

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

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APPEAL NO. 22N-00087

PETITIONER,
VS.

██████████
██████████████████████████
██████████████████
██████████████████████████

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on December 6, 2022 at 2:06 p.m.

APPEARANCES

For Petitioner: ██████████, *pro se*

For Respondent: ██████████, Licensed Nursing Home Administrator

STATEMENT OF ISSUE

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

SUMMARY OF PROCEEDINGS

██████████, Social Services Manager ("SSM") ("Resp't Wit. 1"), and ██████████
██████████, Director of Nursing ("DON") ("Resp't Wit. 2"), appeared as witnesses for
Respondent.

██████████, Hearing Officer, appeared as an observer for the Office of Appeal Hearings. All parties had no objections to the observer.

Respondent submitted one (1) evidence packet, which was marked and entered as Respondent's Exhibit one ("1").

The record was held open until December 7, 2022 to allow Respondent to submit additional evidence and to allow Petitioner time to receive and review the evidence packets submitted by Respondent. Respondent stated during the hearing that a copy of the evidence presented during the hearing and a copy of the evidence submitted after the hearing would be provided to Petitioner. Petitioner stated that she believes Respondent would follow through and provide her with the evidence packets.

Respondent submitted two (2) additional evidence packets, which were marked and entered as Respondent's Exhibits two ("2") and three ("3"). The record was closed on December 7, 2022.

Petitioner's Position

Petitioner took the position that she believes Respondent is attempting to discharge her in retaliation for the reports she has made against the Facility to the Agency for Healthcare Administration ("AHCA").

Respondent's Position

Respondent took the position that its facility is a non-smoking facility, and that Petitioner has been caught smoking, which is an endangerment to the safety of the residents who are receiving oxygen treatments. Respondent is seeking to discharge Petitioner to a facility that allows smoking.

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. On March 16, 2016, Petitioner was admitted into the Facility. (Hr'g R.)
2. On June 15, 2017, Petitioner signed the Facility's "When a Nursing Home Discharges a Resident", which informs residents on the federal law which prevents a nursing home from discharging residents from a facility unless one of the exceptions are met. (Resp't Ex. 3 at 6.)

2. Respondent's DON stated that when Petitioner was admitted into the facility, she was tested for her cognitive ability within one week of admission to assess if she has the capacity to understand instructions. Respondent's DON stated that Petitioner received and signed an admissions packet and that it was explained to her that Facility was a non-smoking facility, and that no one was allowed to smoke on its campus. Respondent's DON also stated that cigarettes, vaper pens, nor electronic cigarettes were allowed in the residents' rooms or anywhere on the facility's property. Respondent's DON stated that when she began her employment at the Facility in September 2022, she had Petitioner sign its non-smoking policy and admissions packet for a second time to inform that her that the Facility was a non-smoking facility and that no smoking was allowed on the campus. (Resp't Wit. 2 Test.)

3. Respondent's DON stated that Petitioner was caught with a vape pen on her person two times in October 2022. Respondent's DON stated that she reviewed the

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.

Facility's non-smoking policy with Petitioner on October 7, 2022 and that she signed a document on the same date to acknowledge that she understood the verbal review.

(*Id.*; Resp't Ex. 3 at 2.)

4. Respondent's SSM stated that Petitioner was caught smoking twice in the Facility's courtyard on November 29, 2022. (Resp't Wit. 1 Test.)

5. Respondent provided, post-hearing, the "Policies and Procedures" which states in part:

Policies and Procedures

Subject: Smoking-Supervised

Document Name: S-406

Effective Date: 11/30/2014

Revision Date: 02/07/2020

Policy:

The Center will provide a safe, designated smoking area for residents. For the safety of all residents the designated smoking area will be monitored by a staff member during authorized smoking time. Smoking is only allowed in designated areas and during designated times. Oxygen is not permitted in the designated smoking area. The Center will have safety equipment available in designated smoking areas including: smoking blankets, smoking aprons, a fire extinguisher and non-combustible self-closing ashtrays.

...

3. The Center will establish and post designated smoking areas and times.

...

5. The Center will retain and store matches, lighters, etc. for all residents.

6. All residents who wish to smoke will sign an agreement attesting to abide by the smoking policies and procedures.

7. Residents will be advised upon admission that violations of the smoking policy may result in revocation of smoking privileges, discharge, and/or being reported to law enforcement.

8. Electronic cigarettes are permitted, but only in facility designated smoking areas.

a. The same rules that apply to regular tobacco cigarettes also apply to electronic smoking materials.

b. Electronic cigarettes and materials, including the liquids, will be retained and stored by nursing staff...

(Resp't Ex. 3 at 3.)

6. Respondent's evidence indicated that Petitioner signed the Policies and Procedures on September 16, 2020. Respondent provided a second signed copy of the

Policies and Procedures, but it is unclear as to when Petitioner signed the second copy. Respondent's evidence does not include a revised smoking policy with Petitioner's signature and acknowledgement to reflect that she was informed that the Facility was currently a non-smoking facility and that none of its residents were allowed to bring cigarettes, vape pens, and electronic cigarettes, nor permitted to smoke anywhere on its campus. (*Id.* at 4; Hr'g R.)

7. On October 6, 2022, a Nursing Home Transfer and Discharge Notice ("the Notice") was issued with an effective date of November 5, 2022. Respondent is seeking to discharge Petitioner due to: "The health of other individuals in this facility is endangered" and "The safety of other individuals in this facility is endangered." The Notice includes the explanation: "Resident educated that facility is a non-smoking facility and continues to smoke." The Notice was signed by the Facility's administrator and the Facility's physician, [REDACTED]. (Resp't Ex. 1.)

8. On October 7, 2022, the Facility's attending physician [REDACTED], opined on the Physician's Telephone Orders that it was "OK to transfer pt to SNF with smoking privileges per protocol" and was signed by the Facility's attending physician and the Facility's DON. Respondent's evidence did not include any other notes or medical records regarding Petitioner's violations of the Facility's smoking policy. (*Id.* at 5; Hr'g R.)

9. Petitioner did not dispute that she was smoking on the Facility's campus but stated that other residents also smoke at the facility and have not received any notices to discharge them from the Facility. (Hr'g R.)

CONTROLLING LAW

10. Section 400.0255(15), Florida Statutes, 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 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—

...

(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...

(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) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(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; and

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

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

- (B) Resident representative information including contact information.
- (C) Advance Directive information.
- (D) All special instructions or precautions for ongoing care, as appropriate.
- (E) Comprehensive care plan goals,
- (F) All other necessary information, including a copy of the resident's discharge summary, consistent with § 483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

...

- (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...(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...

(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 (Emphasis added.)**

CONCLUSIONS OF LAW

13. Respondent's reasons for issuing Petitioner the Notice is: "The health of other individuals in this facility is endangered" and "The safety of other individuals in this

facility is endangered.” These are two of the six reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident.

14. 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. The undersigned has considered only whether the discharge is for a lawful reason.

15. The above controlling authorities explain that the Facility must ensure that the transfer discharge is documented in the resident's medical record when the reasons for transfer discharge are: “The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident” and “The health of individuals in the facility would otherwise be endangered.”

16. The above controlling authorities requires a higher standard of proof in nursing home hearings; there must be substantial and credible evidence at the level of clear and convincing. The findings show that there were no records submitted to support Respondent’s assertion that the Facility is a total non-smoking facility that does not allow smoking in designated smoking areas nor allow residents to have cigarettes, vape pens, or electronic cigarettes. The findings show that Petitioner signed Facility’s Policies and Procedures, which includes its smoking policy that allows its residents to smoke while being supervised in designated areas and times. The findings also show that the Facility provided a copy of its Policies and Procedures which discusses its smoking policy that allows residents to have smoking paraphernalia to be retained and

stored by nursing staff. The undersigned concludes that the Facility provides supervised smoking during designated times and in designated areas, as well as allows its residents to keep smoking paraphernalia on site with the appropriate staff. Based on the evidence provided by the Facility, the undersigned cannot conclude that Petitioner has endangered the safety and health of the other residents. Therefore, the undersigned concludes that Respondent did not meet its burden of proof by clear and convincing evidence that the safety and health of other individuals in the Facility are endangered.

DECISION

Based on the foregoing Findings of Fact, Controlling Law and Conclusions of Law, this appeal is GRANTED. The Facility is ORDERED to immediately readmit Petitioner to the Facility. If a bed is not currently open to readmit Petitioner, the Facility must readmit Petitioner as soon as a bed becomes available.

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. Respondent has no funds to assist in this review, and any financial obligations incurred will be the party's responsibility.

DONE and ORDERED this 22 day of December _____, 2022,

in Tallahassee, Florida.

[REDACTED]

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@myffamilies.com

Copies Furnished To: [REDACTED], Petitioner
[REDACTED], Respondent
[REDACTED]
Agency for Health Care Administration