

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

[REDACTED]

APPEAL NO. 11N-00199

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned at 2:21 p.m. on January 17, 2012, at the [REDACTED] Nursing Home in [REDACTED] Florida.

APPEARANCES

For the Petitioner: [REDACTED] wife to the petitioner.

For the Respondent: [REDACTED] administrator.

ISSUE

At issue is whether discharge intent was correct based on the needs cannot be met in this facility, which is a non-smoking facility. 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 (a) and Section 400.0255, Florida Statutes (2010).

PRELIMINARY STATEMENT

By notice dated November 2, 2011, the respondent informed the petitioner that it was seeking to discharge/transfer him from its facility because his needs could not be met in the facility, which is a non-smoking facility.

On November 15, 2011, the petitioner timely requested a hearing on the matter and continues to reside at the facility pending the outcome of the hearing.

The petitioner did not wish to be present for the hearing. Present as a witness for the petitioner was [REDACTED], Long Term Care Ombudsmen Council.

Present as witnesses for the respondent were [REDACTED], social services, [REDACTED], social worker, and [REDACTED] admissions coordinator.

The admissions contract notates that the facility participates in the Medicare and Medicaid Programs as a service to residents, therefore, the undersigned has jurisdiction in this appeal.

A letter dated January 5, 2012 from the Agency for Health Care Administration (AHCA) was sent to the undersigned and it stated that the representative(s) did not find the facility in violation of any laws or rules. This was entered as Hearing Officer Exhibit 1.

FINDINGS OF FACT

1. The petitioner has resided at the facility since May 2011 due to dementia. Upon admission to the facility, petitioner was required to show that he had not been smoking. The petitioner has been smoking cigarettes, both on and off the property.

2. On November 2, 2011, the facility issued the petitioner a Nursing Home Transfer and Discharge Notice (AHCA Form 3120-002 Revised May '01) advising him that the effective date of the transfer was December 2, 2011. The reasons cited were "Your needs cannot be met in this facility" with a handwritten notation that the facility is a non-smoking facility. The location to which resident is transferred or discharged is notated as "Facility of Resident choice w/appropriate discharge planning by discharging facility social services. Facility to allow cigarettes." The section of the Notice entitled, "Brief explanation to support this action, (attach additional documentation if necessary)" states that the "Resident desires to smoke and current facility is smoke and tobacco free, therefore we are unable to meet resident needs."

3. The Notice was signed by the Administrator on November 2, 2011. The petitioner did not sign the notice. The Nursing Home Transfer and Discharge Notice was not signed by a physician and there was no physician's written order attached (Respondent Exhibit 1).

4. It is the respondent's testimony that the facility is a smoke and tobacco-free facility. The respondent issued the discharge based on the petitioner's needs not being able to be met at the facility as it is a non-smoking facility. The respondent submitted

the State of Florida Department of Veterans' Affairs Standards and Procedures which states:

The Florida Department of Veteran Affairs (FDVA) is dedicated to maintaining a safe living environment for our Nursing Home.....While FDVA already prohibits smoking inside its buildings, the end state is to have all FDVA campuses tobacco/smoke free....
Electronic Cigarette, Vapor Producing devices or Non-Lit smoking devices are all considered smoking in this standard. All references to smoking in this standard include these devices.

5. The social progress notes dated August 22, 2011 indicates that the "Resident does have hx of attempting to buy cigarettes when on facility outing. Family along with resident have been informed of non-smoking policy several times upon admission and since being admitted". On December 20, 2011, the social progress notes states, "This writer witnessed resident trying to purchase cigarettes at outing at Walmart today." On January 13, 2012, the social progress notes state that the petitioner was trying to borrow a lighter from one of his housekeepers on Wednesday. The housekeeper reported the incident to her supervisor.

6. The respondent submitted nurses' notes dated October 25, 2011 at 16:15 which states "Resident entered café and opened VA café door to leave. Housekeeping found him before he went outside. This nurse and social services walked resident back on floor. Resident verbalized, "I need to smoke" and says, "I smoke all the time early in the morning when it's still dark-there's plenty of places to smoke around here." Nurses' notes dated October 25, 2011 18:50 states, "This nurse found resident standing by planter in courtyard smoking a cigarette/cigar. I asked resident to put cigarette out and this nurse notified supervisor." Nurses' notes dated October which states, "Resident

has tried several times to leave facility through the front door. This nurse has spoke with resident every time this occurred. Resident explained that he just wanted to smoke and if he had to leave from here he would..." Petitioner's wife was notified.

7. On October 28, 2011, the nurses' notes indicate that petitioner was "Advised that his wife will be bringing an electronic cigarette that he will be allowed to use if out on the back porch of House 400. He has signed an agreement stating he will not attempt to leave the building and will use electronic cigarette out on porch." However, it is the respondent's testimony that the use of the electronic cigarette is considered to be smoking and is not allowed at the facility. The petitioner's wife argues that the petitioner would not be able to smoke if another resident had not supplied him with the cigarettes. The respondent did not produce documentation in the resident's medical records by the resident's physician or medical director that the petitioner's needs cannot be met by the facility due to its non-smoking policy.

8. Petitioner's witness argues that the discharge notice is inadequate as the facility failed to correctly notate the reason for its intent to discharge by stating the discharge reason was due to "Your needs cannot be met in this facility" and failed to include the discharge location on the notice. The respondent corrected the discharge location after the discharge notice was mailed and intends to discharge the petitioner to its sister facility, [REDACTED] which is a smoking facility located in [REDACTED] Florida.

CONCLUSIONS OF LAW

9. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to s. 400.0255(15), Fla. Stat. In accordance with that section this order is the final administrative decision of the Department of Children and Families.

10. Florida Statute 400.0255, Resident transfer or discharge; requirement and procedures; hearing.--, informs at (15) (b) that the burden of proof must be clear and convincing evidence.

11. 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 and requirements of the controlling authorities have been met.

12. Federal regulations limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In the instant case, the respondent proposes to discharge the petitioner due to his needs cannot be met by facility due to its non-smoking policy.

13. Federal regulations at 42 C.F.R. § 483.12 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--

(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.

(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.

(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.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (a)(6) of this section.

(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.

(ii) Notice may be made as soon as practicable before transfer or discharge when--

(A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (a)(2)(iv) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a)(2)(ii) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a)(2)(i) of this section; or

(E) A resident has not resided in the facility for 30 days.

(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;

(vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; and

(vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(7) Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. (emphasis added)

14. The above cited authorities set forth the conditions which must exist for a nursing home to involuntarily discharge a resident.

15. 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 circumstance, 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 resident's health or safety or 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. (emphasis added)

16. The respondent's reason for discharge is "Your needs cannot be met in this facility." This is one of the reasons given in the above federal law to permit discharge from a facility. According to the above authorities, this discharge reason would require documentation from the resident's physician.

17. The respondent argues that the petitioner repeatedly violated the facility's non-smoking policy prior to the transfer and discharge notice being issued. The petitioner and petitioner's wife were aware of the non-smoking policy. Petitioner's wife was informed that smoking electric cigarettes were considered to be smoking and were not permitted.

18. After review of the entire record as well as the controlling authorities, the undersigned concludes that the resident's clinical record must be documented by the resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) (which is the resident's needs cannot be met). Both federal and state statutes require this. Therefore, the undersigned concludes that the respondent did not meet its burden and the respondent's action to discharge the petitioner cannot be affirmed.

DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the appeal is granted. The respondent 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 _____ day of _____, 2012,
in Tallahassee, Florida.

Paula Ali
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal_Hearings@dcf.state.fl.us

Copies Furnished To: [REDACTED] Petitioner
[REDACTED] Respondent
Agency for Health Care Administration
[REDACTED]