

**FILED**

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

Oct 29, 2019  
Office of Appeal Hearings  
Dept. of Children and Families

[REDACTED]  
[REDACTED]  
[REDACTED]

APPEAL NO. 19N-00093

PETITIONER,

Vs.

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a nursing home discharge hearing in the above-referenced matter on September 27, 2019 at 9:45 a.m., at th [REDACTED].

[REDACTED]

**APPEARANCES**

[REDACTED]  
[REDACTED]

**STATEMENT OF ISSUE**

At issue is the facility's action to discharge the petitioner due to the safety of other individuals in the facility being endangered; a Nursing Home Transfer and Discharge Notice was issued on June 25, 2019 with an effective date of June 25, 2019. The respondent carries the burden of proof by clear and convincing evidence in this appeal.

**PRELIMINARY STATEMENT**

Witnesses for the petitioner were [REDACTED] [REDACTED] and [REDACTED], with the [REDACTED]. Witness for the respondent was [REDACTED] [REDACTED] the facility.

At the request of the undersigned, the Agency for Health Care Administration (AHCA) conducted an on-site inspection of the facility, the results had not been submitted to the Office of Appeal Hearings (OAH) prior to the September 27, 2019 scheduled hearing.

The petitioner submitted one exhibit, which was entered into evidence as Petitioner's Exhibit "1". The respondent submitted one exhibit, which was entered into evidence as Respondent's Exhibit "1". The record was held open until the end of business on October 4, 2019 to allow the petitioner an opportunity to review the respondent's evidence and, if he wished, to rebut said evidence. No additional documentation was received. The record closed on October 4, 2019. On October 11, 2019, the OAH received a letter from AHCA which informed that an unannounced visit to the nursing facility was completed and there were no violations. The undersigned reopened the record and entered the letter into evidence as Hearing Officer's Exhibit "1". The record closed on October 11, 2019.

**FINDINGS OF FACT**

1. The petitioner [REDACTED] has been residing at the respondent's facility for approximately nine years. The petitioner is alert and makes his own healthcare decisions.

2. On October 6, 2010, April 15, 2016 and January 18, 2019, the petitioner signed the resident's smoking safety education & acknowledgement agreement. Part of the smoking policy included information regarding a designated smoking area.

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 the designated smoking area. A staff member must be present during smoking periods. The smoking area is available 16 hours per day.

4. The petitioner violated the smoking policy on the following dates: December 8, 2018, December 9, 2018, January 14, 2019, January 21, 2019, June 12, 2019 and June 19, 2019. The petitioner was found smoking outside in a non-designated smoking area and without supervision.

5. The NH social services director met with the petitioner and educated him on the smoking policy. The petitioner was advised of the consequences for violating the smoking policy. During the period of 2017 through 2019, the respondent conducted interdisciplinary resident/patient teaching reports regarding the smoking policy and the petitioner's violations on December 10, 2018, January 21, 2019, and June 15, 2019, the petitioner refused to sign. On January 14, 2019 and February 15, 2019, the respondent completed a "Resident Council-Meeting Minutes Form" with the petitioner, this document addresses the smoking policy and details incidents regarding smoking in non-smoking areas.

6. The respondent met with the petitioner's sister regarding his non-compliance of the smoking rules. The dangers of not complying with the smoking rules were discussed with the petitioner and his sister.

7. On June 25, 2019, a Nursing Home Transfer and Discharge Notice was issued to the petitioner. The reason listed on the discharge notice indicates "the safety of other individuals in this facility is endangered". The petitioner refused to sign this form. The notice was signed by [REDACTED]. A brief explanation to support the facility's action indicates the following:

Continuously violating facility smoking policy. Keep lighters and smoking materials with him and keeps some in his room.

8. It is the respondent's position that the petitioner continues to violate smoking protocol as he continues to smoke even after the discharge notice was issued to him. On August 27, 2019, September 10, 2019 and September 17, 2019, the petitioner was seen smoking in non-smoking areas, during non-smoking times, and unsupervised.

9. Furthermore, the petitioner's needs cannot be met at the facility. The petitioner is exposing others to the fumes when he smokes in a non-designated area which may affect the other patients' physical health and poses danger to the patients with oxygen tanks.

10. The petitioner denies these allegations. Additionally, he believes his privacy rights were violated due to unannounced search in his room. He is requesting to remain in the facility, his friends reside in the facility.

11. The petitioner's education level is at a third-grade comprehension and he has been diagnosed with [REDACTED]. The petitioner's sister requested, that if the petitioner

must be removed from the facility, the respondent locate a facility in the State of Connecticut or the vicinity close to her residence.

### CONCLUSIONS OF LAW

12. 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.

13. The Code of Federal Regulations, Title 42, Section 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;

(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;**(emphasis added)

(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.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, pursuant to §431.230 of this chapter, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility pursuant to §431.220(a)(3) of this chapter, unless the failure to discharge or transfer would endanger the health or safety of the resident

or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

(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—

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section...

(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.

14. On June 25, 2019, the facility issued a discharge notice to the petitioner. The facility's reason for discharging the petitioner is that 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

15. The Florida Statutes, Title 29, Section 400.0255, 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.** (emphasis added)

(8) The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer. Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. In addition to any other pertinent information included, the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action. Further, the form must state the effective date of the discharge or transfer and the location to which the resident is being discharged or transferred. The form must clearly describe the resident's appeal rights and the procedures for filing an appeal, including the right to request the local ombudsman council review the notice of discharge or transfer. A copy of the notice must be placed in the resident's clinical record, and a copy must be transmitted to the resident's legal guardian or representative and to the local ombudsman council within 5 business days after signature by the resident or resident designee.

...

(10)...

...

(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.

...

(11) Notwithstanding paragraph (10)(b), an emergency discharge or transfer may be implemented as necessary pursuant to state or federal law during the time after the notice is given and before the time a hearing decision is rendered. Notice of an emergency discharge or transfer to the resident, the resident's legal guardian or representative, and the State Long-Term Care Ombudsman Program or the local ombudsman council if requested pursuant to subsection (9) must be by telephone or in person. This notice shall be given before the transfer, if possible, or as soon thereafter as practicable. The State Long-Term Care Ombudsman Program or a local ombudsman council conducting a review under this subsection shall do so within 24 hours after receipt of the request. The resident's file must be documented to show who was contacted, whether the contact was by telephone or in person, and the date and time of the contact. If the notice is not given in writing, written notice meeting the requirements of subsection (8) must be given the next working day.

(12) After receipt of any notice required under this section, the State Long-Term Care Ombudsman Program or local ombudsman council may request a private informal conversation with a resident to whom the notice is directed, and, if known, a family member or the resident's legal guardian or designee, to ensure that the facility is proceeding with the discharge or transfer in accordance with this section. If requested, the State Long-Term Care Ombudsman Program or the local ombudsman council shall assist the resident with filing an appeal of the proposed discharge or transfer.

...

(15) (a) The department's Office of Appeals Hearings shall conduct hearings under this section...

(b) The department shall, by rule, establish procedures to be used for fair hearings requested by residents. These procedures shall be equivalent to the procedures used for fair hearings for other Medicaid cases, chapter 10-2, part VI, Florida Administrative Code. The burden of proof must be clear and convincing evidence...

16. In accordance with the above federal regulation and statute, the discharge notice was signed by a physician designee. The discharge notice also indicated the reason 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.

17. The undersigned reviewed the findings and evidence. The respondent seeks to discharge the petitioner due to the safety of other individuals in the facility being

endangered. The evidence shows that the petitioner continues to smoke outside of the facility's designated smoking times and areas. The petitioner has not demonstrated a willingness to comply with the facility's smoking guidelines as he continues to smoke even after being educated on the facility's smoking policy.

18. 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.

19. Establishing the reason(s) for a discharge is lawful is just one step in the discharge process. The nursing home must also identify an appropriate transfer or discharge location and a safe and orderly transfer or discharge from its facility. The undersigned cannot and has not considered either of these issues. The undersigned only considered whether the discharge was for a lawful reason(s) and that the requirements of the controlling authorities have been met.

20. After careful review of the cited authorities, testimony, and evidence, the undersigned concludes the respondent has met its burden of proof. The undersigned concludes the respondent's action to discharge the petitioner is proper, as the facility has proven that the safety of other individuals in the facility is endangered.

21. 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**

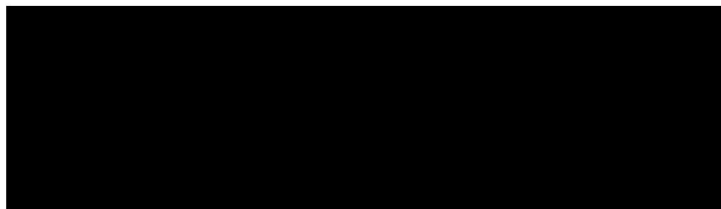
Based on the foregoing Findings of Fact and Conclusions of Law, this appeal is DENIED, as the facility's action to discharge the petitioner is correct and in accordance with federal regulations. The facility may proceed with the discharge in accordance with all applicable AHCA requirements.

**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 29 day of October, 2019,

in Tallahassee, Florida.



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

