

FILED

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

Sep 08, 2021
Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 21N-00042

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter at 1:03 p.m. on July 21, 2021.

APPEARANCES

For Petitioner: [REDACTED] pro se

For Respondent: [REDACTED] Administrator

STATEMENT OF ISSUE

Petitioner appeals Respondent's action discharging Petitioner from [REDACTED] [REDACTED] (the "Facility"). Respondent carries the burden of proof by clear and convincing evidence.

SUMMARY OF PROCEEDINGS

This hearing was originally scheduled to convene on July 13, 2021. On July 7, 2021, the Office of Appeals Hearing ("OAH") received an email from Petitioner that in

part states, "I have medical appointments today & daily through the 15th, that cannot be rescheduled." Therefore, the hearing was rescheduled for July 21, 2021.

On July 19, 2021, Petitioner called the OAH to request that the July 21, 2021, hearing be rescheduled, because she was not prepared to go forward with the hearing. The OAH informed Petitioner to submit her request in writing. On July 20, 2021, Petitioner called the OAH in the AM to inquire if the July 21, 2021, hearing had been rescheduled. The OAH informed Petitioner that the hearing had not been rescheduled. Also, on July 20, 2021, Petitioner called the OAH in the PM to request that the hearing be reschedule for a different reason; Petitioner stated that she had a doctor's appointment on July 21, 2021, in the afternoon. Petitioner did not submit written continuance requests for the July 21, 2021 hearing. On July 21, 2021, at 7:47 a.m., the undersigned sent Petitioner and Respondent an email, denying Petitioner's verbal continuance requests; and informed the parties that the 1:00 p.m. hearing would go forward.

██████████, Florida Certified Ombudsman, appeared as Petitioner's witness. Appearing as witnesses for Respondent from the Facility were: ██████████ ██████████ Director of Social Services and ██████████ Director of Nursing. Petitioner did not submit exhibits. Respondent submitted five (5) exhibits, which were entered into evidence and marked as Respondent's Exhibits one ("1") through five ("5"). The record remained open through end of business July 26, 2021, for Respondent to submit additional exhibits and for Petitioner to submit exhibits. Respondent's exhibits were timely received, which were entered into evidence and marked as Respondent's

Exhibit six (“6”) and seven (“7”). Petitioner did not submit exhibits. The record closed on July 26, 2021.

Petitioner’s Position

Petitioner took the position that the Facility is retaliating against her, because she has made numerous complaints and the Facility wants to get rid of her. Petitioner’s position is that she plans on leaving the Facility; however, she is waiting on insurance and hospice responses before she can leave.

Respondent’s Position

Respondent took the position that Petitioner has been educated on the Facility’s smoking policy; and on three (3) different dates Petitioner signed the Facility’s smoking education acknowledgement forms, agreeing to abide by the Facility’s smoking policy. Respondent’s position is that Petitioner violated the Facility’s smoking policy on at least two (2) separate occasions endangering the safety of other individuals in the Facility.

FINDINGS OF FACT¹

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner, date of birth [REDACTED] 1955, was admitted to the Facility on [REDACTED] [REDACTED] 2019, from [REDACTED] Hospital, due to hip pain. (Hr’g R.)
2. On August 28, 2019, October 1, 2019, and January 11, 2021, Petitioner signed the Facility’s Resident Family and Visitor Smoking Safety Education and Acknowledgment form. The form states in part:

¹ Citations within the Findings of Fact and Conclusions of Law in this order follow Florida Rule of Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

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 and the entire resident population and staff. The facility has established appropriate smoking areas and smoking times that will not interfere in the care of other residents...

GUIDELINES

...

2. Staff member assigned to monitor the smoking area and distribute cigarettes, e-cigarette and or chewing tobacco will, in addition, supervise by conducting walking rounds to observe and intervene for safety issues. Staff will light the cigarette, cigar, etc.

...

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 restrictions of smoking privileges and/or discharge from the facility.

(Resp't Ex. 4 at 5-8.)

3. The Facility's patio is the smoking designated area. Residents may smoke between the hours of: 8:00 a.m. through 10:00 a.m., 1:00 p.m. through 3:00 p.m. and 6:00 p.m. through 10:00 p.m. Residents are also allowed to take their smoking paraphernalia, i.e., vaping device, tobacco cigarettes and lighter, when they sign out to leave the Facility.

(Hr'g R.)

4. On May 15, 2021, Petitioner signed out to leave the Facility; she requested and received her vaping device. Upon returning to the Facility, on May 15, 2021, Petitioner entered the lobby, on her motorized scooter and asked the nurse, "do you want to smell cheerio flavor?" (Resp't Ex. 7.) The Facility's video recorder then captured Petitioner take a puff on the vaping device and exhaled its contents. (Resp't Ex. 6 at 1-3.)

5. On May 26, 2021, the Facility issued Petitioner a Nursing Home Transfer Discharge Notice, listing the following reason for discharge or transfer, "The safety of other individuals in this facility is endangered." The notice was signed by the Facility Administrator and ("█"), Physician. Petitioner refused to sign the notice. (Resp't

Ex. 2.)

6. On July 6, 2021, Petitioner signed out of the Facility; she requested and received her package of tobacco cigarettes and lighter. (Hr'g R.)

7. Also on July 6, 2021, four (4) different individuals reported seeing Petitioner smoking cigarettes outside, under the awning of the Facility's front entrance. (Resp't Ex. 5 at 2-5.)

8. Petitioner agreed that she smoked a cigarette on July 6, 2021, outside the Facility. Petitioner alleged that she smoked to the left of the awning, where she frequently smokes. (Hr'g R.)

9. The Facility's video recorder captured Petitioner smoking a cigarette under the Facility's awning. (Resp't Ex. 6 at 4-8.)

CONTROLLING LAW

10. Section 400.0255(15), Florida Statutes ("F.S."), provides the Department of Children and Families, Office of Appeal Hearings, jurisdiction over the subject matter of this proceeding and the parties. This section further prescribes this order as the final administrative decision of the Department of Children and Families.

11. Title 42 Code of Federal Regulations Section 483.15, Admission, transfer and discharge rights. sets forth the reasons a facility may involuntarily discharge a resident as follows:

- ...
- (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...

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by...

(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section...

[Emphasis added.]

12. Section 400.0255, F.S., Resident transfer or discharge; requirements and procedures; hearings, in relevant 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... 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...

CONCLUSIONS OF LAW

13. Respondent's reason for issuing Petitioner a transfer/discharge notice is, "The safety of other individuals in this facility is endangered." This is one (1) of the reasons listed in the above authority as a valid reason for a transfer/discharge.

14. In accordance with the above authority, the Facility Administrator and [REDACTED], Physician, signed Petitioner's transfer/discharge notice.

15. The evidence established that Petitioner agreed to abide by the Facility's smoking policy when she signed the Facility's Resident Family and Visitor Smoking Safety Education and Acknowledgment form on August 28, 2019, October 1, 2019, and January 11, 2021.

16. The evidence established that on May 15, 2021, Petitioner smoked her vaping device in the Facility's lobby in violation of the Facility's smoking policy.

17. The evidence established that Petitioner smoked tobacco cigarettes underneath the Facility's awning in violation of the Facility's smoking policy.

18. Establishing that the reason for a discharge is lawful is just one step in the discharge process. The Facility must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently preparing the resident for a safe and orderly transfer or discharge from the Facility. The undersigned cannot and has not considered either of these issues as these issues are governed by the Agency for Health Care Administration ("AHCA"). The undersigned only considered whether the discharge is for a lawful reason.

19. After careful review of the evidence and cited authorities, the undersigned concludes that Respondent met its burden of proof by clear and convincing evidence that Petitioner's discharge/transfer reason, is proper.

20. Any discharge by the Facility must comply with all applicable federal regulations, Florida Statutes, and the AHCA requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the AHCA's health care facility complaint line at (888) 419-3456.

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is DENIED. The Facility's action to transfer/discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and 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, Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190. 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. 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 08 day of September , 2021,

in Tallahassee, Florida.



Priscilla Peterson
Hearing Officer
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Copies Furnished To: [REDACTED] Petitioner

[REDACTED]
Agency for Health Care Administration