

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

FILED

Oct 28, 2019

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 19N-00102

PETITIONER,

Vs.

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

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned on September 19, 2019 at approximately 1:30 p.m. at th [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ISSUE

At issue is whether discharge intent was correct based on the petitioner's endangering the safety of other individuals in the facility, which has designated smoking areas and smoking times. 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 and Section 400.0255(15), Florida Statutes.

The respondent carries the burden of proof by clear and convincing evidence.

PRELIMINARY STATEMENT

By notice dated August 1, 2019, the respondent informed the petitioner that the facility was seeking to discharge/transfer him due to the endangerment of the safety of others in the facility due to: "...(petitioner) has broken the smoking policy several times causing safety concerns for himself & others in facility." The discharge notice is signed by physician [REDACTED], on August 1, 2019. On August 7, 2019, the petitioner timely requested a hearing to challenge the discharge/transfer.

Appearing as witnesses for the respondent were [REDACTED], [REDACTED]

[REDACTED] § [REDACTED]

[REDACTED] [REDACTED] essa Burger [REDACTED],

[REDACTED]

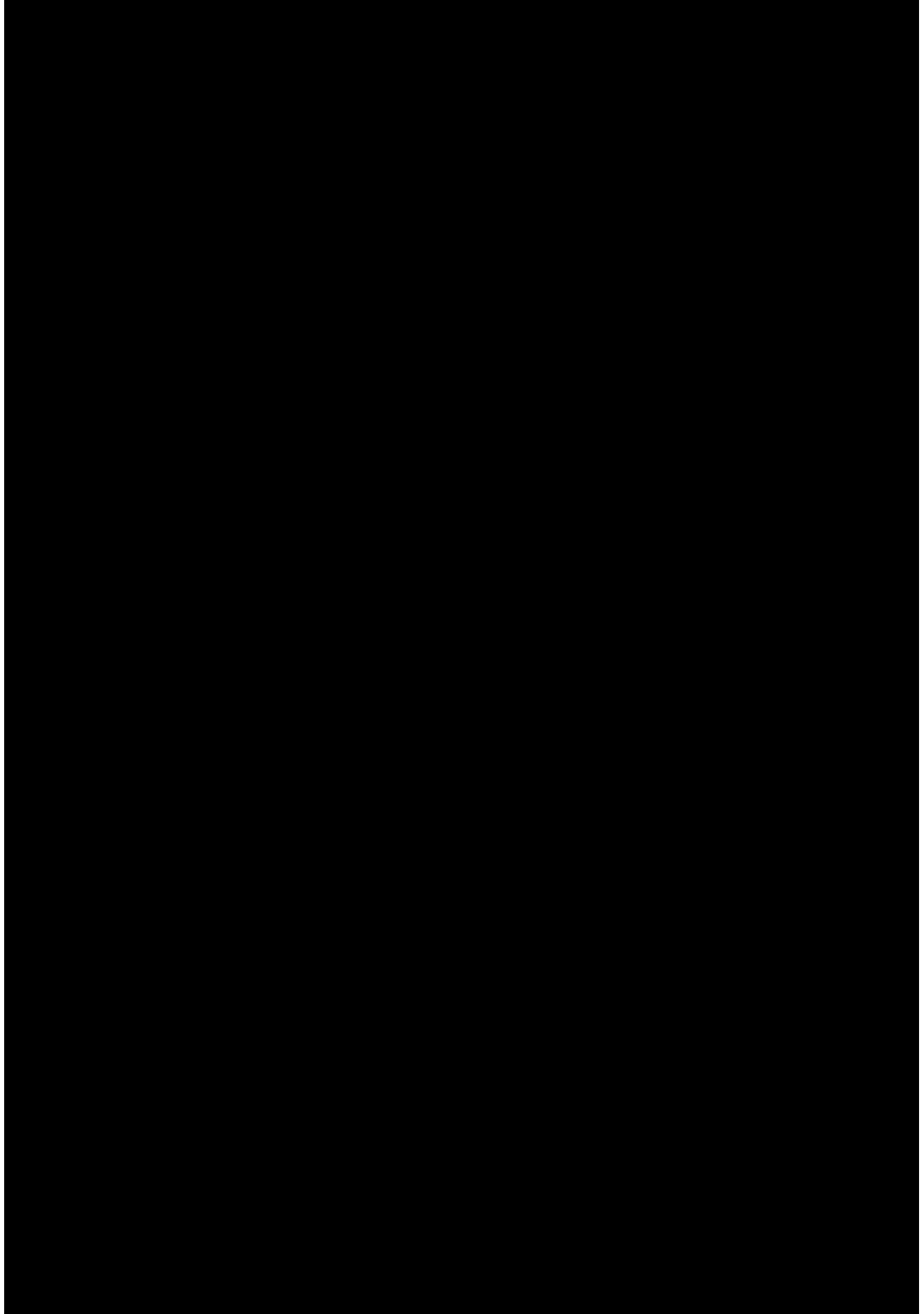
Evidence was received and entered as the Respondent's Exhibits 1 through 2.

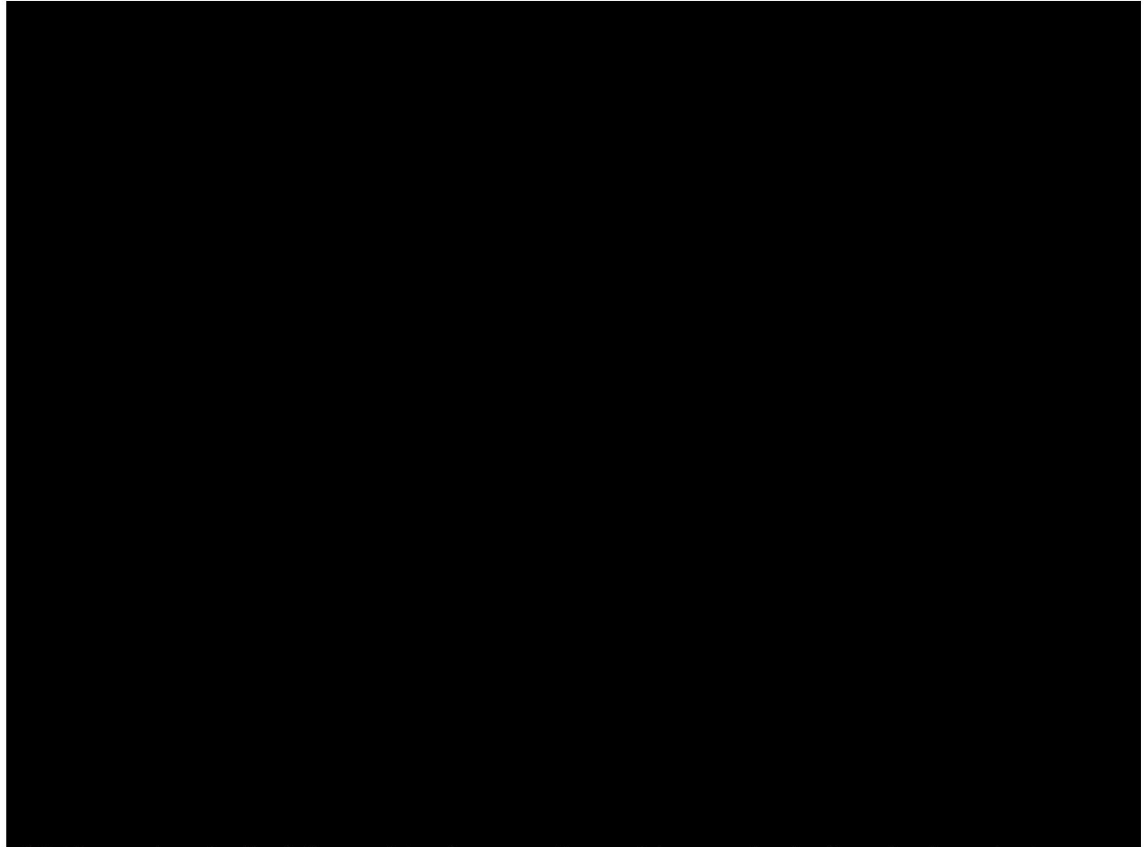
The record was closed at the end of the hearing.

FINDINGS OF FACT

1. The petitioner originally resided at the facility in 2010, left, and was readmitted in 2017 after suffering a stroke. The NHA contends that upon readmission to the facility, petitioner was given its corporate "Smoking Policy" (Policy) from Southern Health Care revised on September 26, 2017. The NHA explained that smokers are identified by its Interdisciplinary Team (IDT) and that a smoking care plan is established and approved before the resident is given approval to smoke.

2. The Respondent Exhibit 2 includes the Policy, which states:





3. The NHA contends that its residents are allowed to smoke in the designated smoking area located in the facility's courtyard during the times on the smoking schedule. The NHA explained that a smoking schedule was established to meet the needs of the residents. The NHA contends that information regarding the location of the designated smoking area and the smoking schedule are both posted at each nursing station. The Respondent's Exhibit 2 includes the Supervised Smoking Times as follows:

Supervised Smoking Times

7:00 A.M. CNA assigned
9:00 A.M. CNA assigned
11:00 A.M. CNA assigned
1:00 P.M. CNA assigned
3:00 P.M. CNA assigned
5:00 P.M. CNA assigned
7:00 P.M. CNA assigned
9:00 P.M. CNA assigned
11:00 P.M. CNA Assigned

4. The respondent contends that the residents must be supervised while smoking during the designated times and must relinquish their smoking materials to the smoke monitor after smoking and before entering the facility. The residents are not allowed to have smoking materials in their rooms. The residents are allowed to smoke during their personal time away from the facility if approved by the physician but must have their smoking materials checked in and out.

5. The RCS contends that the petitioner's care plan was updated in April 2018 to notate that he received education on the smoking policy. The "Resident/Family Education Record/Evaluation-V-2" (Evaluation), dated April 20, 2018, includes documentation to show that the petitioner was provided with information regarding the smoking policy. The Evaluation includes documentation in section A, subsection III as follows: "Review of smoking policy. Safety with smoking, appropriate receptable use, smoking paraphernalia may not be kept on resident's person, but stored with staff in appropriate container. Review of dc potential for violations." The Evaluation's section B, subsection I indicates that an educational evaluation was completed with the petitioner (resident). The Evaluation's section B, subsection I, Evaluation/Follow-up on Education was completed with the petitioner on the subjects of "Community Resources" and "Safety." Subsection III, "Outcome" indicates that the information given to the petitioner "Retained/Able to Demonstrate Correctly" and "Verbalizes Understanding". The Evaluation was signed by Bambi Barber, LPN, on July 23, 2018 (Respondent's Exhibit 2, page 27 and 28). The RCS contends that the petitioner's care plan was updated in July 2018 to notate his noncompliance with the smoking policy.

6. The RCS points out progress notes dated July 14, 2019, which states:

██████████ came to NS and notified this nurse that as she came out with the residents for a scheduled smoke break she found another resident attempting to extinguish his shirt by patting it out. This resident took off his outer shirt and threw it away, it was later found with a burn hole in the right chest area. Skin in that area noted to be pale pink, intact. He refused any first aid care and would not comment on the incident. attempt to notify NOK, message left (Respondent's Exhibit 2, page 17).

7. The RCS contends that on July 16, 2019, the facility conducted a resident council meeting to review the smoking policy and safe smoking agreement. The Resident Council Minutes state: "...Both Policy & Agreement were read to all residents present and signed by each resident to acknowledge their understanding of policies..." (Respondent's Exhibit 2, page 31). The Respondent's Exhibit 2, page 33 includes a log of the residents who attended the resident council meeting. The petitioner's name was listed with his signature, dated July 16, 2019. The Respondent's Exhibit 2, page 14, includes the Safe Smoking Agreement, which states:

I agree to abide by the facility's smoking guidelines, which include:

Being evaluated for the ability to smoke safely and/or determine that I require supervision.

I understand I must wear a smoking apron if I am evaluated to be an unsafe smoker.

I will only smoke in designated outdoor areas. I understand smoking is never allowed inside the facility; including my room or any bathroom.

I understand this also applies to any electronic smoking device and materials.

I will only smoke during the designated smoking times.

I understand that:

I will be supervised when I am smoking.

My smoking supplies (cigarettes, pipe, cigar, electronic cigarette, vape device, lighters, etc) will be stored with the facility staff at all times when not being used in the smoking area at the designated smoking times.

I may not share any smoking supplies with any other residents.

I understand that if I violate the smoking guidelines at any time, I may receive a 30 day letter of discharge notice.

I fully understand the above agreement, had the opportunity to ask questions, and all questions or concerns have been answered to my satisfaction.

8. The Safe Smoking Agreement was signed by the petitioner on July 16, 2019 to acknowledge that he understood the smoking policy that was reviewed during the resident council meeting. The respondent contends that, on July 16, 2019, the petitioner was determined to be an unsafe smoker and is required to wear a smoking apron during his supervised smoking sessions.

9. The Respondent's Exhibit 2, includes Nurse's Progress Note, created by [REDACTED] dated July 22, 2019, which states:

Cna came to this writer during med pass, he said housekeeping saw resident smoking without staff present. When staff member went to check on resident he saw resident outside in the smoke area but no cigarette was visible, he notice a red area on top of right hand. Upon assessment resident noted with a superficial reddened area on top of right hand. MD aware and new treatment orders are in place...

10. The [REDACTED] explained that a cognitive evaluation was conducted with the petitioner on July 22, 2019 and believes that the petitioner understands "yes" and "no" questions 100% of the time. Th [REDACTED] contends that although the petitioner has trouble expressing himself, he has a basic level of understanding of his wants and needs. The [REDACTED] contends that the petitioner has more of a language disorder [REDACTED] following his stroke. Th [REDACTED] believes that the petitioner can understand the smoking policy.

11. The respondent's evidence includes part of the petitioner's medical records. The medical records provide documentation that states under the "Focus" field: "Resident Smokes [REDACTED] is an unsafe smoker. 7/14/19 cont with non compliance with smoking policy. 7/22/19-observed noncompliance with smoking policy..." The "Goal" field states: [REDACTED]) should remain safe with smoking supervision and should continue to

demonstrate safe technique when smoking through this review period.” The “Interventions” field states: “7/15/19-Educated resident to the facility smoking policy with demonstrated understanding as well as smoking area and times of smoking along with use of apron.” The medical record lists the physician as [REDACTED] and has a print date of September 10, 2019 (Respondent’s Exhibit 2, page 15).

12. The [REDACTED] contends that during a weekly room sweep, used cigarettes were found in a drawer in the petitioner’s room. The [REDACTED] did not provide the date and time. The [REDACTED] contends that the smoking policy requires all smoking paraphernalia to be placed with staff members.

13. [REDACTED] contends that she has witnessed the petitioner smoking, unsupervised, on two occasions during the day while walking through the courtyard the past couple of months. [REDACTED], contends that she has witnessed the petitioner smoking outside of the smoking hours on multiple occasion [REDACTED]. [REDACTED] contends that she has witnessed the petitioner smoking outside of the smoking hours. She does not remember the dates and times but contends that she has reported the incidents that have occurred since she began working for the facility in February 2019. The facility’s evidence also includes the witness’s written statements (Respondent’s Exhibit 2, pages 22, 23, and 25). The Respondent’s Exhibit 2, pages 24 and 26 include written statements from facility staf [REDACTED] and [REDACTED] [REDACTED] respectively. Both staff members attest that they have witnessed the petitioner smoking outside smoking hours and smoking while unsupervised.

14. The [REDACTED] contends that the petitioner's brother was contacted by telephone after the July 22, 2019 incident but never heard back from him.

15. The petitioner's brother appreciates the facility giving a warning for the July 14, 2019 incident but argues that a discharge from the current facility to a facility further away would not allow his mother to visit as often as she would like. The petitioner's brother argues that the facility's documentation of the petitioner's violations of the smoking policy is lacking. The petitioner's brother disputes not returning the [REDACTED] phone call regarding the July 22, 2019 smoking incident.

16. The [REDACTED] contends that sometimes the petitioner's violations may not be documented in the notes. The [REDACTED] contends that the petitioner continues to be noncompliant with the smoking policy and that he has not suddenly been noncompliant. [REDACTED] does not know if the violations she witnessed were documented. The CNAs contend that they are not authorized to make entries in the nurse's progress notes but are required to report any violations to a nurse.

17. The [REDACTED] contends that the petitioner has been in violation of the smoking policy since 2017. The NHA explained that he became administrator of the facility one year ago and recognized that the smoking policy needed to be reviewed, which is the reason for the July 16, 2019 resident council meeting. The [REDACTED] contends that the facility where the petitioner will be discharged is less restrictive on its smokers and has more smoking times. The NHA contends that it is his responsibility to enforce the smoking policy to protect the petitioner, other residents, and staff.

CONCLUSIONS OF LAW

18. 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.

19. 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.

(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.

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) 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;

20. Florida Statutes 400.0255, Resident transfer or discharge; requirements and procedures; hearings, states in relevant part:

(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 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...

(b) The resident's health or safety or 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.

21. The respondent's reason for discharge is the safety of individuals is endangered. This is one of the reasons given in the above federal and state law to permit discharge from a facility. According to the above authorities, this discharge reason would require documentation from the resident's physician. The petitioner's physician signed the discharge notice.

22. The petitioner was aware of the facility's smoking policy. He was found to be noncompliant. After review of the entire record as well as the controlling authorities, the undersigned concludes that the nursing facility has correctly established that the safety of individuals in the facility would be endangered. This is one of the six reasons provided in 42 C.F.R. § 483.15 for which a nursing facility may involuntarily discharge a resident.

23. 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.

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.

DECISION

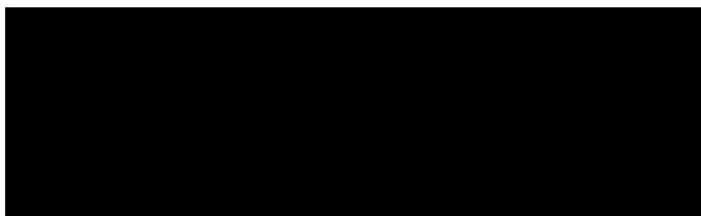
Based upon the forgoing Findings of Fact and Conclusions, the appeal is denied and the facility may proceed with its proposed discharge in accordance with the Agency for Health Care Administration's rules and regulations.

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 28 day of October, 2019,

in Tallahassee, Florida.



Hearing Officer
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FINAL ORDER (Cont.)

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