

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

FILED

Dec 19, 2019

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 19N-00079

PETITIONER,

Vs.

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened two administrative hearings in the above-referenced matter on September 18, 2019 at 9:38 a.m.; and on December 12, 2019 at 9:08 a.m. Both hearings were held at the [REDACTED]

[REDACTED]

APPEARANCES

For the Petitioner: [REDACTED] petitioner's mother

For the Respondent: [REDACTED] attorney for the [REDACTED]

ISSUE

At issue is the facility's intent to discharge the petitioner for the reason of "the health and safety of other individuals in this facility are endangered." A Nursing Home Transfer and Discharge Notice was issued on August 2, 2019. The facility has the

burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found in 42 C.F.R. § 483.15.

PRELIMINARY STATEMENT

The September 18, 2019 hearing was not completed as both parties were to submit evidence that would allow the undersigned the jurisdiction to hear the merits of the appeal. On October 1, 2019, the respondent submitted a Memo of Law. The petitioner did not submit any documentation. The undersigned determined there was jurisdiction to hear the merits of the appeal, so the hearing was reset to November 6, 2019. On November 1, 2019, the petitioner requested a continuance due to a calendar conflict. The continuance was granted, and the hearing was reset to December 12, 2019.

At the September 18, 2019 hearing, the petitioner was present but did not testify. Also, at the September 18, 2019 hearing, the petitioner presented three witnesses who testified: [REDACTED]

[REDACTED] At the December 12, 2019 hearing, the petitioner presented one witness who testified: [REDACTED]

At the September 18, 2019 hearing, the respondent presented one witness who testified: [REDACTED] At the December 12, 2019 hearing, the respondent presented five witnesses who testified: [REDACTED]

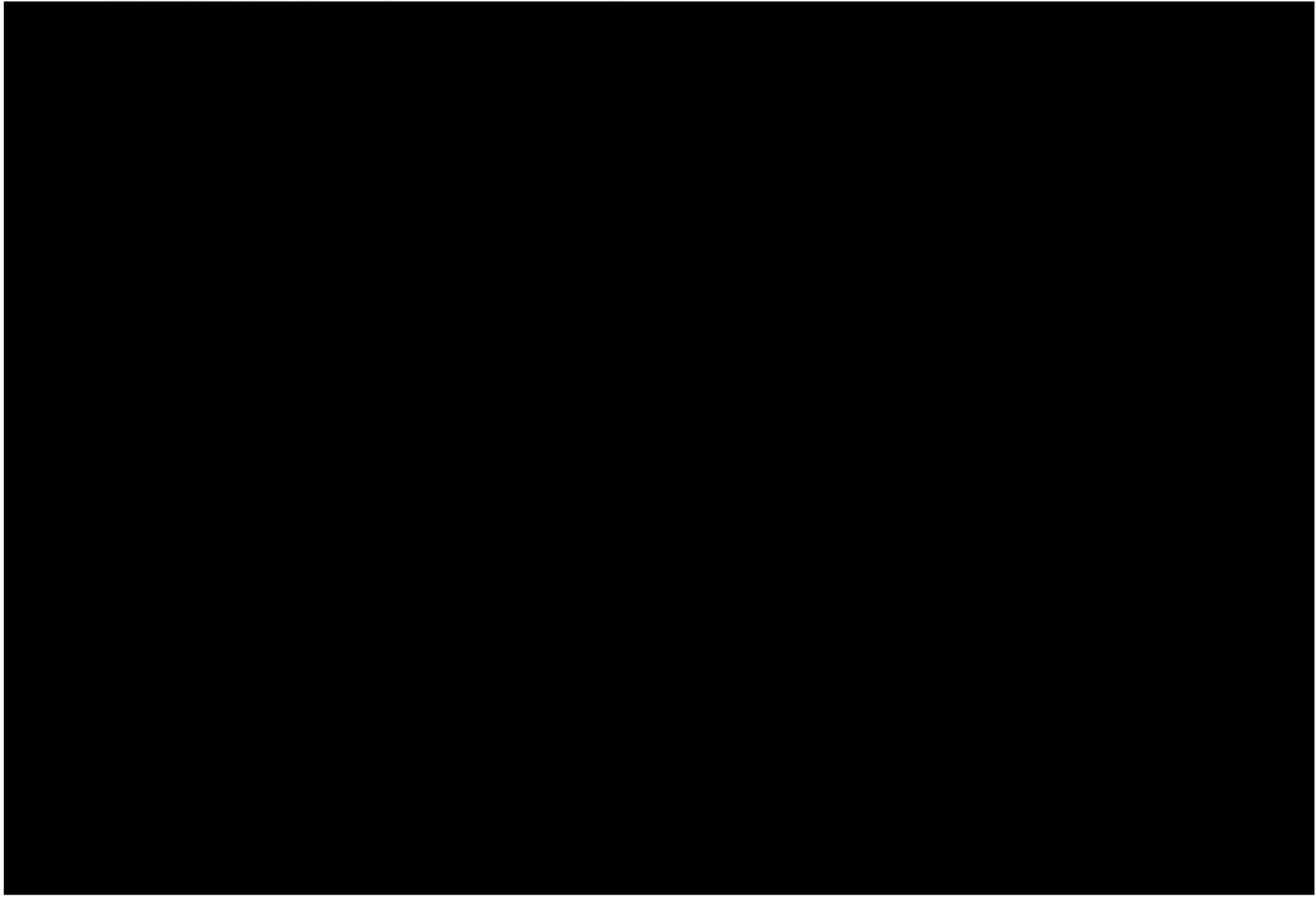
[REDACTED]
[REDACTED] All the respondent's witnesses are from [REDACTED]

At the December 12, 2019 hearing, the petitioner submitted three exhibits, which were accepted into evidence and entered as Petitioner's Exhibits "1" – "3". At the December 12, 2019 hearing, the respondent submitted five exhibits, which were accepted in evidence and marked as Respondent's Exhibits "1" – "5".

FINDINGS OF FACT

1. On August 26, 2016, the petitioner entered the facility and to the date of the hearing, is currently a resident of the facility.
2. On August 29, 2016, the petitioner signed the "Resident/Patient Family & Visitor Smoking Safety Education & Acknowledgment" (Page 1 of Respondent's Exhibit 2) that states the following:

Resident/Patient, Family & Visitor Smoking Safety Education & Acknowledgment



3. On November 12, 2018, the petitioner signed the "Resident/Patient Family & Visitor Smoking Safety Education & Acknowledgment" (Page 2 of Respondent's Exhibit 2) that states the following:

Resident/Patient, Family & Visitor Smoking Safety Education & Acknowledgment



- Does Not Smoke Smokes I smoke, but wishes to participate in a smoking cessation program Uses e-cigarette
 Education provided regarding smoking cessation program if resident/patient desires to quit.

State law prohibits smoking within the facility. It is the facility policy that smoking be directly supervised by a staff member. This is to protect both the individual smoking & the entire resident population & staff. The facility has established appropriate smoking areas & smoking times that will not interfere in the care of other residents/patients. The facility strongly recommends the use of a smoking apron while smoking. The risks of smoking without an apron include but are not limited to:

- Ruined clothing with burn holes or blackened marks • Fire & burns to self
- Fire, burns & death to self or others

The proven effective use of smoking with an apron includes, but is not limited to, protecting the Resident/Patient from:

- Dropped ashes or cigarettes • Potential burns
- Clothing damage due to sparks or ashes from cigarettes • Life threatening fire &/or burns

GUIDELINES

1. Smoking materials should be labeled with the resident's/patient's name & will be maintained in a secure location. Residents/patients may not keep any smoking materials in their rooms including but not limited to: lighters, matches, cigarettes, pipes, cigars, or any other smoking materials. Facility staff will provide & assist each resident/patient as needed during the posted smoking period in the designated area. *Residents/patients may not keep lighters/matches or any other smoking paraphernalia on their person or in their room.*
2. Staff member assigned to monitor the smoking area distribute cigarettes in addition supervises by conducting walking rounds to observe & intervene for safety issues.
3. If the resident/patient 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/patient has exited the designated smoking area. Oxygen is not permitted in the designated smoking area.
4. Family members or visitors may accompany the resident/patient 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/Patients, families or visitors should not provide assistance with or distribute smoking material to any residents wishing to smoke.
6. Electronic Cigarettes may be retained by the resident/patient; however they may only be used in the designated smoking area. The facility is not responsible for damage, loss or misplacement of e-cigarettes or associated materials.

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. On August 2, 2019, the facility issued the petitioner a Nursing Home Transfer and Discharge Notice. The reason for the discharge was "the health and safety of other

individuals in this facility are endangered.” (Respondent’s Exhibit 1) The respondent asserted the petitioner violated the facility’s smoking policy by not adhering to the rules of the policy.

5. The facility has specific times and a place that allows the residents to safely smoke. The smoking place is “by the patio behind the facility”; and the area has tables and chairs for all to utilize. The facility’s smoking times are from 9 a.m. to 9:30 a.m.; 11 a.m. to 11:30 a.m.; 1:30 p.m. to 2 p.m.; 4 p.m. to 4:30 p.m.; 7 p.m. to 7:30 p.m.; and 9 p.m. to 9:30 p.m.

6. The facility has the smoking policy in place to ensure all smokers are supervised while smoking; and to ensure all residents, employees, and visitors remain healthy and safe. The respondent’s witness asserted some residents have fixed and portable oxygen tanks that could cause a fire if individuals smoke around the tanks.

Furthermore, the respondent asserted that smoking causing second hand smoke, which can be considered a health hazard to all residents, employees, and visitors.

7. The respondent’s witness asserted the residents in the facility must give all smoking materials, such as lighters, cigarettes, etc., to the nurses, so the smoking materials can be stored in a safe place.

8. On June 22, 2018, an employee from the respondent’s facility witnessed the petitioner smoking outside with another individual. (Respondent’s Exhibit 5)

9. On July 11, 2018, the petitioner was educated about the facility’s “smoking policy and smoking outside during non-smoke times.” On July 14, 2018, an employee from the respondent’s facility witnessed the petitioner outside in the smoking area with other residents. When asked, the petitioner gave the employee a lighter. On the same day,

the employee reeducated the petitioner about violating the smoking policy. On July 15, 2018 at approximately 5:45 p.m., an employee from the respondent's facility witnessed the petitioner standing partially in the street smoking a cigarette. (Respondent's Exhibit 5)

10. On August 29, 2018, an employee from the respondent's facility discussed with the petitioner and his mother, the petitioner's continued behavior of violating the smoking policy. (Respondent's Exhibit 5)

11. On October 19, 2018, an employee from the respondent's facility witnessed the petitioner sitting on the ground by the laundry area smoking a cigarette. The employee reeducated the petitioner on the facility's smoking policy. (Respondent's Exhibit 5)

12. On April 12, 2019, an employee from the respondent's facility witnessed the petitioner smoking in a non-smoking area and at a non-designated smoking time. The employee reeducated the petitioner on the facility's smoking policy. (Respondent's Exhibit 5)

13. On June 8, 2019, an employee from the respondent's facility believed the petitioner was smoking in his bathroom as there was a strong smell of smoke. The employee reeducated the petitioner about the smoking policy. (Respondent's Exhibit 5)

14. On July 14, 2019, an employee from the respondents' facility witnessed smoke with a strong odor in the petitioner's bathroom. The petitioner was reeducated about the smoking policy. (Respondent's Exhibit 5)

15. On October 24, 2019 and around 8:45 a.m., an employee from the respondent's facility witnessed the petitioner smoking outside without supervision. (Respondent's Exhibit 5)

16. The respondent presented three witnesses who spoke about the instances where they witnessed the petitioner violating the facility's smoking policy.

17. The petitioner suffered a [REDACTED] when he was a teenager and due to the [REDACTED], the petitioner's [REDACTED] was removed. The petitioner's mother asserted that the [REDACTED] of the petitioner's [REDACTED] affects his behaviors; and further asserted the petitioner has [REDACTED] and at times does not remember what was told to him the day before.

18. The petitioner's mother believed the petitioner's [REDACTED] have improved as he is no longer taking the medication [REDACTED]. The petitioner's mother also believed that if the staff at the facility knew his medical conditions, they would be able to effectively assist him in following the facility's smoking policy.

19. The petitioner's mother believed the petitioner's smoking behaviors could be corrected if he was not allowed to leave the facility or if he left the facility, he must always be supervised. The petitioner's mother further believed the petitioner can only obtain cigarettes if he leaves the facility.

20. The petitioner would like to remain in the facility as he is friendly to residents and staff; has deep love for everyone; and brings joy to all as well.

CONCLUSIONS OF LAW

21. 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 that section, this Order is the final administrative decision of the Department of Children and Families.

22. The Code of the Federal regulations at 42 C.F.R. § 483.15 states the reasons for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the petitioner was sent notice indicating his behaviors endangers the health and/or safety of others. The Regulation states, in part:

(a) Admissions policy. (1) The facility must establish and implement an admissions policy...

(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—

...
(2) The facility must—

...
(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;

23. The petitioner's mother argued the petitioner had violated the facility's smoking policy in the past; however, he would no longer violate the facility's smoking policy if there was better communication between the family and staff; and if he had strict supervision to ensure he does not leave the facility.

24. The respondent argued the petitioner continues to violate the facility's smoking policy even after he has been reeducated many times by staff members about the facility's smoking policy. Furthermore, the respondent argued that the petitioner endangers the health and safety of other residents and staff members by either possibly causing fire with oxygen tanks or by exposing others to second hand smoke.

25. The evidence indicates that when the petitioner violates the smoking policy, he endangers the health and safety of residents and staff members. The evidence further

indicates the petitioner is aware and understands the smoking policy even though he continues to violate the policy.

26. The hearing officer concludes the facility has met the burden of proof to establish that although the petitioner was educated about the dangers of smoking, he continues to violate the facility's smoking policy. Based on the evidence presented, the nursing facility has established that the petitioner's violation of the smoking policy endangers the health and safety of residents and staff members. 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.

27. One step in the discharge process is establishing that the reason for a discharge is lawful. The nursing facility 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 only considered whether the discharge is for a lawful reason.

28. 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

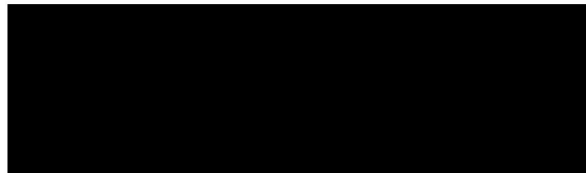
Based upon the foregoing Findings of Fact and Conclusions of Law, the petitioner's appeal is DENIED, as the facility's action to discharge the petitioner is in accordance with federal regulations. The facility may proceed with the discharge action in accordance with the Agency for Health Care Administration's rules and guidelines.

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 19 day of December, 2019,

in Tallahassee, Florida.



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