

**FILED**

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

Nov 02, 2021  
Office of Appeal Hearings  
Dept. of Children and Families

DAWN WHITE  
[REDACTED]

APPEAL NO. 21N-00059

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 2:51 p.m. on September 16, 2021.

**APPEARANCES**

For Petitioner: [REDACTED], Regional Ombudsman Manager

For Respondent: Colin Riley, Esq.

**STATEMENT OF ISSUE**

Petitioner appeals Respondent's action discharging her from [REDACTED] [REDACTED] (the "Facility") due to, "The safety of other individuals in this facility is endangered." Respondent carries the burden of proof by clear and convincing evidence.

**SUMMARY OF PROCEEDINGS**

On September 8, 2021, a hearing continuance request was received from Tracie Rayfield, District Ombudsman Manager, which states in part, "I would like to request a

seven (7) day extension...I am requesting this extension, because the records were received from the attorney at 1:37 this afternoon, and I still need time to review them and write the notes for my argument.” The hearing continuance request was denied as Petitioner had eight (8) days to review Respondent’s evidence.

Petitioner was present at the hearing and provided testimony. [REDACTED] District Ombudsman Manager, appeared as Petitioner’s witness. Appearing as witnesses for Respondent from the Facility were: [REDACTED] Administrator, [REDACTED] RN MDS Coordinator, [REDACTED] Director of Social Services and [REDACTED] Director of Nursing.

Respondent submitted seven (7) exhibits, which were entered into evidence and marked as Respondent’s Exhibits one (“1”) through seven (“7”). Petitioner submitted three (3) exhibits, which were entered into evidence and marked as Petitioner’s Exhibits one (“1”) through three (“3”). The record remained open through end of business September 27, 2021, for proposed orders.

On September 27, 2021, proposed orders from both parties were received. Petitioner’s proposed order was received at 4:45:20 p.m. Respondent’s proposed order was received at 9:27:57 p.m. Respondent’s proposed order will not be accepted and/or considered, as it was received after end of business day on September 27, 2021. Petitioner’s proposed order was accepted and considered in the Final Order. The record closed on September 27, 2021.

### **Petitioner's Position**

Petitioner took the position that she has never endangered others in the Facility. Petitioner's position is that two cigarette butts could have fallen out of her purse when she emptied the contents in the bathroom sink.

### **Respondent's Position**

Respondent took the position that the Facility has, on numerous occasions, reviewed and educated Petitioner with its smoking policy. Respondent's position is that Petitioner continues to violate the Facility's smoking policy; consequently, endangering the safety of others in the Facility.

### **FINDINGS OF FACT<sup>1</sup>**

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] 1973, was admitted to the Facility on [REDACTED] 2018, from an acute hospital, name unknown, due to seizures, neurogenic bladder, CVA, anxiety and manic depression. (Hr'g R.)
2. On October 19, 2020, a copy of the "Facility (Premises) Smoking/Non-Smoking" policy was reviewed and presented to Petitioner. The policy states in part:

This facility has adopted a smoking policy that will promote safety for residents, visitors, families and employees. It is not the intent of the facility to prohibit or restrict smoking privileges, but to provide for the safety of residents who choose to smoke, as well as the safety of all other facility residents, visitors and stakeholders...

**GUIDELINE:**

2. Smoking will be allowed within the 'Designated Smoking Area' only... The smoking area will be equipped with the two required metal cans with self-closing lids.

---

<sup>1</sup> 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.

- a. One metal can designated and labeled as "Butts only"
- b. One metal can designated and labeled as "Trash Only"

...

5. All smoking materials, including, but not limited to: electronic devices, lighters, matches, and cigarettes, are required to be deposited and kept at the nurse's medication room for single use distribution only...

6. Staff will maintain all smoking materials until designated smoking times. Smoking times will be designated per facility protocol with input from all facility residents who smoke...

If suspected of smoking policy violation the following should be initiated:

- a. Resident is placed on 1 to 1 supervision, with notification to facility Administration and the resident's attending physician.
- b. Resident is interviewed as it relates to concerns with violation of smoking policy as well as re-education of policy and risks.
- c. Behavior care plan or contract may be considered as needed if violations have occurred.
- d. Institute a contraband search utilizing the contraband search form which contains instruction for frequency of checks.
- e. Discuss with the medical director or resident physician and document. If warranted, Facility Administration to deliver an Emergency Discharge Notification while assistance is provided to find a safe discharge.

(Resp't Ex. 2 at 5-8.)

3. Resident's cigarettes, lighters, etc. are kept in a locked cart. The key is at the nurses' station. The designated smoking area is the outside gated smoking patio. (Hr'g R.)

4. The smoking times are: 6:00 a.m. to 6:30 a.m., 9:00 a.m. to 9:30 a.m., 11:00 a.m. to 11:30 a.m., 1:00 p.m. to 1:30 p.m., 4:00 p.m. to 4:30 p.m., 7:00 p.m. to 8:00 p.m.

(Resp't Ex. 4 at 3.)

5. On December 22, 2020, ten (10) cartons of cigarettes were removed from Petitioner and put in the Facility's cigarette cart. (Resp't Ex. 1 at 4.)

6. On April 22, 2021, at 9:09 p.m., Petitioner was smoking outside the gated smoking patio, unsupervised. (*Id.* at 3.)

7. On April 29, 2021, Petitioner had a lighter and half a cigarette on her body. (*Id.*)

8. On May 5, 2021, Petitioner's roommate reported that she found two (2) cigarette butts in the bathroom she shares with Petitioner. And reported smelling smoke coming from the bathroom. (*Id.* at 2.)

9. On August 2, 2021, at 10:00 p.m., Petitioner went to the smoking area, unsupervised. (*Id.* at 1.)

10. On October 19, 2020, October 23, 2020, March 30, 2021 and June 4, 2021, the Facility completed smoking policy review and educate sessions to promote safety with its resident smokers. Petitioner and Petitioner's witness were present during the meetings. (Resp't Ex. 4.)

11. On August 2, 2021, the Facility issued Petitioner a Nursing Home Transfer Discharge Notice, listing the following reason for the discharge or transfer, "The safety of other individuals in this facility is endangered." The notice was signed by the Facility Administrator and MB, AARN. Petitioner refused to sign the notice. (Resp't Ex. 5 at 1-2.)

12. Included with the Nursing Home Transfer Discharge Notice was Petitioner's medical record completed by [REDACTED] MD, which states in part, "Pt is medically cleared to be discharged in care of her father on [REDACTED] 21, due to failure to comply with smoking policy." (*Id.* at 4.)

13. On August 3, 2021, a psychiatric evaluation was completed on Petitioner. The evaluation states in part:

Patient is a current tobacco user and has refused intervention for tobacco cessation at this time...

Patient evaluated in room...She states that she is not coming in her room or smoking. She also is upset she got a 30-day notice.

Discussed with nursing staff, ARNP and social services. Patient is manipulative, she is ambulating, smoking and coming out of room...

(Pet'r Ex. 3.)

14. On August 17, 2021, a medical evaluation was completed on Petitioner, due to Petitioner's concern regarding the Transfer Discharge Notice. The medical record in part states, "She states that she never violated the smoking policy. She appears in good health and is a good candidate for independent living or ALF." (Pet'r Ex. 2.)

15. On August 31, 2021, another medical evaluation was completed on Petitioner, due to Petitioner's concern regarding the Transfer Discharge Notice. The medical record in part states, "continues to smoke daily, refuses smoking cessation aids, nicotine dependence, failed to comply with smoking policy." (Resp't Ex. 6.)

### **CONTROLLING LAW**

16. 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.

17. 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.]

18. 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...

(15)(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.

### **CONCLUSIONS OF LAW**

19. 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.

20. In accordance with the above authority, the Facility Administrator and MB, AARN, signed the Transfer Discharge Notice.

21. The evidence established that the Facility reviewed and educated Petitioner on its smoking policy on at least four (4) different dates.

22. The evidence established that Petitioner violated the Facility's smoking policy on five (5) occasions.

23. The above authority explains that when the Facility transfers or discharges a resident for "The safety of other individuals in this facility is endangered.", it "must ensure that the transfer or discharge is documented in the resident's medical record."

24. The evidence established that on August 3, August 11, August 17, and August 31, 2021, Petitioner's medical records were documented regarding the Transfer Discharge Notice.

25. 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.

26. 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 Transfer Discharge reason is in accordance with the above cited authority.

27. 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 02 day of November, 2021,

in Tallahassee, Florida.



Priscilla Peterson  
Hearing Officer  
Suite I, Room 129  
2415 North Monroe Street  
Tallahassee, FL 32303-4190  
Office: 850-488-1429  
Fax: 850-487-0662  
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED] Petitioner  
[REDACTED] Respondent  
[REDACTED]  
Agency for Health Care Administration  
[REDACTED]  
Colin Riley, Esq.