

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

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 19N-00103

PETITIONER,

Vs.

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

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned on October 10, 2019 at 11:45 a.m. at th [REDACTED]

[REDACTED]

APPEARANCES

[REDACTED]

[REDACTED]

ISSUE

At issue is whether discharge intent was correct based on the petitioner's health has improved so that the facility's services are no longer needed and endangering the safety of other individuals in the facility, which is a non-smoking facility. 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 5, 2019, the respondent informed the petitioner that the facility was seeking to discharge/transfer him due to his health has improved sufficiently so that he no longer needs the services provided by the facility and due to the endangerment of the safety of others in the facility. The discharge notice included a brief explanation that states: "Resident reached max potential" and "Smoking on center grounds. The facility is a non-smoking facility" (Respondent's Exhibit 1). The discharge notice included discharge orders signed by the facility's physician on August 5, 2019. On August 9, 2019, the petitioner timely requested a hearing to challenge the discharge/transfer.

Appearing as witnesses for the petitioner were his sister [REDACTED], and sister's boyfriend [REDACTED]

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

Evidence was received and entered as the Respondent's Exhibits 1 through 3.

The record was closed at the end of the hearing.

FINDINGS OF FACT

1. The petitioner was admitted into the facility as a short-term resident on June 24, 2019. The █████ explained that the admission packet was signed by the petitioner acknowledging his understanding that the facility was a non-smoking facility. The Respondent's Exhibit 3 includes the Admission Agreement (Agreement) dated June 24, 2019, paragraph seven, which states: "Smoking: This is a smoke free center...Patients agree to follow the Center's smoking policy (a copy of which has been provided to them)." The Agreement was signed by the petitioner on June 25, 2019. The █████ contends that the petitioner smoked on the facility's premises upon admission. The █████ contends that staff educated him on his non-compliance with the smoking policy. The █████ contends that staff and nurses reported that they have found cigarettes, lighters, and the smell of smoke in his room; this puts other residents, including those on oxygen, at risk. The █████ explained that the petitioner's non-compliance also creates a fire hazard. The █████ contends that the petitioner also uses tobacco to roll his cigarettes and creates a trail throughout the facility, which may entice other residents to consume the tobacco. The █████ contends that the facility offers the patch to residents who smoke. The █████ contends that the petitioner was offered the patch on July 12, 2019 but he declined. The Respondent's Exhibit 2, page 29, includes a Nursing Progress Note, dated July 12, 2019, which states: "...He actively smokes cigarettes and refused offered nicotine patch as replacement to be ordered..."

2. The █████ contends that the petitioner was on therapy caseload and that the insurance coverage for his skilled nursing care ended. The Respondent's Exhibit 2,

page 8, includes the Notice of Medicare Non-Coverage (Notice). The Notice states: "The Effective Date Coverage of Your Current Skilled Nursing Services Will End: 07/04/19..." The [REDACTED] contends that the [REDACTED] opined that the petitioner reached his full potential. The [REDACTED] contends that the petitioner has a [REDACTED] and that he is not compliant with [REDACTED]. The F [REDACTED] contends that due to the petitioner not [REDACTED] he [REDACTED] was unable to get his full cooperation with therapy. The [REDACTED] contends that the petitioner was walking on his [REDACTED] even though he was advised by his physician to use his wheelchair and to [REDACTED]. The Respondent's Exhibit 2, page 30, includes Nursing Progress Note (Note), dated July 9, 2019, which states: "...Resident observed to have [REDACTED] and walking on bare feet...wound bed had hair, grass and dirt ...I again educated the resident on the importance of keeping the dressing intact and not walking on the foot. The resident stated "Yeah I know..." The [REDACTED] contends that the petitioner will sometimes leave the facility to go the gas station on his bicycle and puts weight on his [REDACTED] which hinders the [REDACTED]. The [REDACTED] contends that one Saturday morning, the petitioner signed himself out of the facility, and was gone until 11:00 p.m. The [REDACTED] contends that staff called him and looked for him. The [REDACTED] further explained that the petitioner checks himself out of the facility several times and that this puts the facility at risk because he misses taking his [REDACTED] and is prevented from proper [REDACTED]. The [REDACTED] contends that the petitioner was observed smoking within the facility's premises. The Respondent's Exhibit 2, page 28, includes the Note, dated July 13, 2019. The Note

states: "Resident was observed signing himself out of the facility...without socks or shoes on. Writer stated that he must wear socks and shoes...resident said "okay sorry" and did not put socks or shoes on and exited...smoked a cigarette in the parking lot..."

The Respondent's Exhibit 2, page 27, includes Note dated July 25, 2019, which states:

"Writer spoke with resident again on smoking policy/resident verbalized understanding but continues to be non-compliant/resident is non-compliant with [REDACTED]

[REDACTED]...frequently removes wound dressing and walk [REDACTED] is at times verbally abusive to the staff..."

3. The [REDACTED] contends that staff have found beer cans that the petitioner has left around the facility. The [REDACTED] contends that the petitioner [REDACTED] as not yet healed and believes that his smoking and alcohol consumption reduces the chances for [REDACTED]. The DCS contends that the petitioner was taught how to take care of his foot and has demonstrated competency in dressing his wound. The DCS believes that since the petitioner checks himself out of the facility and is able to ride his bicycle to go where he would like, he should be able to attend his doctors' appointments or call family members to arrange transportation to get to his appointments. The DCS believes the petitioner understands how and when to take his medications. The DCS believes the petitioner can care for himself within the community.

4. The [REDACTED] and [REDACTED] explained that the speech therapist [REDACTED] conducted [REDACTED] of Judgment on October 2, 2019. The [REDACTED] explained that the [REDACTED] is a tool to assess the practical judgement of the residents. The

█ explained that impaired judgement is often found in patients with dementia. Th █ explained that as a screening tool, the █ is an accurate assessment of current judgement skills but is not designed to make a definite cognitive diagnosis. The █ explained that the petitioner scored a total █ score of 20 out of 21, which is a score consistent with persons who do not have dementia and who demonstrate basic judgment skills and competencies. The █ explained that individuals who obtain this score are able to perform activities of daily living (ADLs) in the community with minimum assistance. The █ explained that the petitioner's judgement subtest score was a seven, which indicates that he has normal judgement, and has no serious issues with executive functions. Th █ explained that individuals with a subtest score of seven typically do not have dementia, but this does not mean that the individual will exercise good judgements or make appropriate decisions. The █ contends that he was the petitioner's physical therapist during the evaluation and at the discharge of his physical therapy at the supervision level. The █ contends that the petitioner was able to get in and out of his bed, was able to walk on his own, and go to the bathroom on his own at the supervision level.

5. The petitioner's sister does not agree with th █ The petitioner's sister contends that her brother will have a hard time functioning in the community and will be a risk to himself if discharged to the homeless shelter in █ The petitioner contends that the petitioner has a mental disability and cannot take care of himself. The petitioner's sister contends that when the petitioner lived with their mother, he was unable to feed and clean himself. The petitioner's sister contends that the petitioner

had a diabetic reaction and almost went into a diabetic coma. The petitioner's sister explained that when their mother had a stroke and went into the nursing home, the owner of the home evicted her brother and said that he was not capable of living on his own. The petitioner's sister contends that the petitioner has not had a diabetic episode since he has been at the facility and that he has been more coherent since he has been at the facility. The petitioner's sister argues that their mother is living at the facility and that it would be detrimental to the petitioner's mental and physical health to be discharged to the homeless shelter. The petitioner's sister believes the petitioner will die if he is moved to a homeless shelter. The petitioner's sister argues that the petitioner will be too far from her and his mother and that she will not be able to take care of him if he is moved to Daytona Beach.

6. The petitioner's sister argues that there is a smoking area at the facility and that others smoke on the premises. The petitioner's sister acknowledges that the petitioner keeps tobacco in his room and that she has spoken to him about it. The petitioner's sister does not believe that he is leaving a trail within the facility. The petitioner's sister argues that the facility does not have proof that the petitioner is the one who is leaving beer cans around the facility, as she believes the beer cans were possibly left by others who are consuming beer at the facility.

7. The petitioner's friend argues that the petitioner will burn the house down if he lives on his own, as he tried to charge his phone using the microwave. The petitioner's friend believes that the petitioner has been doing well since he has been in the facility.

8. The petitioner denies trying to charge his phone with the microwave. The

petitioner denies being non-compliant. The petitioner acknowledges that he smoked on the facility's premises but denies knowing that the facility is a non-smoking facility. The petitioner does not want to be discharged to a facility away from his mother. The petitioner does not dispute that he leaves the facility, but contends that he returns by the curfew, which is 12:00 a.m.

9. The [REDACTED] contends that the petitioner is still at risk for going into a diabetic coma even if he continues to reside at the facility due to his frequent absences from the facility. The [REDACTED] acknowledges that the petitioner has a mental disability. The [REDACTED] explained that an assisted living facility (ALF) [REDACTED] is willing to accept him with his income. The [REDACTED] explained that the [REDACTED], [REDACTED], and the [REDACTED] in [REDACTED] are both [REDACTED] h [REDACTED] believes that the petitioner behaves as if he is residing in an apartment complex instead of a rehabilitation center. The [REDACTED] explained that the [REDACTED] is a nursing facility for individuals with a higher level of functioning in an apartment-like setting and is more suitable for the petitioner and his needs. The [REDACTED] explained that the petitioner has reached his maximum potential and that the facility's physician agreed and signed the discharge orders.

10. The [REDACTED] contends that the petitioner has been determined to be competent and believes he will be able to perform his [REDACTED] within the community.

CONCLUSIONS OF LAW

11. 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.

12. 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;
 - ...
 - (C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;

13. 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.

14. The respondent's reasons for discharge is, the petitioner's health has improved sufficiently so that he no longer needs the services provided by the facility, and the safety of individuals is endangered. These are two 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 orders that were attached to the Nursing Home Transfer and Discharge Notice.

15. After review of the entire record as well as the controlling authorities, the undersigned concludes that the nursing facility has correctly established that the petitioner's health has improved sufficiently so that he no longer needs the services provided by the facility, and the safety of individuals in the facility would be endangered. These are two of the six reasons provided in 42 C.F.R. § 483.15 for which a nursing facility may involuntarily discharge a resident.

16. 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.

17. 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

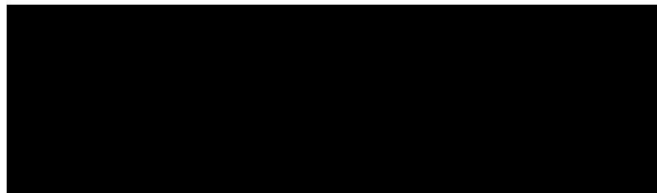
Based upon the forgoing Findings of Fact and Conclusions, the appeal is denied and the facility may proceed with its proposed discharge in accordance with the Agency for Health Care Administration's rules and regulations.

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 30 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

