

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

[REDACTED]

APPEAL NO. 11N-00076

Petitioner,

vs.

FILED

SEP 12, 2011

Administrator

[REDACTED]

OFFICE OF APPEAL HEARINGS
DEPARTMENT OF CHILDREN AND FAMILIES

Respondent.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on July 27, 2011, at 9:00 a.m., at [REDACTED] in [REDACTED], Florida.

APPEARANCES

For the Petitioner: [REDACTED], Petitioner's wife

For the Respondent: [REDACTED], Facility Administrator

ISSUE

Respondent has the burden of proof to show by clear and convincing evidence that Petitioner's discharge by notice dated March 31, 2011 is in accordance with the requirements of Code of Federal Regulation at 42 C.F.R. § 483.12(a)(2)(iii): "The safety of individuals in the facility is endangered".

PRELIMINARY STATEMENT

By notice dated March 31, 2011, Respondent informed the petitioner that he was to be discharged because “[t]he safety of other individuals in this facility is endangered”. (Respondent’s Exhibit 1 at 1). On April 4, 2011, the Office of Appeal Hearings timely received a request for a hearing to challenge Respondent’s discharge of Petitioner.

Present on behalf of petitioner was [REDACTED] Ombudsman and [REDACTED] Ombudsman. Present on behalf of Respondent was [REDACTED], Director of Nursing for the facility. Petitioner submitted Petitioner’s Exhibits 1, 2 and 3 into evidence. Respondent submitted Respondent’s Exhibits 1, 2 and 3 into evidence.

FINDINGS OF FACT

1. Petitioner was a patient of [REDACTED] (Respondent or Administrator) in [REDACTED], Florida until April 6, 2011, when patient was transferred via Baker Act to [REDACTED], Florida. Petitioner remains at the [REDACTED] as of the date of the hearing.

2. On a Nursing Home Transfer and Discharge Notice dated March 31, 2011, Respondent informed Petitioner of its intent to discharge Petitioner. Respondent explained its action by stating “[r]esident has physically assaulted staff members while they were attempting to provide care. Overpowered a nurse and took the needle from her and attempted to stick her. Also punched a CAN in the abdomen. Resident is at risk of injury to self + others.” (Respondent’s Exhibit 1 at 1). The discharge notice was signed by [REDACTED], Nursing Home Administrator, and included a Physician’s Order dated March 31, 2011. In the March 31, 2011 order, [REDACTED] stated, “Begin d/c

planning r/t Resident physically assaulting staff members + is at risk of injury to self + others.” (Respondent’s Exhibit 2 at 1).

3. [REDACTED], Director of Nursing, testimony included the following incidents based on Petitioner’s file:

March 23, 2011	Petitioner fell twice on two separate occasions.
March 26, 2011	Petitioner took needle from a nurse and Petitioner attempted to stab nurse with it.
March 27, 2011	Petitioner punched a CNA in the stomach and Petitioner fell down on a separate occasion.
March 28, 2011	Petitioner was combative toward staff while staff was attempting to provide care.
March 29, 2011	[REDACTED] Orders Petitioner be Baker Acted to [REDACTED].
March 30, 2011	Petitioner returns to Respondent’s facility
March 31, 2011	Discharge Notice issued and discharge meeting with petitioner.
April 3, 2011	Petitioner fell.
April 5, 2011	Petitioner grabbed nurses shirt and ripped it open while nurse attempting to care for Petitioner.
April 6, 2011	Petitioner was combative and sat on the floor refusing to allow staff to assist Petitioner up.
April 6, 2011	Dr. [REDACTED] Orders Petitioner be Baker Acted a second time to [REDACTED].

4. [REDACTED] testified before the Sherriff’s Department arrived to remove petitioner from the facility, she was attempting to provide incontinent care to petitioner when he kicked her in the stomach. [REDACTED] describes petitioner as an aggressive and strong man.

5. Petitioner submitted a psychological evaluation by [REDACTED], dated July 12, 2011, which identifies petitioner as a 52-year old male who suffered a stroke which was compounded by diabetes and alcohol abuse resulting in physical and cognitive residuals. (Petitioner’s Exhibit 3 at 1-4). [REDACTED] concludes that Petitioner does not have schizophreniform thought disorder, major affective disorder, or

dementia. [REDACTED] further concludes that although petitioner has physical limitations and needs and displays labile moods and volatile temperament, petitioner “does not presently evince any realistic manifest dangerousness to himself or others, or such global inability to make reasonable decisions on his own behalf, as would meet Florida statutory criteria mandating extended confinement to a full-time inpatient hospital environment”. (Petitioner’s Exhibit 3 at 4). [REDACTED] recommends petitioner be placed in his local community at a nursing home or under family care.

6. Petitioner argues that based on [REDACTED] evaluation and petitioner’s current state, petitioner is no longer aggressive, if he ever was, and desires an opportunity to receive rehabilitation. Petitioner argues that [REDACTED] evaluation shows petitioner is not a danger to himself or others and that a discharge should be denied.

7. After the second Baker Act of petitioner on April 6, 2011, [REDACTED] testified that she called [REDACTED] twice to inform [REDACTED] of her opportunity to pay \$235 to hold petitioner bed for him to return to respondent’s facility upon discharge from the Baker Act facility. [REDACTED] testified [REDACTED] said she would contact [REDACTED] after considering her options; however [REDACTED] testified she never received a call back from [REDACTED]. [REDACTED] testified that petitioner’s bed was then filled by another patient and no other beds are available at this time for petitioner. [REDACTED] further testified that respondent’s bed hold policy was signed by petitioner upon admission. (Petitioner’s Exhibit 1 at 1).

8. Petitioner argues that the Bed Notice and Authorization document, explaining the bed hold policy, was never received by petitioner as required by Federal

Regulations and therefore the transfer should be deemed invalid, and petitioner should be readmitted to the facility.

9. Petitioner also argues that the discharge plan of care was insufficient because it listed petitioner's wife's house as the location of discharge. Petitioner argues it is clear petitioner needs assistance and supervision which cannot be given by petitioner's wife. Therefore the notice is insufficient.

10. Respondent argues that the discharge plan of care was sufficient because the patient was consulted and [REDACTED] was given an opportunity to participate, however she chose not to. Respondent argues that petitioner asked to be discharged to his home with his wife and respondent agreed to his request. Respondent argues it had no reason to seek any other placement because petitioner is a competent adult.

CONCLUSIONS OF LAW

11. Federal regulations limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, Petitioner was sent notice indicating that he would be discharged from the facility in accordance with of Code of Federal Regulation at 42 C.F.R. § 483.12(a)(2)(iii): "The safety of individuals in the facility is endangered".

12. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

13. In accordance with Florida Administrative Code § 65-2.060(1) the burden of proof was assigned to Respondent.

14. 42 C.F.R. § 483.12 Admission, transfer, and discharge rights states in part:

(a) Transfer and discharge—

(1) *Definition*: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

(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—

...

(iii) The safety of individuals in the facility is endangered;

...

(3) *Documentation*. When the facility transfers or discharges a resident under any of the circumstances specific in paragraphs (a)(2)(1) 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)(1) 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.

(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.

(6) *Contents of the notice*. The written notice specified in paragraph (a)(4) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement that the resident has the right to appeal the action to the State;

(v) The name, address and telephone number of the State long term care ombudsman....

15. Florida Statutes § 400.0255, Resident transfer or discharge; requirements

and procedures; hearings, states in part:

(1) As used in this section, the term:

(a) "Discharge" means to move a resident to a noninstitutional setting when the releasing facility ceases to be responsible for the resident's care.

(b) "Transfer" means to move a resident from the facility to another legally responsible institutional setting.

...

(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.

(8) The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer. Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. In addition to any other pertinent information included, the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action.

...

(10)(a) A resident is entitled to a fair hearing to challenge a facility's proposed transfer or discharge. The resident, or the resident's legal representative or designee, may request a hearing at any time within 90 days after the resident's receipt of the facility's notice of the proposed discharge or transfer.

(b) If a resident requests a hearing within 10 days after receiving the notice from the facility, the request shall stay the proposed transfer or discharge pending a hearing decision. The facility may not take action, and the resident may remain in the facility, until the outcome of the initial fair hearing, which must be completed within 90 days after receipt of a request for a fair hearing.

(c) If the resident fails to request a hearing within 10 days after receipt of the facility notice of the proposed discharge or transfer, the facility may

transfer or discharge the resident after 30 days from the date the resident received the notice.

(11) Notwithstanding paragraph (10)(b), an emergency discharge or transfer may be implemented as necessary pursuant to state or federal law during the period of time after the notice is given and before the time a hearing decision is rendered. Notice of an emergency discharge or transfer to the resident, the resident's legal guardian or representative, and the local ombudsman council if requested pursuant to subsection (9) must be by telephone or in person. This notice shall be given before the transfer, if possible, or as soon thereafter as practicable. A local ombudsman council conducting a review under this subsection shall do so within 24 hours after receipt of the request. The resident's file must be documented to show who was contacted, whether the contact was by telephone or in person, and the date and time of the contact. If the notice is not given in writing, written notice meeting the requirements of subsection (8) must be given the next working day.

...

(c) If the hearing decision is favorable to the resident who has been transferred or discharged, the resident must be readmitted to the facility's first available bed.

(d) The decision of the hearing officer shall be final. Any aggrieved party may appeal the decision to the district court of appeal in the appellate district where the facility is located. Review procedures shall be conducted in accordance with the Florida Rules of Appellate Procedure...

16. The sole issue before the undersigned is the discharge of petitioner from respondent's facility based on the March 31, 2011 discharge notice under 42. C.F.R. § 483.12(a)(2)(iii). The validity of the April 6, 2011 Baker Act transfer from respondent's facility to [REDACTED] is not at issue in the instant appeal because no evidence was presented by either party of the issuance of a notice of transfer or the lack thereof. Fla. Stat. § 400.0255(10)(a), grants appeals rights when requests for appeal are made at any time within 90 days of receipt of a transfer or discharge notice that was issued by the facility. Therefore, the undersigned cannot establish jurisdiction at this time of the said transfer because no evidence was presented as to whether a notice was issued or

not issued, or if the transfer was made under the emergency discharge or transfer under (11).

17. According to the above authority, an appeal must be made within 90 days that the transfer notice was received. The only appeal request received by the undersigned was based on the discharge notice dated March 31, 2011. Since the appeal request was received on April 4, 2011, the undersigned concludes that the discharge hearing was timely requested and therefore has jurisdiction over the respondent's discharge of petitioner. Therefore, the undersigned will continue with the discharge analysis based on 42 C.F.R. § 483.12(a)(2)(iii) and Fla. Stat. § 400.0255(7)(b).

18. Respondent's position is that petitioner has shown numerous incidents of aggression and hostility and is therefore a danger to himself and others. Respondent argues that [REDACTED] evaluation of petitioner is that he is a danger to himself and others based on his past conduct and aggressive nature and therefore discharge is proper.

19. Petitioner's position is that petitioner has never been known to be a hostile person and that if he was a danger at one time, he is no longer. Petitioner argues that [REDACTED] evaluation of petitioner shows he is not a danger to himself or others.

20. The undersigned concludes that the evidence shows petitioner was harmful to himself and others on several occasions and that the safety of other individuals in the facility is endangered.

21. Although [REDACTED] evaluation did conclude petitioner does not manifest dangerousness to himself or others, the evidence and testimony taken at the

hearing does not support this conclusion. Additionally, [REDACTED] recognizes that petitioner has “labile moods and volatile temperament”. Therefore, the undersigned assigns more credit to the opinion of [REDACTED], the facility’s treating Physician, as it relates to the discharge issue under challenge.

22. Petitioner also argues that the place of discharge is insufficient because it listed an inappropriate discharge location. The Agency for Health Care Administration determines the appropriateness of the discharge location, and is outside the undersigned’s jurisdiction. Therefore no conclusion is made on the appropriateness of discharge location in this Order.

23. Based on the evidence presented, the nursing facility has established that the safety of other individuals is endangered. This is one of six reasons provided in federal regulation (42 C.F.R. § 483.12) for which a nursing facility may involuntarily discharge a resident.

24. 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.

25. 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.

DECISION

The appeal is denied because respondent's action to discharge the petitioner is in accordance with Federal Regulations. Respondent's discharge from the facility must comply with the treating physician's order and in accordance with applicable Agency for Health Care Administration requirements.

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 _____ day of _____, 2011,
in Tallahassee, Florida.

Nathan Koch
Hearing Officer
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Copies Furnished To: [REDACTED], Petitioner
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