

May 23, 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. 19N-00017

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened an administrative hearing in the above-referenced matter on April 16, 2019 at 2:24 p.m. in Carrabelle, Florida.

APPEARANCES

For the Petitioner: [REDACTED]

For the Respondent: [REDACTED], Facility Administrator

ISSUE

Petitioner is appealing the Nursing Home Transfer and Discharge Notice issued to the petitioner on February 13, 2019 by the Respondent. The Notice indicates the intent to discharge the petitioner as the health and safety of other individuals is the facility is endangered. The respondent carries the burden of proof by clear and convincing evidence.

PRELIMINARY STATEMENT

██████████, District Ombudsman, appeared as a witness for the petitioner. ██████████
██████████, Ombudsman administrative assistant, appeared as an observer with no
objections from the parties.

██████████, Director of Nursing; ██████████, Director of Social Services; and
██████████, Unit Manager; appeared as witnesses for the respondent.

The Nursing Home Transfer and Discharge Notice was entered as Administrative
Exhibit 1. The Agency for HealthCare Administration Complaint report was entered as
Administrative Exhibit 2.

The respondent provided evidence at the hearing which was entered as
Respondent's Exhibits 1 through 9.

The record was held open for additional information from both parties through
April 30, 2019.

The petitioner submitted evidence on April 24, 2019 which was entered as
Petitioner's Exhibit 1.

The respondent submitted supplemental evidence in two parts on April 19, 2019.
The documents were combined and entered as Respondent's Exhibit 10.

The petitioner submitted a Proposed Final Order on April 30, 2019.

The record closed on 4/30/2019.

FINDINGS OF FACT

1. The petitioner has been a resident of ██████████
██████████ for approximately nine years.

2. The petitioner is presently [REDACTED]. He is limited in movement to his motorized wheelchair.

3. The petitioner uses an electronic vape pen which requires charging in lieu of other smoking paraphernalia.

4. The respondent issued a Nursing Home Transfer and Discharge Notice on February 13, 2019 indicating the petitioner being discharged under "The health of other individuals in the facility is endangered" and "The safety of other individuals in the facility is endangered". The respondent noted in the Brief Explanation section "Refusing to follow tobacco policy, aggressive in motorized wheelchair". The form was signed by the facility administrator and [REDACTED]. The petitioner refused to sign this form. (Administrative Exhibit 1)

5. The respondent has a smoking policy with last revision May 15, 2018. The policy specifies the residents may only smoke in the designated location. The policy specifies that resident smoking materials will be retained and distributed by facility staff to the residents. (Respondent's Exhibit 4, pages 3 and 4)

6. The respondent submitted a Smoking Contract signed by the petitioner on January 4, 2019. The contract specifies the use and possession of smoking tobacco at the facility. The contract indicates designated locations are "designated smoking area". The contract discusses cigarettes lighters and/or other smoking materials and where they are to be stored. In a long-term care unit, the contract states residents are prohibited from keeping smoking materials in the resident's room or possession but kept secured by the facility. The respondent identified the "designated smoking area" as a courtyard near the petitioner's room. The respondent confirmed there is no limitation on

smoking after leaving the front of the building as long as you are going off property.

(Respondent's Exhibit 4, page 1 and 2)

7. The respondent explained the facility's considers "smoking" and "vaping" the same activity and use one policy for both activities. The respondent explained they use the definition as found in section 877.112, Florida Statutes, Nicotine products and nicotine dispensing devices...

(1) DEFINITIONS.—As used in this section, the term:

(a) "Nicotine dispensing device" means any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product, any replacement cartridge for such device, and any other container of nicotine in a solution or other form intended to be used with or within an electronic cigarette, electronic cigar, electronic cigarillo, electronic pipe, or other similar device or product.

8. The respondent presented a Behavior Contract to the petitioner on July 21, 2016. This contract specifically states: "all cigarettes and smoking materials (ie [sic] lighters) may not be kept on me, they are to be locked up by the facility per policy and released to me during scheduled smoking periods and when I leave the facility on an leave of absence. When I return from a leave of absence I understand I must turn in my cigarettes and lighters to staff who will lock items up in designated area/location." The petitioner refused to sign this contract. (Respondent's Exhibit 3, page 2)

9. The respondent presented an undated typed statement from an ARNP. The administrator identified the ARNP author as [REDACTED], who works with [REDACTED]. The statement does not show the complete name of the ARNP. The statement indicates the petitioner has been educated on behavioral expectations at the facility to ensure that all residents have a safe and stable environment. The statement

describes the petitioner as non-compliant with safety measures and causing mental anguish to other in the care of the facility. The statement also indicates the petitioner's behaviors endanger other residents and staff physically and mentally. The statement shows the writer as knowing the petitioner is vaping in his room and exposing others to the fumes which may affect their physical health. (Respondent's Exhibit 1)

10. The respondent presented results of a [REDACTED] testing from sample collected on September 21, 2018. The results indicate the petitioner was [REDACTED] for [REDACTED], [REDACTED], and [REDACTED]. (Respondent's Exhibit 2, pages 1 and 2)

11. The respondent presented a KePro Florida PASRR Level II Determination Summary Report dated May 9, 2017. The report shows the petitioner having [REDACTED] [REDACTED]. The report shows the petitioner as having an increase in [REDACTED] symptoms that had not responded to ongoing treatment. (Respondent's Exhibit 2, pages 3 and 4)

12. The respondent presented the Behavior Contracts which were presented to the petitioner on June 1, 2016, November 17, 2016, and February 12, 2018 and the petitioner did not sign. Each of these Behavior Contracts lists five options the facility would address with a resident. The facility marked on each of these contracts "I am not permitted to curse, yell at, or treat staff with disrespect. If I have a problem with a staff member, I know I can speak with either the social worker or administrator about this issue." Additionally, handwritten on these contracts is "Must use electric w/c safely at all times!" (Respondent's Exhibit 3, pages 1, 3 and 4)

13. The petitioner stated he refused to sign each of these contracts as he did not understand they were only meaning this one item. He thought the facility was seeking to address all items, including he could not even shake hands with people.

14. The respondent presented a Behavior contract dated June 26, 2017 which reviewed the "use/possession of illegal substances (ie [*sic*] marijuana, crack-cocaine, wet, etc) on the premise." Additionally, handwritten on the contract is "alcohol". The petitioner refused to sign this document. (Respondent's Exhibit 3, page 5)

15. The respondent presented a Behavior Contract, Illegal Substance which was presented to the petitioner on September 24, 2018 but not signed by the petitioner. (Respondent's Exhibit 5)

16. The respondent presented a Nursing Note dated February 10, 2018 indicating a staff member believed the petitioner would try to run them over with his wheelchair. (Respondent's Exhibit 9)

17. The respondent provided an Episodic Behavior Note dated February 9, 2019. In the note, the author described the petitioner as cursing and calling a staff member and her mother explicit names. The author also documented the petitioner "charging" at the individual with his motorized wheelchair. The author documented the petitioner charging at her with his wheelchair when she attempted to intervene. (Respondent's Exhibit 6, page 2)

18. The respondent provided Episodic Behavior Notes from February 22, 2019. In the note, the author describes the petitioner as vaping in his room and refusing to lock up vaping materials. The author noted the petitioner had just signed a behavior

agreement and was aware of impending discharge for refusal to comply with smoking policy. (Respondent's Exhibit 6, page 2)

19. The respondent provided Episodic Behavior Notes from February 26, 2019. In this note, the author describes the petitioner as vaping in room. The author also describes the petitioner's unwillingness to release his vape to staff as he had to charge it. (Respondent's Exhibit 6, page 1)

20. The respondent provided Episodic Behavior Notes from the petitioner's record. In the note dated March 17, 2019 the author describes the petitioner obtaining his vape, signing himself out. The note further describes the petitioner keeping his vape until staff asked for the vape. The petitioner would not provide the charger until around 1 pm. (Respondent's Exhibit 6, page 1)

21. The respondent provided a Social Services note dated April 5, 2019. The Social Services Director was the author of the note. The note documented the petitioner being loud in the hallway to the point of disrupting a therapy session for another resident. The note describes the petitioner as becoming upset and cursing at the author when she approached to intervene. The note indicates the petitioner's response that his ombudsman had told him he did not have to talk to her. (Respondent's Exhibit 7, page 6)

22. The petitioner explained he liked to go to the "Grill" and have several beers while he is there visiting with friends. The petitioner does not believe it is wrong for him to have beers while he is away from the facility.

23. The petitioner stated he has agreed for his vape to be locked up in a box which he has a key to be able to access his vape when he needs it.

24. The petitioner stated that he charges his vape on his laptop and did not want to turn his laptop over to the facility. He is aware that the facility has a charger they can use to charge vape pens for residents.

25. The parties reported at hearing a meeting between the respondent, the petitioner, ombudsman and a representative from AHCA occurring on or about February 18, 2019. The parties all state there was an agreement reached. There was no written documentation of the meeting. There was no signed agreement as to the specifics goals or outcomes documented regarding, providing a lock box and key for his vaping materials, expected behavior changes, limitations or restrictions for interaction with specific staff, who seem to trigger outbursts from the resident, completed at the time of that meeting. The parties concur the petitioner requested [REDACTED] at that meeting.

26. The first meeting regarding [REDACTED] did not occur until April 5, 2019 due to difficulties with obtaining a counselor. The petitioner requested to receive one-hour sessions biweekly and receive his medications prescribed due to [REDACTED] from Florida Counseling Center.

27. The respondent stated counseling and interventions have not worked with the petitioner in the past. The respondent is concerned that the petitioner's behaviors will continue to escalate until he does cause harm to the safety of others.

28. The respondent stated that staff and residents have complained regarding the odor from the petitioner's vaping in his room. The respondent states they are unable to place a roommate in the petitioner's room due to his behavior and vaping.

29. The petitioner stated that he previously had a roommate for two and a half years.

30. The petitioner stated he found out one of the medications he was prescribed, [REDACTED], does not work well with someone who has [REDACTED] issues.

31. The petitioner stated that he believes that the items he vapes are sweet smelling.

32. The petitioner stated he did refuse drug treatment when he tested positive for marijuana. He stated his doctor removed a pain medication for 100 days when that happened. He reports he has since had lab work done showing he no longer tests positive for marijuana.

33. The petitioner stated he is frustrated with his situation and believes he is being "railroaded" out of the facility.

34. The petitioner has a history of using foul language. The petitioner stated during hearing he previously did not consider his foul language could be viewed as threatening, but through the course of the hearing, he now understood that others may view his foul language as threatening. The petitioner further admitted that calling people derogatory names is not appropriate.

CONCLUSIONS OF LAW

35. 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. In accordance with said authority, this order is the final administrative decision of the Department of Children and Families.

36. Federal Regulations appearing 42 C.F.R. § 483.15 sets forth the reasons a facility may involuntarily discharge a resident as follows: Admission, transfer and discharge rights.

(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;

(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.

37. Based on the evidence presented, the nursing facility has established that the reasons for requesting this discharge is due to the safety of others in the facility is endangered and health of others in the facility is endangered. These are two of the six reasons provided in federal regulation (42 C.F.R. § 483.15) for which a nursing facility may involuntarily discharge a resident.

38. The findings show the respondent's desire to discharge related is related to two activities. The first is the petitioner's vaping habits. The second is due to the petitioner's [REDACTED] issues and aggression with his wheelchair. The undersigned will review each situation upon its own merits.

39. The undersigned will first review the allegations regarding the petitioner's vaping habits. The findings show the respondent has a Smoking Policy. The findings also show the respondent's statement that the policy for smoking also applies for vaping activities as they are using the definition found in section 877.112, Florida Statutes, Nicotine products and nicotine dispensing devices. The findings show the Smoking Policy and contract signed by the petitioner on January 4, 2019 discuss the use and possession of smoking tobacco at the Facility. The undersigned finds no mention of vaping or vaping materials within the documents. The undersigned concludes the facility's use of the Florida Statute definition is not clearly identified for the resident signing the contract.

40. The undersigned reviewed the records provided from PRIOR to the Notice of Discharge and Transfer issuance and found NO instances in any of the Progress Notes of the petitioner's use of his vape materials inappropriately. The findings show three instances AFTER the Notice of Discharge and Transfer was issued on February 13, 2019 where the petitioner was documented for having possession of his vape in his room rather than returning it immediately to the lock box as required in the policy. The undersigned notes as the "Smoking Contract" was signed on January 4, 2019, and the "lock box" was not provided until February 2019. The incidents documented occurred approximately within a month of the lock box being provided. The undersigned notes

this was a new process for him at the time of documentation and an allowance for that period of adjustment should be made. The undersigned concludes now that the lock box and key have been provided and the procedure in place for the petitioner for a period of time, this activity does not constitute endangering the safety or health of others in the facility.

41. The undersigned reviews the allegation regarding the petitioner [REDACTED] and aggressive use of his wheelchair. The findings show two instances where the petitioner demonstrated aggressive actions either verbally or with his wheelchair. The first instance documented was February 10, 2018 and the second on February 9, 2019. The undersigned concludes these incidents were isolated incidents documented by staff nearly a year apart in occurrence. The undersigned concludes this does not constitute a danger to the health or safety of others as they appear to be isolated events.

42. The undersigned notes the physician, [REDACTED], signed the Discharge and Transfer Notice on February 13, 2019. This is the only instance where [REDACTED] name appears within the documentation presented by the respondent to substantiate the respondent's claim that the petitioner endangers the health or safety of other individuals in the facility.

43. The undersigned notes the respondent's concern for the petitioner's use of alcohol. The findings show the petitioner has signed out of the facility and gone somewhere else to consume alcohol. The respondent provided no policy that limits an individual's right to consume alcohol when they sign out of the facility.

44. The findings show the petitioner requested [REDACTED] therapy/counseling and medication. The findings also show the petitioner is now receiving these services. The undersigned concludes the respondent has failed to meet the burden of proof by clear and convincing evidence to show the petitioner endangers the health or safety of others in the facility on an ongoing basis.

45. 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.

46. 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.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the appeal is granted. The Discharge and Transfer Notice is voided.

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 23 day of May, 2019,

in Tallahassee, Florida.



Melissa Roedel
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED], Petitioner
[REDACTED], Respondent
[REDACTED], Agency for Health Care Administration