

FILED

Jun 10, 2019

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-00166

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on May 14, 2019 at 9:09 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 December 9, 2018, the petitioner timely requested an appeal to challenge the respondent's action.

The hearing was scheduled on January 23, 2019. The petitioner appeared. The respondent appeared. [REDACTED], Registered Nurse and Director of Nursing and [REDACTED] Social Worker, both appeared as witnesses for the respondent. After the petitioner concluded their testimony, the respondent stated he wished to have legal counsel present. The hearing was concluded, and a continuance was granted to give time to locate legal counsel. The hearing was rescheduled for March 6, 2019.

On March 6, 2019, the petitioner appeared. The respondent appeared. The petitioner stated he did not receive the notice of hearing and has not had adequate time to obtain legal counsel. The hearing was rescheduled for April 9, 2019 at 9:00 a.m.

On April 3, 2019, the petitioner contacted the Office of Appeal Hearings (OAH), requesting a continuance. On April 4, 2019, the undersigned issued ORDER TO SHOW GOOD CAUSE, giving the petitioner ten (10) days to provide good cause in writing. On April 18, 2019, the undersigned issued ORDER GRANTING GOOD CAUSE. The hearing was rescheduled for May 17, 2019 at 9:00 a.m.

[REDACTED], Broward District Ombudsman Manager, appeared as a witness for the petitioner.

The petitioner submitted no exhibits. The respondent submitted, which was marked and entered as Respondent's Exhibits "1" through "14". The undersigned submitted one-page exhibit, letter from Agency for Health Care Administration (AHCA) related to the discharge, which was marked and entered as Hearing Officer's Exhibit "1".

FINDINGS OF FACT

1. On June 7, 2018, the petitioner was admitted the nursing facility. The petitioner is alert and makes his own healthcare decisions.
2. The petitioner ([REDACTED]) can complete his activities of daily living (ADLs) for himself. The petitioner also has a percutaneous endoscopic gastrostomy (PEG) tube for feeding. The petitioner no longer uses the PEG tube for feeding. He eats all meals and drinks by mouth. The petitioner refuses to have the PEG tube removed.
3. On November 7, 2018, the petitioner was given a Resident/Patient, Family & Visitor Smoking Safety Education & Acknowledgement form. The form is an agreement of the resident to follow the facility's smoking policy. The form indicates the following (Respondent's Exhibit 1):



4. The petitioner refused to sign the agreement.
5. Residents are prohibited from possessing cigarettes, lighters, and any other smoking materials on their person or in their room. The smoking materials must be kept in the designated smoking box that is secured by staff. Residents are only allowed to smoke during designated times and in designated areas. A staff member must be present during smoking periods. The staff members are the only persons allowed to light cigarettes for the residents (Respondent's Exhibit 12).
6. The petitioner can smoke off the property of the facility.
7. The respondent claims the petitioner has been seen possessing his own smoking materials including lighters and he has asked other residents to light cigarettes for him.

He was seen removing smoking materials from a plastic bag on his wheelchair
(Respondent's Exhibit 9).

8. The petitioner states he hides his smoking materials in the bushes on the property of the hospital. He claims he does go onto the hospital property to smoke but he does not smoke on the facility's property.

9. The respondent states the petitioner is violent with the staff, cursing and throwing things at them, when he is not allowed out to smoke or he is questioned about having smoking materials on his person or in his room.

10. On April 5, 2019, a pack of cigarettes and lighter were seen in the petitioner's room. When asked why he had these items in his room and not the smoking box, he became verbally abusive with the nursing staff and told them to get out of his room
(Respondent's Exhibit 9).

11. On November 27, 2018, A Nursing Home Transfer and Discharge notice was issued to the petitioner. The reasons listed on the discharge were your needs cannot be met in this facility and the safety of other individuals in this facility is endangered. There was brief explanation: "Non-compliant Smoking Policy and Dietary Restrictions". The notice was signed by [REDACTED], M.D. The petitioner signed the notice
(Respondent's Exhibit 1).

12. The petitioner timely requested the appeal.

13. The petitioner has been noncompliant, but he is now willing to comply because he has an upcoming surgery and would prefer to remain in the facility where they know him.

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

15. 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

16. 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.

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

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;

...

(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.

19. On November 27, 2018, the facility issues a discharge notice to the petitioner.

The facility's reasons for discharging the petitioner are his needs can longer be met and 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.

...

(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 regarding the discharge reason. The findings show the petitioner was aware of the smoking policy. Through his own testimony, the petitioner acknowledged that he violated the smoking policy after he was continually advised of the smoking rules.

23. After careful review of the testimony, evidence, and controlling authorities, the undersigned concludes the nursing facility has correctly established that the safety of

other individuals in the facility would be endangered due to violation of the smoking policy.

24. 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.

25. 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.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the appeal is hereby DENIED, as the facility's action to discharge the petitioner is correct and in accordance with Federal Regulations. The facility may proceed with the discharge as discussed in the Conclusions of Law, in accordance with applicable Agency of 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 10 day of June, 2019,

in Tallahassee, Florida.



Pamela B. Vance
Hearing Officer
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Copies Furnished To: [REDACTED], Petitioner

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Respondent

[REDACTED]
Agency for Health Care Administration