

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

FILED

Feb 26, 2019

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00154

PETITIONER,

Vs.

CASE NO.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on January 31, 2019, at 9:53 a.m., at [REDACTED]

APPEARANCES

For the Petitioner:

[REDACTED]

For the Respondent:

[REDACTED]

Nursing Home Administrator (NHA)

STATEMENT OF ISSUE

At issue is whether the nursing home's action to transfer and discharge the petitioner is appropriate based on the federal regulations at 42 C. F. R. § 483.15. Federal regulations limit the reasons for which a Medicaid or Medicare certified nursing home may discharge a patient. The nursing home is seeking to transfer and discharge the petitioner because the safety of other individuals in the facility is endangered. The burden of proof is clear and convincing evidence and is assigned to the facility.

PRELIMINARY STATEMENT

By Nursing Home Transfer and Discharge Notice dated November 9, 2018, the respondent informed the petitioner that he was to be discharged from the facility. The effective date listed on the Discharge Notice was December 8, 2019. On November 28, 2018, the petitioner timely requested an appeal to challenge the respondent's action.

██████████ Registered Nurse, Unit Manager, appeared as witness for the respondent.

The petitioner did not present any exhibits. The respondent presented three exhibits which were accepted into evidence and marked as Respondent's Exhibits 1 through 3. The evidence contains the Nursing Home Transfer and Discharge Notice, Progress Notes for the petitioner and the facility's smoking policy. A letter from the Agency for Health Care Administration (AHCA) informed that an unannounced visit to the nursing facility was completed and there were no violations. This letter was entered into evidence as Hearing Officer's Exhibit 1.

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 at the respondent's facility since January 25, 2018. The petitioner is very alert and makes his own healthcare decisions.
2. In April 2018, the facility started enforcing its smoking policies. The residents were informed of the facility's designated smoking area and the smoking times. The smoking times were 9:30 a.m., 1:30 p.m., 3:15 p.m., and 6:30 p.m. (Respondent's Exhibit 3).

3. As part of the smoking guidelines, all smoking materials must be stored at the nurse's station and locked up. 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 specified areas. A staff member must be present during smoking periods.

4. On June 16, 2018, the respondent violated the facility's smoking policy. He went out into the garden to smoke at 6:45 a.m.; during a non-designated smoking time and without supervision.

5. On June 16, 2018, the respondent met with the petitioner and educated him on the facility's smoking policy. The petitioner understood and stated that it will not happen again. (Respondent's Exhibit 2, page 1).

6. On September 24, 2018 at 11:23 p.m., the petitioner was found outside in the smoking area yelling for help to come back to the television area. He went to the smoking area unsupervised.

7. On September 30, 2018, the petitioner yelled and screamed profanity at the nursing staff.

8. On October 15, 2018, the petitioner yelled and screamed profanity in the hallway. He claimed that he was in pain and needed his pain medication.

9. On November 8, 2018, the petitioner was seen outside holding a cigarette during a nonsmoking time and unsupervised. The nurse in charge asked why he was smoking. He did not provide an answer but left and went inside. He was again educated on the risks of smoking unsupervised (Respondent's Exhibit 2, page 5).

10. On November 9, 2018, it was reported that the petitioner threw water on another resident.

11. On November 9, 2018, a Nursing Home Transfer and Discharge notice was issued to the petitioner. The reason checked on the discharge notice was "The safety of other individuals in this facility is endangered". (Respondent's Exhibit 1).

12. The respondent believes that the petitioner's needs will be better met at a facility that has a more flexible smoking policy; one where he can smoke at any time. The respondent maintains that the petitioner continues to violate smoking protocol as he continues to keep smoking materials in his possession even after the discharge notice was issued to him.

13. The petitioner did not dispute the smoking related charges brought forward by the respondent. He acknowledged being aware of the smoking policy. He stated that he had lost his cigarettes after putting them in the lock box and was fearful to lose them again. The petitioner does not want to leave the facility. He asserted that he has made friends. The petitioner asserted that since the Transfer and Discharge Notice he has been better behaved. The petitioner explained that he was in serious pain and the nursing staff did not want to give him his pain medication.

14. The facility asserts that the petitioner can be only given pain medication as prescribed by his doctor.

CONCLUSIONS OF LAW

15. 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.

16 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.

17. On November 9, 2018, the facility issued a discharge notice to the petitioner.

The reason for discharging the petitioner is the safety of other individuals in the facility is endangered, which is a reason permitted for discharge from a facility in accordance with the above federal regulations.

18. 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.

19. 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 transferred, and the petitioner's appeal rights along with other required assistance information.

20. The undersigned reviewed the findings and evidence. The respondent claims that the safety of other individuals in the facility is endangered. The evidence shows that the petitioner continues to smoke outside of the facility's designated smoking times. The petitioner has not demonstrated a willingness to comply with the facility's smoking

guidelines as he continues to keep smoking materials in his possession even after being educated on the nursing facility's smoking policy.

21. Based on the evidence presented, the nursing facility has established that the safety of other individuals in the facility is endangered. 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 that the petitioner may be discharged for this reason.

22. 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.

23. Any discharge by the facility must comply with all applicable federal regulations, statutes, and the AHCA requirements. Should the petitioner have concerns about the appropriateness of the discharge location or the discharge process, he may contact the AHCA'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 26 day of February, 2019,

in Tallahassee, Florida.



Christiana Gopaul-Narine
Hearing Officer
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Copies Furnished To: [REDACTED], Petitioner
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Agency for Health Care Administration