

Feb 15, 2016

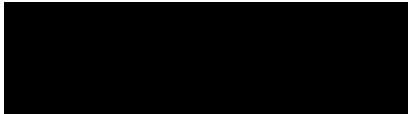
STATE OF FLORIDA  
DEPARTMENT OF CHILDREN AND FAMILIES  
OFFICE OF APPEAL HEARINGSOffice of Appeal Hearings  
Dept. of Children and Families

APPEAL NO. 15N-00103


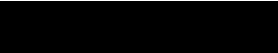
PETITIONER,

Vs.

ADMINISTRATOR

RESPONDENT.  
\_\_\_\_\_/**FINAL ORDER**

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on December 17, 2015 at 10:10 a.m. in Pensacola, Florida

**APPEARANCES**For the Petitioner:  OmbudsmanFor the Respondent:  Facility Administrator**STATEMENT OF ISSUE**

At issue is whether the facility's intent to discharge the petitioner due to inability to meet his needs in the facility based on Federal Regulations found at 42 C.F.R. § 483.12 is correct. A Nursing Home Transfer and Discharge Notice was issued on October 20, 2015. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate.

**PRELIMINARY STATEMENT**

The petitioner's children, [REDACTED] son, [REDACTED] daughter, and [REDACTED] daughter, appeared as witnesses for the petitioner. [REDACTED] Risk Manager, and [REDACTED] Director of Nursing appeared as witnesses for the facility.

[REDACTED] state ombudsman, and Greg Watson, hearing officer, appeared as observers with no objection from either party.

Agency for HealthCare Administration (AHCA) submitted a letter on November 30, 2015 informing the undersigned an unannounced visit was made to the facility by AHCA staff on November 12, 2015. AHCA staff did not note any violation of laws or rules found during the visit to the facility.

The ombudsman requested the undersigned take judicial notice of a decision made by the administrative law judge (ALJ) in Docket No. 1293 A-211, Washington State Office of 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 the undersigned to take judicial notice of Final Orders 11N-00024 and 15N-00088 issued by the Office of Appeal Hearings for the Department of Children and Families, in which the hearing officers 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.

As the facility's attorney was not able to be present at the hearing, the undersigned allowed the record to remain open through January 11, 2016 for submission of Proposed Final Orders from both parties. The hearing recording was distributed to both the ombudsman and the facility's attorney on December 28, 2015.

### **FINDINGS OF FACT**

1. The petitioner was admitted to this facility in May 8, 2015. Upon admission to the facility, the respondent acknowledged the petitioner has cognitive deficits and a diagnosis of [REDACTED]. The petitioner has difficulty walking and has abnormalities in his gait and mobility. The petitioner's family is unable to care for him at home.

2. The respondent contends that its facility is unable to meet the petitioner's needs due to his risk of falls unless he is receiving one-on-one care. The respondent explained one-on-one care is not a service routinely provided by the facility.

3. The respondent issued a Nursing Home Transfer and Discharge Notice to the petitioner on October 20, 2015 citing "Your needs cannot be met in this facility" as the reason for discharge. The notice also indicated, "Requiring one-on-one care due to physical risks."

4. The respondent documented the petitioner's care plan on May 11, 2015 the petitioner is at risk for further falls due to problems with gait and balance. The note also shows the petitioner has a history of falls prior to admission to this facility.

(Respondent Exhibit 1, page 2)

5. In August 2015, the petitioner's falls became more frequent with six per month documented for August, September and October 2015. (Respondent Exhibit 2)

One of the falls resulted in a trip to the emergency room for hip pain evaluation. Two of the falls resulted in skin tears.

6. The petitioner's son described the petitioner as enjoying walking as an activity throughout his lifetime. However, due to the petitioner's declining physical abilities, he now requires assistance when walking. The son explained that due to his [REDACTED] and [REDACTED] the petitioner does not understand that he cannot just get up and walk when he wants. The son does not believe his father understands he has a risk for falling now when he walks and he needs to wait for assistance.

7. The respondent has attempted multiple interventions to attempt to prevent the petitioner from falling. The interventions included non-skid footwear; replacing the Velcro belt with a clip belt; alternate bed placement; fall mat usage; 30-minute checks, door alarm to bathroom, environmental changes, wheelchair alarm, placed by nurses station for monitoring, high back reclining wheelchair with anti-roll backs to wheelchair and one-on-one care. These are documented in the petitioner's care plan.

8. The respondent explained the intervention of 30-minute checks on the petitioner was successful, but falls occurred when the 30-minute check order expired.

9. The respondent began using one-on-one care only with the petitioner on October 18, 2015. The respondent did not document any falls occurring after the one-on-one care began.

10. Although the petitioner's physician signed the Transfer and Discharge Notice, no supporting documentation from the petitioner's medical record or testimony of the physician was offered to explain why the physician believed the petitioner's needs could not be met in the facility.

11. The respondent confirmed that at the time of the AHCA inspection, the petitioner was on one-on-one care, he did not have any falls, and all of his needs were being met.

12. The respondent explained they meet the staffing needs in accordance with standards set by the state.

13. The respondent explained one-on-one care is not a service the facility provides long term as it takes staff away from caring for other residents.

14. The respondent has other one-on-one care residents in the facility. The respondent explained these residents have the one-on-one care provided privately, as they or their family pays for the companion or caregiver. If the petitioner's family chose to provide a companion or one-on-one caregiver, the respondent would allow the petitioner to remain in the facility.

15. The petitioner's family expressed satisfaction in the care the petitioner receives in the facility. They further expressed concern for his welfare should he be discharged as they all work and are not home full time to care for their father.

16. The respondent was unable to answer the question of how the petitioner's discharge to a family member's home would meet his needs.

#### **CONCLUSIONS OF LAW**

17. 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.

18. 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.

19. Florida Statutes § 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;"

20. The facility issued a discharge notice based on its belief that the petitioner's needs could not be met in the facility. This is one of the six reasons provided in federal regulation (42 C.F.R. § 483.12) for which a nursing facility may involuntarily discharge a resident.

21. 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.

22. 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.

23. 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's need for one-on-one care 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 his 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.

24. Federal Regulations 42 C.F.R. § 483.25 "Quality of Care" states in relevant part:

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and plan of care.

...

(h) Accidents. The facility must ensure that—

(1) The resident environment remains as free of accident hazards as is possible; and

(2) Each resident receives **adequate supervision** and assistance devices to prevent accidents. (emphasis added)

25. The respondent demonstrated the ability to meet the petitioner's needs in the facility by providing one-on-one care. The respondent also demonstrated the ability to meet the petitioner's needs while the petitioner was on a "30-minute check order", but falls happened before the order was given and once the order expired. The above controlling authority requires the respondent to provide the necessary care and services for the residents they serve. Although the respondent reported one-on-one care is not a service the facility provides, this does not exempt the respondent from the federal requirement to provide the care or service when it is necessary so that adequate supervision is provided to prevent accidents.

26. Although the physician signed the Nursing Home Transfer and Discharge Notice, the respondent did not provide any evidence to show that the discharge was necessary for his welfare. This is both a federal and state requirement.

27. Based upon the evidence presented, the undersigned concludes 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 on the above Findings of Fact and Conclusions of Law, the appeal is granted. The facility has not established that this discharge is permissible under federal or state regulations.

**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 15 day of February, 2016,  
in Tallahassee, Florida.



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Melissa Roedel  
Hearing Officer  
Building 5, Room 255  
1317 Winewood Boulevard  
Tallahassee, FL 32399-0700  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED] Petitioner  
[REDACTED] Respondent  
Ms. Donna Heiberg  
Agency for Health Care Administration  
[REDACTED]