

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

FILED

AUG 19 2009

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 09N-00100

PETITIONER,

Vs.

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing convened before the undersigned hearing officer on July 29, 2009, at 9:15 a.m., at the above facility, in Miami, Florida. The petitioner was present and represented herself.

_____, social services director, represented the respondent. Present as witnesses for the respondent were _____ assistant administrator, _____ director of nursing and _____, assistant director of nursing.

ISSUE

At issue is whether or not the action by the facility to discharge the petitioner from _____ is correct. The nursing home has the burden of proof to establish that the discharge action is consistent with the federal regulations.

FINDINGS OF FACT

1. The petitioner is a resident of _____
She entered the facility on November 2, 2005. She is residing at the facility pending the outcome of this appeal.
2. On June 3, 2009, the facility issued a Nursing Home Transfer and Discharge Notice to the petitioner. The discharge notice indicated that the facility was proposing to discharge the petitioner. The reasons cited were that the health of other individuals in this facility was endangered and that the safety of other individuals in this facility was endangered. (Respondent's Exhibit 1)
3. The respondent submitted copies of Nurse's Notes and Social Progress Notes from the petitioner's medical records, which were read into the record by the respondent's representative.
4. According to the notes the petitioner has aggressive behavior and outbursts to other residents. The outbursts have ranged from yelling, screaming and touching other residents. The notes indicate the petitioner is very demanding and verbally abusive to the facility staff. These notes outline incidents of violation of the facility's cigarette smoking policies. According to the notes, on June 1, 2009, the petitioner gave her roommate food, violating facility rules that prohibit residents to feed other residents. The respondent notes that the petitioner could have killed her roommate as this patient is in bed feeding and should not take food by mouth.

5. The respondent did not provide any clinical records from any physician to support the allegations and the facility's position.

6. All witnesses for the facility, present at the hearing, acknowledged that none of them were verbally abused by the petitioner, but maintained that all incidents were accurately recorded in the Nurse's Notes and Social Progress Notes.

7. The facility moved the petitioner recently to another room in the second floor where she has shown better behavior. The facility is looking for an assisted living facility (ALF) convenient to the petitioner to discharge her.

8. The petitioner's alleges that she did not know that she could not feed other residents. She explains that she gave her roommate a peanut butter and jelly sandwich because she was hungry, crying and begging for food. The petitioner believes that she saved her roommate's life. Additionally, the petitioner denies that she is verbally abusive to anyone in this facility. The petitioner also denies that she has touched any other residents. She purports that she gets along with everybody and has not been in trouble before.

CONCLUSIONS OF LAW

Jurisdiction to conduct this type of hearing is conveyed to the Department by federal regulations appearing in 42 C.F.R. § 431.200. Additionally, federal regulations limit the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient.

Federal regulations at 42 C.F.R. § 483.12 states in part:

(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.

The respondent's reasons for discharging the petitioner are "the health of other individuals in this facility is endangered and the safety of other individuals in this facility is endangered." These are two of the reasons given in the above federal law to permit discharge from a facility.

The respondent argues the petitioner has displayed problem behaviors to include outbursts to other residents and verbal abuse to facility staff. The respondent also argues that the petitioner has violated facility rules that prohibit the residents to feed other residents in the facility.

It is noted that these behaviors are not acceptable and need correction.

Florida Statutes 400.0255 (7)(b) requires the resident's physician or medical director to document why the petitioner's stay at the facility would endanger the safety of other individuals at the facility, as follows:

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.

There is no evidence that the petitioner's physician or the facility's medical director recommended a discharge of the petitioner for the reasons given. The Nurse's Notes and Social Progress Notes were read into the record by someone other than the author and could not be cross-examined; therefore, it was considered hearsay evidence. The undersigned cannot rely solely on hearsay when rendering a decision. Without testimony from her physician or documentation from the clinical record by her physician, the undersigned is not able to find that the discharge is consistent with the federal regulations.

DECISION

The appeal is granted. The respondent facility is not permitted to discharge the petitioner pursuant to this discharge action under appeal.

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

FINAL ORDER (Cont.)

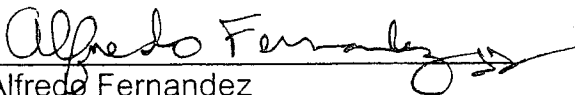
09N-00100

PAGE - 6

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 19th day of August 2009,

in Tallahassee, Florida.


Alfredo Fernandez
Hearing Officer
Building 5, Room 255
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Tallahassee, FL 32399-0700
850-488-1429

Copies Furnished To