

May 22, 2018

Office of Appeal Hearings
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 18N-00017

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on April 12, 2018, at 9:56 a.m., at [REDACTED]

[REDACTED]

APPEARANCES

For the Petitioner: Janet Palomino

For the Respondent: Nashika Ogilvie, Nursing Home Administrator (NHA)

ISSUE

Federal regulations limit the reasons for which a Medicaid or Medicare certified nursing home may discharge a patient. At issue is whether or not the nursing home's action to transfer and discharge the petitioner is an appropriate action based on the federal regulations at 42 C. F. R. § 483.15. The nursing home is seeking to transfer and discharge the petitioner because: (1) her needs cannot be met in this facility and (2) the

safety of other individuals in this facility is endangered. The burden of proof is clear and convincing evidence and is assigned to the facility.

The only issue before the hearing officer is whether the discharge was in accordance with federal regulations. Any issues concerning petitioner's allegations of improper protocol of the facility staff, or treatment the petitioner received while residing at the facility are not within the jurisdiction of the hearing officer.

PRELIMINARY STATEMENT

By Nursing Home Transfer and Discharge Notice, dated January 29, 2018, the respondent informed the petitioner that she was to be discharged from the facility effective February 28, 2018. On February 22, 2018, the petitioner timely requested an appeal to challenge the respondent's action.

[REDACTED]

[REDACTED] Administrator in Training, appeared as witnesses for the respondent.

During the hearing, the petitioner did not present any exhibits. The respondent introduced seven exhibits which were accepted into evidence. The record was left open for an additional 15 minutes for the respondent to submit copies of some of the evidence to the undersigned. The evidence was received and marked as the Respondent's Exhibits 1 through 7. The evidence contains the petitioner's documentation of contacts with facility's staff, an Admission form and Evaluation Form, Nurse's Notes, Social Service Progress Notes in addition to other documents. The record was closed on April 12, 2018.

No representative from the Agency for Health Care Administration (AHCA) was present.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The petitioner has been residing in the respondent's facility since July 27, 2017. Petitioner is very alert and makes her own healthcare decisions. She was admitted as a therapy patient and as such, it was anticipated her time in the facility would be short-term, not long-term.
2. Upon entering the nursing facility, the petitioner was assigned May 3, 2018 as a target date for her discharge. Her progress was set to be reviewed on February 7, 2018. The facility has been discussing discharge planning process with the petitioner to home with family or an Adult Living Facility (ALF) since her arrival, see Respondent's Exhibit 5.
3. On July 28, 2017, the petitioner signed a Resident/Patient, Family & Visitor Smoking Safety Education & Acknowledgment form agreeing to follow the facility's smoking policy, see Respondent's Exhibit 2 below. The form indicates the facility strongly recommends the use of a smoking apron for all smokers and included the following:

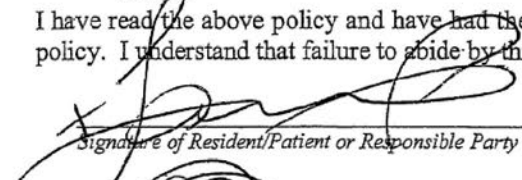
GUIDELINES

1. Smoking materials should be labeled with the Resident's/Patient's name & will be maintained in a secure location. Residents/Patients *may not* keep any smoking materials in their room including but not limited to: Lighters, Matches, Cigarettes, Pipes, Cigars, or any other smoking material. Matches & lighters and other smoking materials are available from the staff for Resident/Patient use at smoking times posted by the facility. Facility staff will provide & assist each resident/patient with assistance needed during the posted smoking period.

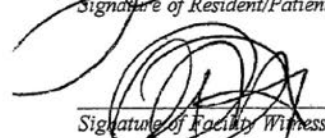
NOTE: Residents/Patients may not keep lighters/matches or any other smoking paraphernalia on their person or in their room.

2. Staff member assigned to the smoking area will monitor the area & distribute cigarettes & matches/lighter in addition to conducting walking rounds to observe & intervene for safety issues & to provide supervision & intervention when appropriate.
3. If the Resident/Patient is receiving oxygen, staff members will assist with removal prior to entering the designated smoking area. Once the smoking session is completed the staff will assist in reapplying the oxygen as ordered.
4. Family members or visitors may accompany the Resident/Patient to the designated smoking area at the designated times, however assistance should not be provided unless there is a staff member in attendance.
5. Residents/Patients, families or visitors should not provide assistance to other Residents wishing to smoke.

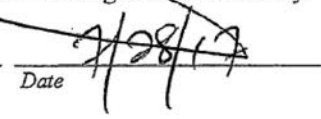
I have read the above policy and have had the opportunity to ask questions. I agree to abide by the facility policy. I understand that failure to abide by this policy could lead to discharge from the facility.



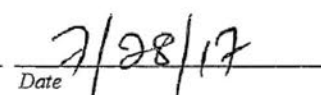
Signature of Resident/Patient or Responsible Party



Signature of Facility Witness



Date



Date

4. Residents are prohibited from possessing cigarettes, e-cigarettes and lighters on their person or in their rooms. Residents are only allowed to smoke during designated times and in designated areas. A staff member must be present during smoking periods.

5. Alert residents are allowed to leave the facility anytime. However, they are not allowed to be out overnight.

6. Petitioner has been signing herself out of the facility at all hours to smoke outside of the facility without any staff supervision.

7. On October 9, 2017, the facility's alarm system was activated when the petitioner tried to exit the main entrance to go out to smoke. Behavior notes entered by a

registered nurse on October 10, 2017, indicate that the petitioner failed to follow the facility's smoking protocols for smoking in non-designated areas.

8. On November 2, 2017, the petitioner exited the facility around 12:00 a.m. and was observed smoking outside in a non-designated area.

9. Progress notes on the petitioner's file indicates on January 12, 2018, the social worker observed the petitioner sitting in the front porch ready to wheel down to go smoke. He pulled her to the side and informed her that she cannot smoke there. He provided the petitioner with a copy of the smoking policy agreement which she signed on July 28, 2017, see Respondent's Exhibit 7.

10. On January 17, 2018, law enforcement was called to the facility after the petitioner reported she was being threatened by another resident's visitor. The facility's report indicates that the petitioner was upset when her choice of music was no longer being played and that witnesses to the incident pointed to the petitioner as the aggressor. Two witnesses provided written statement to the facility indicating that the petitioner had called someone and asked him to bring a firearm to the facility to assist her. AHCA, DCF, and Broward Sheriff Office (BSO) declined to accept a formal report, see Respondent's Exhibit 6.

11. On January 29, 2018, a Nursing Home Transfer and Discharge notice was issued to the petitioner. The reasons listed on the discharge notice are: (1) her needs cannot be met in this facility and (2) the safety of other individuals in this facility is endangered. There was a brief explanation, "Not following Smoking Policy or Designated times and areas and threatening to shoot up facility". The notice was signed by [REDACTED] M.D. and the petitioner, see Respondent's Exhibit 1.

12. The respondent believes the petitioner's possession of cigarettes, and lighters on her person is a danger to others as these items may accidentally cause a fire.

Additionally, the respondent believes that her continued unsupervised smoking episodes are violations of the smoking policy. Additionally, the respondent explained that the petitioner has psychological needs that the facility cannot provide. Finally, the respondent explained that the petitioner has been accepted at different facilities, but she declined to even visit them. The respondent maintains that the petitioner continues to violate smoking protocols even after the discharge notice was issued to her for doing so.

13. The petitioner did not dispute the smoking related charges brought forward by the respondent. She acknowledged being aware of the smoking policy, and leaving the facility at night to go across the street to smoke. She does not believe she is a danger to herself or to others. She believes she can still benefit from the services provided by the facility and that she is being discharged for speaking her mind. She maintains that she has no place to go. She does not believe she has any psychological problems.

14. The only issue before the hearing officer is whether the discharge was in accordance with federal regulations. Any issues concerning petitioner's allegations of improper protocol by facility staff, medication changes or diagnoses, or treatment the petitioner received while residing at the facility (Respondent's Exhibits 1, 2, 3 & 5) are not within the jurisdiction of the hearing officer. These issues must be addressed with AHCA.

15. As of the day of this hearing, the petitioner remains in the facility pending a hearing decision. Despite her multiple complaints about the services there, the

petitioner wants to remain at the facility. She believes the respondent's action to discharge her is retaliation because she reported falling at the facility.

16. At the request of the undersigned, AHCA was to conduct an on-site inspection of the facility and provide a written response to the undersigned. As of the day of this order, a response has not been filed with the office as to the outcome of the inspection.

CONCLUSIONS OF LAW

17. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties, pursuant to Section 400.0255(15), Florida Statutes.

18. Federal Regulations at 42 C. F. R. § 483.15, Admission, transfer and discharge rights in relevant part states:

...
(c) *Transfer and discharge*—(1) *Facility requirements*—(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless—

(A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(B) 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;

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(D) The health of individuals in the facility would otherwise be endangered; (emphasis added)

(E) 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. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for

his or her stay. 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

(F) The facility ceases to operate.

...

(2) *Documentation.* When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) Documentation in the resident's medical record must include:

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

...

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by—

...

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section (emphasis added).

...

(3) *Notice before transfer.* Before a facility transfers or discharges a resident, the facility must—

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

(4) *Timing of the notice.* (i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when—

(A) The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or

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

(5) *Contents of the notice.* The written notice specified in paragraph (c)(3) 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 of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (Pub. L. 106-402, codified at 42 U.S.C. 15001 *et seq.*); and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a

mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

19. On January 29, 2018, the facility issued a discharge notice to the petitioner. The facility's reasons for discharging the petitioner are: (1) her needs cannot be met in this facility and (2) the safety of other individuals in this facility is endangered. These are two of the reasons permitted for discharge from a facility in accordance with the above federal regulation.

20. Section 400.02555, Florida Statutes, Resident transfer or discharge; requirements and procedures; hearings in part states:

(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:

...

(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.

...

(10)

...

(b) If a resident requests a hearing within 10 days after receiving the notice from the facility, the request shall stay the proposed transfer or discharge pending a hearing decision. The facility may not take action, and the resident may remain in the facility, until the outcome of the initial fair hearing, which must be completed within 90 days after receipt of a request for a fair hearing.

21. In accordance with the above federal regulation and statute, the notice was signed by a physician. The notice also indicated the reasons and effective date of the discharge, the location to which the petitioner is to be discharged, and the petitioner's appeal rights along with other required assistance information.

22. The undersigned reviewed the findings and evidence in regards to (1) her needs cannot be met in this facility. The findings and evidence provided do not include enough information on the petitioner for the undersigned to conclude that the petitioner's needs can no longer be met in the facility at the time she was issued the Nursing Home Transfer and Discharge Notice. The undersigned concludes the respondent has NOT met the burden of proof to show the petitioner should be discharged based on this rationale.

23. The undersigned reviewed the findings, evidence, and testimony in regards to (2) the safety of other individuals in this facility is endangered. The findings show the petitioner acknowledges her verbal aggression and forceful tone when she is trying to make a point. The findings show the petitioner possesses materials that are deemed unsafe when not properly stored and used. The findings also show other residents and staff view her behavior as threatening. The findings further show law enforcement was called in to diffuse a possible volatile situation involving the petitioner and her reference

to have a firearm brought to the facility. Finally, the respondent is concerned that the petitioner's verbal aggression may turn physical.

24. Based on the evidence presented, the nursing facility has established that the safety of other individuals in this facility is endangered based on the petitioner's continued defiance of the facility's smoking protocols. This is one of the six reasons provided in federal regulation (42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident. After careful review of the evidence and testimonies, the undersigned concludes that the respondent has MET the burden of proof to show the petitioner may be discharged based for this reason.

25. Establishing that the reason(s) for a discharge is lawful is just one step in the discharge process. The Facility must also identify an appropriate transfer or discharge location and a safe and orderly transfer or discharge from the facility. The Hearing Officer cannot and has not considered either of these issues. The Hearing Officer only considered whether the discharge was for a lawful reason(s) and that the requirements of the controlling authorities have been met.

26. Any discharge by the facility must comply with all applicable federal regulations, statutes, and the Agency for Health Care Administration requirements. Should the petitioner have concerns about the appropriateness of the discharge location or the discharge process, she may contact the Agency for Health Care Administration's health care facility complaint line at (888) 419-3456.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the petitioner's appeal is DENIED. The facility may proceed with its proposed discharge action in accordance with all applicable Agency for Health Care Administration requirements.

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 Office of Appeal Hearings, Bldg. 5, Rm.255, 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 22 day of May, 2018,

in Tallahassee, Florida.



Roosevelt Reveil
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Copies Furnished To:  Respondent

Agency for Health Care Administration