

FILED

JAN 14 2010

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

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

APPEAL NO. 09N-00166

PETITIONER,

Vs.

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned-hearing officer on December 3, 2009, at 10:20 a.m., at the facility. The petitioner was present and represented by _____ certified ombudsman for the _____

_____ Ombudsman Council. Present as witnesses for the petitioner were _____ District Ombudsman Manager for the _____ Ombudsman Council; _____ petitioner's mother and _____, petitioner's father. The respondent was represented by _____, facility Administrator. Present as witnesses for the respondent were _____, facility Director of Nursing and _____ facility Social Services Director. Present observing was _____ Ombudsman Council.

The record was held open for 14 days to allow the respondent to submit additional evidence and to allow both parties the opportunity to submit proposed orders.

No additional evidence was received from the respondent. A proposed order was received from the petitioner's representative.

ISSUE

At issue is whether or not the action by the facility to discharge the petitioner, on the basis that the facility cannot meet the needs of the petitioner, is correct.

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.

FINDINGS OF FACT

1. The petitioner has been a resident at the facility on multiple occasions beginning October 7, 2004 with a most recent re-admission date of June 3, 2009. The petitioner is a quadriplegic. He requires total care. The petitioner cannot perform any of the activities of daily living and requires skilled nursing services.

2. At the end of July 2009, a staff member observed a small amount of marijuana in the petitioner's room. This substance was confiscated. A police report was filed. This circumstance initiated the facility's plans to transfer the resident to another nursing facility. The charges resulting from the police report against the petitioner were dismissed by the Assistant State Attorney.

3. On August 7, 2009, additional items were added to the care plan for the petitioner, reflecting the facility's plan to address the concerns associated with substance abuse. The petitioner was not present during this care plan meeting and was not aware of the addition to his care plan until the discharge hearing.

4. On August 19, 2009, facility staff met with the petitioner's physician to discuss the concerns related to the marijuana incident. On August 21, 2009, the petitioner's

physician submitted a written order to start discharge planning for transfer to Williston Nursing. The physician's order does not indicate that the facility can no longer meet the petitioner's needs or that the safety of other individuals is endangered by the petitioner's behavior. The facility's director of nursing believes that the physician will write the final order for discharge when the petitioner has been approved for discharge.

5. The respondent, by Nursing Home Transfer and Discharge Notice dated October 1, 2009, notified the petitioner of its intent to discharge him, effective November 1, 2009, because the petitioner's needs could not be met by the facility. The notice listed an explanation for the discharge which stated, "On July 29, 2009...was found to have a small amount of marijuana in his room. This behavior cannot be tolerated and the narcotic does present a danger to self and others." The facility's administrator believed that the facility could not meet the needs of the petitioner because of the marijuana possession.

6. Director of nursing believed that the facility has been able to care for the petitioner's needs since the event, that no further incidents have occurred and that the facility has been able to provide the services that the petitioner requires.

7. The Nursing Home Transfer and Discharge Notice dated October 1, 2009 listed , Tampa, Florida as the location to which the petitioner was to be discharged.

CONCLUSIONS OF LAW

Jurisdiction to conduct this type of hearing is conveyed to the Department by federal regulations. 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 that 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 and 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.

Florida Statutes 400.0255, Resident transfer or discharge; requirements and procedures; hearings, states in relevant part:

(3) 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...

(15)(b) The department shall, by rule, establish procedures to be used for fair hearings requested by residents. These procedures shall be equivalent to the procedures used for fair hearings for other Medicaid cases, chapter 10-2, part VI, Florida Administrative Code. The burden of proof must be clear and convincing evidence..

The findings show that the respondent indicated on the notice of discharge that the reason for the discharge was that the petitioner's needs could not be met by the facility. Testimony received showed that the facility has been able to care for the petitioner's needs and that the facility has been able to provide the services that the petitioner requires. There was no evidence presented by the respondent that showed that the facility could no longer meet the petitioner's needs.

In the explanation paragraph of the notice of discharge, the respondent stated that the petitioner's actions are a danger to himself and others. There was no evidence presented that showed how the petitioner's behavior endangered other individuals in the facility. Additionally, there was no documentation from the petitioner's medical records that was presented by the respondent that showed that the petitioner's behavior endangered other individuals in the facility.

The petitioner's physician submitted a written order to start discharge planning for transfer to The order does not explain how the petitioner's behavior would justify the discharge based on either the facility not being able to meet the petitioner's needs or that the safety of other individuals is endangered. Additionally, there was no testimony received from the petitioner's physician.

According to the above authorities, the respondent's burden of proof must be clear and convincing evidence. Based solely on the facts as presented in this case, the hearing officer cannot conclude that the petitioner's needs cannot be met by the facility or that the safety of other individuals in the facility is endangered. Therefore, it is determined that the respondent did not meet its burden and the respondent's action to discharge the petitioner is not justified. The petitioner is to be allowed to remain at the nursing facility.

DECISION

The appeal is granted. The respondent may not proceed with the proposed discharge.

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.

FINAL ORDER (Cont.)

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DONE and ORDERED this 14th day of January, 2010,

in Tallahassee, Florida.



Morris Zamboca

Hearing Officer

Building 5, Room 255

1317 Winewood Boulevard

Tallahassee, FL 32399-0700

850-488-1429

Copies Furnished To

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