

Involuntary Discharges of LTC Residents: Best Practices for Facilities



Craig Conley

Memphis, Tennessee

901.577.2290

cconley@bakerdonelson.com

Involuntary Discharge Process: Overview

1. Pre-Discharge

- obtain written order of physician and document reason for transfer or discharge in resident's clinical record
- provide notice to resident, family, and/or legal representative(s)
- prepare summary of treatment and other documentation for accepting facility (if applicable)

2. Discharge

- orientation for transfer or discharge
- with resident's consent, transfer clinical record to accepting facility (if applicable)

3. Appeals Process

- resident may appeal within 30 days
- resident remains at facility until conclusion of appeal
- Administrative Law Judge (ALJ) must render decision within 90 days (unless extended)

Before Transfer or Discharge: Best Practices

- Establish and maintain written policies and procedures for admission, transfer and discharge
- Make certain that whoever is involved in the transfer or discharge process is well-versed in what is required by the rules and regulations
- Document any and all incidents of violent or erratic behavior by residents, especially over an extended period of time
- Get physician and/or NP involved in the process well in advance of transfer or discharge

Case Study

- Resident – 55-year-old admitted to facility on 10/17/2017
- Resident – fully oriented, quadriplegic, schizophrenia and borderline personality disorder
- Throughout residency – resident verbally abused staff and threatened their job security
- Referred resident to facility's psychiatric counselor – refused

Case Study (continued)

- Administrator warned resident on multiple occasions that continued behavior could result in discharge
- Despite warnings – behavior continued
- On 2/1/2018 – facility issued 30-day notice of discharge to another facility in same geographic area
- On 2/14/2018 – resident appealed

Case Study (continued)

- Involuntary Discharge Appeal hearing – 5/7/2018
- Final Administrative Order – 5/17/2018
- Petition for Stay and Reconsideration – 5/24/2018
- Order Denying Petition – 5/25/2018
- Discharged – 5/25/2018

Before Transfer or Discharge: Best Practices

4/11/2018 11:24 AM	4/11/2018 11:29 AM	True	Behavior Note	Late entry for 4-10-2018 At 545pm I was at the 500/600 hall nurses station filing Mr. [redacted] was at the desk and Stated "Friday is going to be a beautiful day " I asked what do you mean Mr. [redacted] stated " That he won't be here for his hearing". I asked why he wasn't going to be present for his hearing, Mr. [redacted] stated he didn't have to be that he was going out with his Beyonce to Red Lobster and I said ok. I went and reported the conversation to administrator.
4/11/2018 10:54 AM	4/11/2018 11:00 AM	False	Health Status Note	RESIDENT WAS MOBILIZING PAST THE NURSING OFFICE AS THIS NURSE WAS WALKING INTO OFFICE AND STATED "ITS ABOUT TO GET HAIRY AROUND HERE I JUST GOT OFF A HEARING CALL WITH MY ATTORNEY" THIS NURSE DID NOT MAKE RESPONSE AND CONTINUED INTO OFFICE. WHEN I WALKED BACK OUT INTO HALL RESIDENT REPLIED IM LEAVING HERE AND THIS NURSE RESPONDED "ARE YOU GOING OUT FOR THE DAY?" AND HE RESPONDED "YES AND IM NOT COMING BACK, IM LEAVING TODAY, TOMORROW AND FRIDAY". THIS NURSE RESPONDED "HAVE A GOOD TIME AND BE CAREFUL".
4/11/2018 10:56 AM	4/11/2018 10:58 AM	True	Behavior Note	WHILE I WAS DOING MY MED PASS RESIDENT CAME DOWN THE HALL AND BECAME VERBAL TELLING ME I HAD BETTER GET ME LAWYER THAT I WAS GOING TO NEED ONE .

Before Transfer or Discharge: Best Practices (continued)

4/13/2018 8:46 AM	4/13/2018 8:52 AM	True	Behavior Note
			RESIDENT CAME TO NURSING OFFICE DOOR AND STATED "LET ME MAKE SOMETHING CLEAR TO YOU AND YOUR STAFF, NOONE IS GOING TO TELL ME WHAT TO DO WHEN I AM OUTSIDE THIS FACILITY, I AM OVER THE AGE OF 21. I DONT DO DRUGS, YOU CAN DRUG TEST ME ANYTIME". THIS NURSE STATED IT IS NOT DRUGS I WAS CONCERNED WITH, IT WAS ALCOHOL AND HIM RETURNING TO A HEALTHCARE FACILITY UNDER THE INFLUENCE OF ETOH AND DRIVING AROUND IN AN ELECTRIC WHEELCHAIR, THAT IT WAS A SAFETY CONCERN TO HIM AND OTHER RESIDENTS". RESIDENT STATED THAT I WAS "TARGETING HIM. THIS NURSE STATED THAT I "WAS ONLY INFORMING HIM HE COULD NOT RETURN TO A HEALTHCARE FACILITY INEBRIATED. HE AGAIN STATED THAT WAS "TARGETING AND DROVE HIS WHEELCHAIR AWAY.

What they did right:

- included specific details about resident's behavior
 - after incident, get statements from staff members ASAP
- consistently documented events over time
 - longstanding "paper trail" on resident's behavior → easier to demonstrate grounds for involuntary transfer/discharge

Determination for Involuntary Transfer or Discharge

Permissible reasons for involuntary transfer/discharge:

1. Necessary to meet resident's welfare and needs cannot be met
 - the resident's physician must document reason in clinical record
 - if transferring to hospital, **must** provide notice of "bed-hold" policy
 - cannot be a pretext to transfer resident and then refuse to readmit him/her
2. Resident's health has improved sufficiently for discharge
 - resident's physician must document reason in clinical record
3. Safety of individuals in facility endangered
4. Health of individuals in facility endangered
 - any physician may document reason
5. Failure, after reasonable and appropriate notice, to pay for care
6. Facility ceases to operate

Must document reason for involuntary transfer or discharge in the resident's clinical record

Determination for Involuntary Transfer or Discharge **(continued)**

Other **considerations** for involuntary transfer/discharge:

1. Traumatic effect on the resident
2. Proximity of accepting facility to current facility, and to resident's family and friends
3. Availability of necessary medical and social services at the accepting facility
4. Compliance by accepting facility with all applicable federal and state regulations

Other **requirements** for involuntary transfer/discharge:

1. Orientation: provide sufficient preparation and orientation to ensure safe and orderly transfer/discharge from facility
2. provide summary of treatment and resident's clinical record to accepting facility, if transferring
 1. Must obtain consent of resident or resident's legal representative

Notice of Transfer or Discharge

Must give resident, next of kin, and/or legal representative written notice **at least** 30 days before involuntary transfer or discharge.

- Exceptions: Give notice as soon as is **practicable** when...
 - Resident poses a danger to safety and/or health of resident or others
 - Resident's health improves sufficiently to allow discharge sooner
 - Resident's medical needs require more urgent transfer or discharge
 - Resident has resided in facility for less than 30 days

Must send a copy of the notice to State LTC Ombudsman and other agencies.

Notice of Transfer or Discharge (continued)

Notice of Transfer or Discharge must include:

1. Reason(s) for involuntary transfer or discharge
2. Effective date of transfer or discharge
3. Location to which the resident will be transferred or discharged
4. Notice of resident's right to appeal
5. Name, mailing address, and telephone number of:
 - i. State LTC ombudsman, and
 - ii. Agencies responsible for mentally ill or developmentally disabled persons, if appropriate

Example Notice of Transfer or Discharge

Nursing Facility Notice of Transfer or Discharge

Refer to 42 CFR 483.12. This form is required for those transfers or discharges initiated by the nursing facility, and not by the resident, legal guardian or representative.

Resident Information	
Name _____	Medicaid ID (if applicable) _____
Resident Representative (if applicable)	
Name _____	Address _____
Phone _____	
Location to which resident is transferred or discharged (required)	
Name <u>MANOR</u>	Address _____
Phone _____	

Nursing Facility Information	
Name <u>CAL</u>	Address _____
Phone _____	Facility Contact Name _____ Contact Phone _____

Notice Information	
Date notice is given <u>2/1/18</u>	Date of Transfer/Discharge <u>3/5/18</u>
The transfer/discharge date must be at least 30 days after the date the notice is given unless an exception applies. The resident may choose to move earlier than the effective date.	

Example Notice of Transfer or Discharge

(continued)

Reason for discharge or transfer:

- Your bill for services at this facility has not been paid after you received notice and time to pay.
- This facility is closing.

For the following reasons, page 2 of this form must be signed by a physician, or a physician's written order for discharge or transfer must be attached. The physician may be the resident's attending or treating physician, the facility medical director, or a nurse practitioner or physician's assistant as a designee to one of the aforementioned.

- Your needs cannot be met in this facility.
- Your health has improved enough that you no longer need the services provided by this facility.
- The health of other individuals in this facility is endangered.
- The safety of other individuals in this facility is endangered.

You must provide a brief explanation to support this action (attach additional documentation if necessary):

(Administrator)
has stated to me on numerous occasions that he has a strong personality as he references his past bad SNF experiences. He has on multiple occasions called staff "hillbillies" and incompetent. He has made inappropriate sexual comments to staff while receiving showers. He has stated that there are some direct care staff that are not to give him care but then will complain that TennCare LTSS dev. 09/2014 they should give him care. (After the staff member is reassigned) Per staff; he has threatened their job on multiple occasions while giving him care. We have rearranged staffing schedules and assignments to meet his wants however he is still not satisfied.

Example Notice of Transfer or Discharge (continued)

The nursing home must tell you why they want you to move. Here is what they said:

You Can Get Help

You can appeal this. The State will have a hearing for your case. Also, you can get help with your appeal. See below. If you ask, the nursing home must help you with this. Talk to the Nursing Home Contact Person on the first page. And the nursing home must help you call the people below.

You Can Appeal

You can appeal if you don't agree with the nursing home. You have 30 days to appeal. The 30 days starts on the day you got this page. If you appeal within 30 days, the nursing home usually cannot make you move until you get a decision. But, if you do not appeal within 30 days, you must move by the proposed date on the first page.

How to Appeal

If you want to appeal, call **1-866-797-9469**. This is a free call. Or fax your appeal to 615-734-5317. Or email cd.appeals.tennCare@tn.gov. Or write to TennCare's Office of General Counsel, ATTN: Involuntary NF Discharge Appeals, 310 Great Circle Road, Nashville, TN 37243. Make sure to send a copy of these pages.

Example Notice of Transfer or Discharge (continued)

Long-Term Care Ombudsman

You can ask someone at the State to help you. This person is the Long-Term Care Ombudsman. They can explain this page to you. They can also help you appeal. Call **1-877-236-0013**. This is a free call. Or email lauren.mecker@tn.gov. Or write to them at 502 Deaderick Street, Andrew Jackson Building, 9th Floor, Nashville, TN 37243-0860.

TennCare Advocacy Program

Do you have a mental illness? And do you need help with the nursing home? The TennCare Advocacy Program can help you. Call **1-800-758-1638**. This is a free call. Or email TennCareAdvocacy@tnca.com. Or write to them at 310 Great Circle Road, Nashville, TN 37243.

Department of Intellectual and Developmental Disabilities

Do you have an intellectual or developmental disability? And do you need help with the nursing home? The Department of Intellectual and Developmental Disabilities can help you. Call **1-800-535-9725**. This is a free call. Or email Carmelita.Hillsman@tn.gov. Or write to them at 400 Deaderick Street, Citizen's Plaza State Office Building, Nashville, TN 37243.

I gave these completed pages to the resident:

Nursing Home Administrator/Designee Name

Signature

Date

2/1/18

Physician/Designee Name (When Required)

Signature

Date

2/1/18

Example Notice of Transfer or Discharge (continued)

me refused to sign or accept documents
 I received these pages:

Resident or Representative Name	Signature	Date
Notice given to:		
Resident	<i>[Signature]</i>	2/1/18 (Date)
Resident's Representative	<i>[Signature]</i>	(Date)
Resident Clinical Record	<i>[Signature]</i>	2/1/18 (Date)
Local LTC Ombudsman	<i>[Signature]</i>	2/2/18 (Date)
State LTC Ombudsman	<i>[Signature]</i>	2/2/18 (Date)
HCFA Commissioner's Designee	<i>[Signature]</i>	2/2/18 (Date)

To the Nursing Home: Send these pages to the HCFA Commissioner's Designee, the State LTC Ombudsman, and the Local LTC Ombudsman at:

Tennessee Department of Health Care Finance and Administration
 Office of General Counsel
 ATTN: Involuntary Discharge Appeals- NF
 310 Great Circle Road- 3W
 Nashville, TN 37243
 Telephone: 866-797-9469
 Fax: 615-734-5317
 Email: cd.appeals.tennicare@tn.gov

State Long-Term Care Ombudsman
 Tennessee Commission on Aging and Disability
 ATTN: Involuntary Discharge Appeals- NF
 502 Deaderick Street, 9th Floor
 Nashville, TN 37243-0860
 Tel: 615-837-5112
 Fax: 615-741-3309
 Email: lauren.meeker@tn.gov

Contact information for each Local LTC Ombudsman is at
<https://www.tn.gov/aging/topic/district-long-term-care-ombudsman>.

Appeal of Involuntary Transfer or Discharge – Process

- Resident has 30 days to submit an appeal
- Facility **cannot** transfer/discharge resident until process is complete unless failure to do so endangers health or safety
- Facility must be represented by an attorney
- Hearing on appeal is held before Commissioner's Designee from the Department of Finance & Administration and an ALJ
- Commissioner's Designee must render judgment on appeal within 90 days of the hearing

Appeal of Involuntary Transfer or Discharge – Process (continued)

Resident's common/potential arguments on appeal:

- For involuntary transfer/discharge due to inability to meet resident needs
 - argue that facility is attempting to "dump" difficult resident on hospital ER
- For involuntary transfer/discharge of dangerous resident
 - argue against necessity of transfer/discharge
 - argue that facility failed in its obligation to provide care necessary to maintain highest practicable physical/mental/psychosocial well-being of resident
- For involuntary transfer/discharge based on failure to pay
 - argue that facility did not provide resident with adequate time to pay

Record-keeping (e.g., resident's clinical record, incident reports from staff) is vital because burden of proof by a preponderance of the evidence lies with the facility

Appeal of Involuntary Transfer or Discharge – Hearing

- Hearing is either held in person at the facility before the Commissioner's Designee and ALJ or via telephone
- Opening statement presented by both sides
- Facility presents its case first by calling witnesses (live or by affidavit) and presenting proof
- The resident presents his/her proof
- Closing arguments presented by both sides

Appeal of Involuntary Transfer or Discharge – Hearing (continued)

5. I am aware of the planned discharge of Mr. _____ from _____
and am of the opinion that the planned discharge will not pose a threat to

Mr. _____

SWORN TO AND SUBSCRIBED before me this 26 day of April, 2018.

Notary Public

My Commission Expires:

Apr. 17, 2019

Appeal of Involuntary Transfer or Discharge Final Administrative Order

**BEFORE THE COMMISSIONER OF THE TENNESSEE
DEPARTMENT OF FINANCE & ADMINISTRATION**

IN THE MATTER OF:

Petitioner,

v.

Respondent.

)
)
) **NURSING FACILITY**
) **INVOLUNTARY DISCHARGE**
) **APPEAL**
)
)
)
)
)

FINAL ADMINISTRATIVE ORDER

This contested administrative proceeding was heard telephonically on May 7, 2018, before Administrative Judge Elizabeth Cambron, assigned by the Secretary of State, Administrative Procedures Division, and Audrey Dorrough Seamon, sitting for the Commissioner of the Tennessee Department of Finance and Administration.¹

Appeal of Involuntary Transfer or Discharge Final Administrative Order (continued)

CONCLUSION

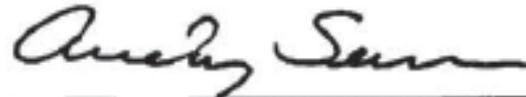
Based on the foregoing, _____ has proven by a preponderance of the evidence that Respondent's transfer or discharge is necessary for his welfare and Respondent's needs cannot be met at _____ and the health of individuals in the facility would otherwise be endangered if Respondent were to remain at _____.

It is, therefore, **DETERMINED** that _____ may proceed with the involuntary discharge, after suitable discharge planning has been conducted. Should Respondent not cooperate with discharge planning, _____ may independently make the necessary arrangements to transfer or discharge Respondent to a suitable location in accordance with TENN. COMP. R. & REGS. 1200-13-01-.06(2)(d)(5), governing regulations and the findings contained

Appeal of Involuntary Transfer or Discharge Final Administrative Order (continued)

herein. Accordingly, in light of the foregoing, it is hereby **ORDERED** that _____ may discharge Respondent, consistent with the requirements in this Order.

This Final Administrative Order is entered and effective this 18th day of May, 2018.



AUDREY DORROUGH SEAMON
Commissioner's Designee
Division of TennCare

Process After Final Administrative Order

- Either party may file a Petition for Reconsideration within 15 days after entry of the Final Order
- Either party may submit a Petition for Stay of Final Order within 7 days after entry of the Final Order
- The aggrieved party may seek judicial review by filing a Petition in the Chancery Court for Davidson County within 60 days after entry of the Final Order

Involuntary Transfers or Discharges

Final Takeaways

- Develop, maintain, and adhere to facility policies in compliance with federal and state regulations
- Communicate with the resident, resident's family, and/or legal representative
- Maintain accurate records of any events or erratic behavior by resident
- Document everything in resident's clinical record

Involuntary Transfers or Discharges

Final Takeaways

- Provide timely and proper notice of involuntary transfer or discharge
- Be prepared to support determination with a paper trail
- Secure a safe and orderly discharge plan



Questions?

