to discharge the petitioner from its facility is not consistent with the above controlling authorities.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Petitioner's appeal is granted. The facility has not established that discharge is permissible under federal or state regulations.

FINAL ORDER... (Cont.)

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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 04 day of December, 2015,

in Tallahassee, Florida.



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