

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

FILED

Nov 06, 2018

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00090

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on October 11, 2018, at 9:59 a.m., at [REDACTED].

APPEARANCES

For the Petitioner: [REDACTED]

For the Respondent: [REDACTED], Nursing Home Administrator (NHA)

STATEMENT OF 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 her needs cannot be met in this facility. The burden of proof is clear and convincing evidence and is assigned to the facility.

3. On April 19, 2018, the respondent met with its smoking residents and discussed the smoking policy. During the meeting residents were informed of the designated smoking area and smoking times. The petitioner was present at the meeting and signed the Smoking Guidelines, agreeing to abide by the facility's smoking policy (Respondent's Exhibit 2, page 10).



DATE: 4/19/18

RE: Smoking Guidelines

Dear



as recently revised its smoking guidelines to ensure the safety of all patients including those who smoke and those who do not smoke. As one of our patients, we want to make sure you are aware of these guidelines:

- Smoking is not allowed inside the Center at any time.
- Patients may only smoke in designated areas at designated times.

(may want to include specific times) 9:00AM, 10AM, 1:30PM, 3:15PM, 6:30PM

- All patients must be supervised while smoking.
- All smoking materials must be stored at the nurses' station. Patients may not maintain smoking materials in their rooms. This includes all smoking materials, tools, devices, and electronic smoking alternative products.
- Each patient who smokes will be assessed to determine if they are able to smoke safely. If you cannot smoke independently, you may be required to wear protective clothing and have assistance while smoking.
- Oxygen concentrators, tanks or other oxygen equipment may not be used within 6 feet of any person who is smoking.

Thank you for working with us to create a healthy and safe environment for our all of us.



Acknowledgment: I have reviewed these guidelines and understand that I must comply with them to ensure the safety of myself and other patients residing at the center.



Patient Signature

4. As part of the smoking guidelines, all smoking materials must be stored at the nurse's station. Residents are prohibited from possessing smoking materials in their rooms or on their person. Residents are only allowed to smoke during designated times and in designated areas. A staff member must be present during smoking periods.
5. On June 20, 2018, the petitioner was found in noncompliance of the facility's smoking policy. Petitioner was smoking at a nonsmoking time.
6. On June 27, 2018, the respondent held a second Smoking Guideline meeting. The smoking times were discussed and revised smoking times were agreed upon. The revised smoking times were 6:00 a.m., 10:00 a.m., 2:30 p.m., 4:00 p.m., and 7:30 p.m. The petitioner refused to sign the revised smoking guidelines (Respondent's Exhibit 2, page 11 and 13).
7. On July 2, 2018, the petitioner was found outside on the patio smoking without being supervised. The nurse in charge asked her to come in the building but she refused. Her family was called and notified of the incident. The petitioner was educated on the facility's smoking policy (Respondent's Exhibit 3, page 55).
8. On July 3, 2018, the petitioner's cigarettes and lighter were found on a table in the designated smoking area. She was observed going to the smoking area during a nonsmoking time. She was again educated on the facility's smoking policy and reminded of the incident from the prior evening (Respondent's Exhibit 3, page 54).
9. On July 6, 2018, the respondent spoke with the petitioner regarding wearing an apron as she was an unsafe smoker. She refused to wear an apron. The smoking policy was again reviewed with the petitioner (Respondent's Exhibit 3, page 51).

10. On July 24, 2018, the petitioner went out to smoke around 9:00 a.m., at a nonsmoking time (Respondent's Exhibit 3, page 39).

11 On July 27, 2018, a Nursing Home Transfer and Discharge notice was issued to the petitioner. The reason cited on the discharge notice was "Your needs cannot be met in this facility." The notice was signed by [REDACTED], the administrator and the petitioner (Respondent's Exhibit 1).

12 On August 6, 2018, the petitioner was found smoking at 2:20 a.m., during a nonsmoking time (Respondent's Exhibit 3, page 34)

13. On August 26, 2018, at 6:30 a.m., after the designated smoking time, the petitioner refused to return from smoking (Respondent's Exhibit 3, page 29).

14. On September 5, 2018, the petitioner was found napping with a lit cigarette in her hand during a nonsmoking time (Respondent's Exhibit 3, page 23).

15. On September 13, 2018, at 3:29 p.m., the petitioner was found smoking in front of the facility, a nonsmoking area, while waiting for her ride (Respondent's Exhibit 3, page 12)

16. The respondent believes that the petitioners' needs will be better met at a facility that has a more flexible smoking policy; one where she can smoke at any time. The respondent asserted that it has found a facility where the residents can smoke anytime. The respondent maintains that the petitioner continues to violate smoking protocols even after the discharge notice was issued to her.

17. The petitioner did not dispute the smoking related charges brought forward by the respondent. She acknowledged being aware of the smoking policy. She stated that she had lost her cigarettes after putting them in the lock box and was fearful to lose

them again. She feels that the time designated for smoking is not reasonable. She feels that the facility should have more flexible smoking times. The petitioner feels that the smoking times are the only enjoyable times. She likes to sit outside in the courtyard and look at the constellations. She asserts that she likes living at this facility and would do anything to stay at the facility.

CONCLUSIONS OF LAW

18. 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.

19. 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.

(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.

...
(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.

20. On July 27, 2018, the facility issued a discharge notice to the petitioner. The reason for discharging the petitioner is her needs cannot be met in this facility, which is a reason permitted for discharge from a facility in accordance with the above federal regulations.

21. Section 400.0255, 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:

...

(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...

(10) (a) A resident is entitled to a fair hearing to challenge a facility's proposed transfer or discharge. The resident, or the resident's legal representative or designee, may request a hearing at any time within 90 days after the resident's receipt of the facility's notice of the proposed discharge or transfer.

(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.

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

23. The undersigned reviewed the findings and evidence. The respondent claims that the petitioner's needs cannot be met at this facility and the evidence shows that petitioner continues to smoke outside of the facility's designated smoking times. Also, the petitioner has not demonstrated a willingness to comply with the facility's smoking guidelines. The findings show that the petitioner smokes whenever she wishes to do so even after multiple counseling and education sessions.

24. Based on the evidence presented, the nursing facility has established that the petitioner's needs cannot be met at this facility. 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 its burden of proof to show the petitioner may be discharged 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 06 day of November, 2018,
in Tallahassee, Florida.

Christiana Gopaul Narine

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