

FILED

Feb 26, 2019

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

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 18N-00162

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on January 23, 2019 at 9:19 a.m. All parties appeared telephonically from different locations.

APPEARANCES

For the Petitioner: [REDACTED], pro se

For the Respondent: [REDACTED], Nursing Home Administrator

STATEMENT OF ISSUE

At issue is whether 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 the safety of other individuals in the facility is endangered. The burden of proof is assigned to the facility by clear and convincing evidence.

PRELIMINARY STATEMENT

By Nursing Home Transfer and Discharge Notice dated November 27, 2018, the respondent informed the petitioner that he was to be discharged from the facility effective December 27, 2018. On November 30, 2018, the petitioner timely requested an appeal to challenge the respondent's action.

██████████, Registered Nurse and Director of Nursing and ██████████ ██████████, Social Worker, both appeared as witnesses for the respondent.

The petitioner submitted no exhibits. The respondent submitted a five-page evidence packet, which was marked and entered as Respondent's Exhibits "1" through "2". The hearing officer submitted a 2-page exhibit, which was marked and entered as Hearing Officer Exhibit "1".

FINDINGS OF FACT

1. On August 3, 2018, the petitioner was admitted to the nursing facility. The petitioner is very alert and makes his own healthcare decisions.
2. The petitioner (██████████) can complete his activities of daily living (ADLs) for himself. The respondent contends he would benefit from an assisted living facility (ALF) setting. He is not currently receiving therapy in the facility.
3. On November 7, 2018, the petitioner signed a Resident/Patient, Family & Visitor Smoking Safety Education & Acknowledgment form agreeing to follow the facility's smoking policy. The form indicates the following (Respondent's Exhibit 3):

GUIDELINES

1. Smoking or tobacco materials should be labeled with the resident's/ name and will be maintained in a secure location. Residents may not keep any smoking or tobacco materials in their room, or on their person, to include but may not be limited to: lighters, matches, cigarettes, pipes, cigars, e-cigarettes or any other smoking materials. Facility staff will provide materials and assist each resident as needed during the posted smoking times, in the designated area.
2. Staff member assigned to monitor the smoking area and distribute cigarettes, e-cigarette and or chewing tobacco will, in addition, supervise by conducting walking rounds to observe and intervene for safety issues. Staff will light the cigarette, cigar, etc.
3. If the resident 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 once the resident has exited the designated smoking area. Oxygen is not permitted in the designated smoking area. Obtain a physician's order to remove oxygen if the resident is on continuous oxygen.
4. Family members or visitors may accompany the resident/ to the designated smoking area at designated smoking times, however smoking assistance should not be provided by visitors. Staff member(s) in attendance will provide the needed smoking assistance.
5. Residents/ families or visitors should not provide assistance with or distribute smoking material to any residents wishing to smoke.
6. Staff will ensure the availability of Stop and Watch tools or report changes in condition to nursing personnel.

I have read the above 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 restriction of smoking privileges and/or discharge from the facility.



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

5. The petitioner contends he has followed all the smoking policies since signing the agreement and there is no proof he has not followed the policies.

6. The respondent has no documented instances of the petitioner not following the policy once the agreement was signed. There are no case notes or other indications he has not followed the smoking policy.

7. On November 27, 2018, a Nursing Home Transfer and Discharge notice was issued to the petitioner. The reason listed on the discharge notice was the safety of other

individuals in this facility is endangered. There was a brief explanation: "Not following Smoking Policy". The notice was signed by [REDACTED] The petitioner declined signature (Respondent's Exhibit 1).

8. The petitioner timely requested the appeal.

9. The petitioner suggests the notice was issued just to get rid of him.

10. The respondent states the petitioner has been compliant with the smoking policy once the notice was issued.

11. As of the day of this hearing, the petitioner remains in the facility pending a hearing decision.

12. ACHA completed an on-site inspection of the facility. There were no violations found related to this discharge (Hearing Officer's Exhibit 1).

CONCLUSIONS OF LAW

13. 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 409.285, Fla. Stat.

14. This order is the final administrative decision of the Department of Children and Families under Section 409.285, Fla. Stat.

15. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

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—

...

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

...

(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;

...
(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 27, 2018, the facility issued a discharge notice to the petitioner. The facility's reason for discharging the petitioner is the safety of other individuals in this facility is endangered. This is one of the reasons permitted for discharge from a facility in accordance with the above federal regulation.

18. 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.

...

(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 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.

20. The undersigned reviewed the findings and evidence regarding the discharge reason. The findings show the petitioner was aware of the smoking policy. However, the findings and evidence do not show the petitioner was in violation of the smoking policy once he signed the agreement. The respondent was unable to provide specific dates or times when the petitioner was in violation of the smoking policy. The undersigned concludes the respondent has NOT met the burden of proof to show the petitioner should be discharged for this reason.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is hereby GRANTED. The facility has not established that this discharge is permissible under federal or state regulations; therefore, the facility may NOT proceed with the discharge at this time.

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.

FINAL ORDER (Cont.)

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DONE and ORDERED this 26 day of February, 2019,
in Tallahassee, Florida.

Pamela B. Vance

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Copies Furnished To: [REDACTED], Petitioner

[REDACTED],
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[REDACTED]
Agency for Health Care Administration