

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

FILED

JAN 13 2015

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

[REDACTED]

APPEAL NO. 14N-00153

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned on December 11, 2014 at 10:24 a.m. at the [REDACTED] [REDACTED] in Jacksonville, Florida.

APPEARANCES

For the Petitioner: The petitioner was present and represented herself.

For the Respondent: [REDACTED] facility 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 October 15, 2014, the respondent informed the petitioner that it was seeking to discharge/transfer her from its facility because her needs could not be met in the facility, which is a non-smoking facility.

On October 15, 2014, the petitioner timely requested a hearing on the matter and continues to reside at the facility pending the outcome of the hearing.

Present as a witness for the respondent was [REDACTED] Director of Social Services.

A letter dated November 14, 2014 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 October 2013. Upon admission to the facility, petitioner was required to review and sign the admission agreement, which includes its "no-smoking policy".

2. The Respondent Exhibit 2 includes the "Admission Agreement", which states the "no-smoking policy" is a condition of admission; the facility will not accommodate smokers. The "Admission Agreement" states: "...If the Customer is found to have smoking materials or **paraphernalia of any kind** on the property or inside the Center, discharge will be initiated..." There are no designated smoking areas outside of the

property. The petitioner signed the "Admission Agreement" upon her admission on October 21, 2013.

3. On or around July 14, 2014, the social services director observed the petitioner crawling on her hands and knees on floor to retrieve cigarettes located underneath her dresser. The petitioner gave the cigarettes to the social services director. The "Multidisciplinary Note" entry indicates that the social services director discussed the incident with the petitioner and informed her that if she were caught smoking again, she would be asked to transfer to another facility. Petitioner agreed not to smoke again (Respondent Exhibit 2, page 2).

4. On August 30, 2014, the medical director counseled the petitioner to quit smoking and "offered her available smoking cessation aids including nicotine patches, etc." (Respondent Exhibit 2, page 3).

5. The "Multidisciplinary Note" dated September 2, 2014 states that the petitioner was smoking a cigarette off of the center's property. The petitioner returned to the facility when she was reminded of its "no-smoking policy". The team members counseled the petitioner on her violation of the non-smoking policy and explored alternate facilities for her discharge location. The petitioner gave the team members the cigarette and lighter that she had in her possession (Respondent Exhibit 2, page 4).

6. The petitioner acknowledges that she was aware of the facility's no-smoking policy upon her admission into the facility. The petitioner also acknowledges that she was in possession of the smoking paraphernalia. She contends she did not plan on

smoking when she was admitted and has not smoked since the last incident in September 2014.

7. The facility is concerned for the safety of the other residents; therefore, its residents are not allowed to possess smoking materials on its premises. The facility determined that petitioner's needs cannot be met by the facility.

CONCLUSIONS OF LAW

8. 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.

9. 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.

10. 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.

11. 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 her needs cannot be met by facility due to its non-smoking policy.

12. 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)

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

14. 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 (emphasis added)

(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.

15. 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. The petitioner's attending physician signed the discharge notice and offered her advice on how to quit smoking, as documented in a letter written by the facility's medical director.

16. The petitioner was aware of the non-smoking policy. After review of the entire record as well as the controlling authorities, the undersigned concludes that the nursing facility has correctly established that the needs of the petitioner cannot be met at the facility. This is included as one of the reasons provided in federal regulation (42 C.F.R. § 483.12) for which a nursing facility may involuntarily discharge a resident.

17. 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

Based upon the forgoing Findings of Fact and Conclusions, the appeal is denied and the facility may proceed with its proposed discharge in accordance with the Agency for Health Care Administration's rules and 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.

FINAL ORDER (Cont.)

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DONE and ORDERED this 13th day of January, 2015,

in Tallahassee, Florida.



Paula Ali

Hearing Officer

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 Respondent

Mr. Robert Dickson, AHCA