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APR 01 2010

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

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

APPEAL NO. 10N-00013

PETITIONER,

Vs.

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on March 2, 2010, at 2:30 p.m., in Destin, Florida. The petitioner was present and was represented by _____, District Ombudsman Manager, _____ Long-Term Care Ombudsman Council (LTCOC). The respondent was represented by _____, executive director,

The hearing record was held open for 14 days or until March 16, 2010 to allow for the submission of proposed orders. The undersigned received a proposed order from the petitioner's representative and the record was closed.

ISSUE

At issue is the facility's action of January 13, 2010, intending to discharge the petitioner because the safety of other individuals in the facility is endangered.

The respondent will have the burden to prove by clear and convincing evidence that the petitioner's discharge is in accordance with the requirements of the Code of Federal Regulations at 42 C.F.R. §483.12(a) and Section 400.0255, Florida Statutes (2009).

FINDINGS OF FACT

1. The petitioner submitted into evidence Exhibit #1, a copy of the Nursing Home Transfer and Discharge (AHCA Form 3120-0002 Revised May '01) signed by the Respondent and Petitioner on January 13, 2010. A copy was transmitted to the Long-Term Care Ombudsman Council. The notice listed the "Date Notice is given" as January 13, 2009 and the "Effective Date" of discharge as January 13, 2009. The "Location to which the resident was to be transferred or discharged (required):" was left blank with no entry. The original Transfer and Discharge Notice, section entitled, "Brief explanation to support this action," was also left blank with no entry. The space reserved for the Physician/Designee Name, signature, and date were left blank with no entry.
2. The respondent submitted into evidence Respondent's Exhibit 1, a rehabilitated Nursing Home Transfer and Discharge Notice which was signed

by the Respondent and Petitioner on January 13, 2010 and signed by the physician on January 27, 2010. The respondent indicated that the physician was not available to sign the Nursing Home Transfer notice as he was out of town. In addition to the physician's signature two weeks after the original notice, the document inserted a brief explanation to support this action as follows:

Violation of facility smoking policy – Resident has been asked to smoke only @ designated smoking times w/facility supervision in accordance w/policy & has agreed to adhere to smoking policy, but has violated policy by smoking w/out supervision & not turning in smoking items.

The respondent acknowledged that a copy of the rehabilitated Notice of Transfer and Discharge was not provided to the petitioner and the Long-Term Ombudsman Council.

3. The petitioner, who is a smoker, was admitted to the nursing facility on May 20, 2008. At that time of his admission, the facility permitted its residents to smoke. The facility changed its policy regarding smoking and became a non-smoking facility sometime around July 9, 2008. New residents were informed of the no smoking status and current smokers were "grandfathered" in with the following restrictions: (1) Smokers could only smoke in designated smoking areas. (2) Smoking was permitted at designated times, and (3) Smokers were permitted to maintain smoking paraphernalia in a designated box near the C-wing nurses' station. The Respondent stated that smoking

residents were informed that the facility would assist them in complying with the new policy by providing them with nicotine patches or other cessation aids or helping them relocate to another facility that did not have a non-smoking policy. There was a note in the petitioner's Social Service Progress Notes dated July 9, 2008 indicating that the petitioner had been informed of the new smoking policy. The facility's executive director was to send a copy of the new smoking policy to the petitioner. The Respondent was unable to produce a copy of a document detailing the specifics of the smoking policy at that time.

4. A revised smoking policy dated March 16, 2009 was submitted into evidence outlining in part:

"Those residents who smoke and resided in facility prior to the facility's non-smoking date of 3/16/09 are permitted to maintain smoking paraphernalia in designated smoking box located at C-wing nurses' station and to smoke in designated facility smoking area at designated facility smoking times of:

7:00am to 7:20 am
9:00am to 9:20 am
11:00am to 11:20am
1:00pm to 1:20pm
3:00pm to 3:20pm
5:00pm to 5:20pm
7:00pm to 7:20pm
9:00pm to 9:20pm

The revised policy was not made a part of the resident's record, but rather a copy of the smoking schedule was placed in each smoking resident's room.

5. The Respondent indicated there was a "three times and you're out" rule in that a resident is given three opportunities to comply with the smoking policy.

There was no evidence to document the existence of such a rule or that the resident was aware of this rule. The Respondent contends the petitioner violated the smoking policy by smoking in the designated area at times other than those posted and further alleged that the petitioner retained possession of smoking material, specifically a lighter which she has been unable to find or remove from the petitioner. There were allegations that the petitioner repeatedly violated the smoking policy. The violations were not routinely documented and there was only one documented violation occurring on July 26, 2009, wherein the petitioner took a pack of cigarettes from the "smoking box" located at the nursing station and then went to the designated smoking area.

6. The respondent stated that she was not concerned with the petitioner's use of the lighter as much as with her concern that other non-cognizant residents might wander into the petitioner's room and find the lighter, thereby creating a potential danger to the residents of the facility.
7. The petitioner testified that he greatly enjoys his smoke breaks and the fellowship he has with other residents as well as staff during the smoking breaks. He acknowledged that he likes to smoke at 6 a.m. but the staff is not available to accommodate his desire to smoke at that particular hour. In addition, the petitioner argued that there have been occasions when the staff is unavailable to supervise the smokers as outlined in their smoking schedule.

8. The Respondent stated that of the 115 current residents, four are smokers who are "grandfathered" in under the current smoking policy and that all of these smoking residents are required to be supervised according to the policy in force.
9. Finally, the respondent indicated that efforts to find another suitable placement for the petitioner have been unsuccessful in that the petitioner does not wish to go to a "sister" facility that permits smoking and that efforts to find suitable living arrangements, such as the Pavilion were terminated once the ombudsman became involved.

CONCLUSIONS OF LAW

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

Federal regulations at Title 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.

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

The respondent argues the petitioner has violated facility rules that permit the residents who are "grandfathered" in to smoke in designated smoking areas at designated smoking times and who are required to surrender the smoking paraphernalia to be kept in a "smoker's box" at the end of the smoking period. It is noted that the smoking policy was put into place as a measure to ensure that residents of the facility are kept safe from potential fire hazards or accidents and to accommodate the few remaining residents who were previously allowed to smoke before the facility changed to a non-smoking facility.

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:

- (3) When a discharge or transfer is initiated by the nursing home, the nursing home administrator employed by the nursing home that is discharging or transferring the resident, or an individual employed by the nursing home who is designated by the nursing home administrator to act

on behalf of the administration, must sign the notice of discharge or transfer. 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.

The Respondent argued that the petitioner violated the smoking policy on numerous occasions and that there was a "three times and you're out" policy. There is no evidence that such a policy exists or that the petitioner was aware of the existence of such a policy. The Nurse's Notes and Social Progress Notes were provided by the executive director and read into the record. The only evidence provided that the petitioner violated a smoking policy was recorded on July 26, 2009. Further, if there is indeed a three strike policy in place, there was no documentation to show that the petitioner continued to willfully disregard the policy or that he was in possession of smoking paraphernalia as suspected by the facility.

Based on the evidence and testimony, the undersigned is not able to conclude by clear and convincing evidence that the discharge of the petitioner for the reason of the safety of other individuals in the facility is endangered, is correct. Therefore, the discharge action cannot be affirmed.

DECISION

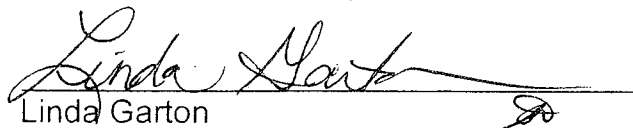
The appeal is granted. The respondent facility is not permitted to discharge the petitioner pursuant to this discharge action under appeal.

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 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 18th day of April, 2010,

in Tallahassee, Florida.



Linda Garton
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
850-488-1429

FINAL ORDER (Cont.)

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