

FILED

Jan 13, 2016

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 15N-00101

PETITIONER,

Vs.

Administrator

[REDACTED]

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned at 2:24 p.m. on December 9, 2015, at the [REDACTED] [REDACTED] Florida.

APPEARANCES

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

For the Respondent: [REDACTED] facility administrator.

ISSUE

At issue is whether discharge intent was correct based on the safety of other individuals in the facility is endangered. The facility allows smoking in designated areas at the designated times. 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.

PRELIMINARY STATEMENT

By notice dated October 21, 2015, the respondent informed the petitioner that it was seeking to discharge/transfer him from its facility because safety of other individuals in the facility is endangered. The petitioner timely requested a hearing on the matter and continues to reside at the facility pending the outcome of the hearing. The notice was signed by the attending physician.

Present as witnesses for the respondent were [REDACTED] unit manager, and [REDACTED] social services assistant.

A letter dated December 3, 2015 from the Agency for Health Care Administration (AHCA) indicated that AHCA 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 2013. The petitioner was given a copy of the "Resident Smoking Policy" which states: "It is against Daytona Beach and Health and Rehabilitation Center's policy to have cigarettes or smoking materials in resident's room or on resident's person." There is a designated smoking area at the facility.

2. The "Resident Smoking Policy" instructed of the designated smoking area and the allowable smoking times. The policy also stated that cigarettes and smoking materials are to be given to the nurse for safe-keeping. The smoking policy was signed by the petitioner on April 16, 2015. The Facility Smoking Policy (Effective October 1,

2010) states under the heading "Process", subtitle 1, Resident Smoking, paragraph two: "Any resident that fails to comply will be addressed with the Administrator and Social Services Director and documented in your medical record. Repeat incidences will result in a 30 day notice of discharge for non-compliance. There will be one warning given and 30 day notice of discharge will be issued after second incident of non-compliance."

3. The facility's records indicate periods when the petitioner was observed smoking at non-designated times. The Departmental Notes dated April 20, 2015 state: "This writer went to the smoking area to do supervise smoking with the resident's and this resident was already out smoking at a non-smoking time..." The Notes dated June 23, 2015 state: "This writer went to see this resident who was outside smoking at a non-smoking time, this resident was reeducated on the smoking policy..."

4. The Departmental Notes dated October 21, 2015 reports:

Unit Manager came to this writer and reported that resident was smoking in his room. Upon entering his room, resident had oxygen on via nasal canula and the smell of smoke was prevalent. Resident denied smoking, upon observation a Altoids tin was noted in resident lap, when I touched it with my hand it was very hot to touch. Upon opening, 2 ½ cigarettes with 1 lighter was noted and ½ time size of marijuana. Resident had just put cigarette out in the tin...Complete room check done, findings: 2 knives, scissors, 2 packs of cigarettes, additional lighter, clorax spray, pliers and aerosol air freshner...Will offer nicotine patch for resident use...

5. The Departmental Notes continued on October 21, 2015 states: "This writer offered resident nicotine patch. Resident stated he does not want a nicotine patch. MD notified of incident. New order given to d/c resident to son."

6. On October 21, 2015, the facility issued a Nursing Home Transfer and Discharge Notice advising petitioner that the effective date of the transfer was

November 20, 2015. The reason cited was, "The safety of other individuals in this facility is endangered." The facility included on the notice the explanation that the petitioner was "witnessed smoking in his room with his oxygen on nasal canula" and that this act endangered the safety of other individuals in the facility.

7. The Notice was signed by the Administrator on October 21, 2015. The petitioner also signed the Notice on October 21, 2015. The Nursing Home Transfer and Discharge Notice was signed by the petitioner's physician, [REDACTED]. Respondent Exhibit 2 includes Physicians Orders List signed by the petitioner's physician, [REDACTED] on October 21, 2015 which states: "Resident to be discharged to [REDACTED] (son)..."

8. The petitioner acknowledges that he was aware that he cannot have smoking materials in his room; he admits to having smoking materials in his possession in his room. The petitioner denies smoking in his room or smoking outside of the designated hours.

9. The respondent contends that its records indicate that the petitioner continued to have in his possession materials, such as bleach, knives, and illegal drugs (Respondent Exhibit 2). The respondent also contends that the petitioner endangered his safety and the safety of other individuals in the facility by having unauthorized smoking materials in his room and by smoking around an oxygen tank.

10. Due to disputed, relevant findings of whether petitioner smoked in his room, the undersigned must make the finding. Petitioner admitted to having smoking materials in his room and petitioner was aware this was against the facility's policy. The

facility offered its documented notes and testimony of petitioner having smoking materials in his room and the reasons supporting the belief that petitioner smoked in his room while wearing oxygen. The undersigned finds it persuasive that petitioner did in fact, smoke in his room.

CONCLUSIONS OF LAW

11. 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.

12. 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.

13. 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.

14. 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.

15. 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 the safety of other individuals in the facility is endangered as he is not complying with the smoking policy.

16. 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)

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

18. 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.

19. The respondent's reason for discharge is "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. According to the above controlling statute, this discharge reason would require documentation from the resident's physician. The petitioner's attending physician signed the discharge notice and provided a statement on his recommendation.

20. The petitioner was aware of the smoking policy. He admits having smoking materials in his room. The findings also show petitioner smoked in his room. This certainly could have lead to very serious safety consequences for everyone in the building. After review of the entire record as well as the controlling authorities, the undersigned concludes that the nursing facility has established that the safety of other individuals in the facility was endangered. The physician agreed and signed the applicable discharge document. The undersigned concludes the respondent has properly issued the 30 day advance discharge notice.

21. 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.

DONE and ORDERED this 13 day of January, 2016,
in Tallahassee, Florida.



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Copies Furnished To: [REDACTED] Petitioner
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Mr. Robert Dickson, AHCA