

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

[REDACTED]
[REDACTED]
[REDACTED]

APPEAL NO. 22N-00091

PETITIONER,
VS.

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

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned reconvened a nursing home discharge hearing in the above-referenced matter on January 23, 2023 at p.m. at 3:23 p.m., in Jacksonville, Florida.

APPEARANCES

For Petitioner: [REDACTED]

For Respondent: [REDACTED]

STATEMENT OF ISSUE

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

SUMMARY OF PROCEEDINGS

The hearing was previously scheduled to telephonically convene on January 4, 2023 at 2:15 p.m.

On December 12, 2022, Petitioner's attorney requested for the hearing to convene by Microsoft TEAMS as opposed to a conference call. Petitioner's attorney's request was granted.

On December 16, 2022, Petitioner's attorney filed a Request for Production to allow preparation for deposition that was to take place during the week of December 26, 2022 in preparation for hearing set for January 4, 2023.

On December 21, 2022, the undersigned issued an Order Scheduling Hearing and requested for all parties to provide email addresses for invitation to the Microsoft TEAMS meeting no later than seven (7) days prior to the hearing.

On January 3, 2023, Petitioner's attorney contacted the Office of Appeal Hearings to inform that the deposition is being arranged with the facility and requested to reschedule, as he was not aware he needed to provide an email to receive link for Microsoft TEAMS meeting. Petitioner's attorney advised to call into the hearing to address request to reschedule.

On January 4, 2023, the hearing telephonically convened. Petitioner's attorney requested to reschedule to an in-person hearing. Respondent did not object. Petitioner's attorney's request was granted. Hearing was rescheduled to an in-person hearing on January 23, 2023 at 3:00 p.m. at Respondent's facility located in [REDACTED], Florida.

On January 23, 2023, the hearing reconvened at Respondent's facility.

[REDACTED], [REDACTED],
[REDACTED], and
[REDACTED], appeared as witnesses
for Respondent.

██████████ appeared as a court reporter. The court reporter was advised that the undersigned's recording is the official record for this appeal.

Respondent submitted two (2) evidence packets. Petitioner's attorney objected to Respondent's second evidence packet on the grounds that the evidence was hearsay. The objection was overruled, as the undersigned would determine in the Final Order if the evidence met an exception to the hearsay rule. The evidence was marked and entered as Respondent's Exhibits one ("1") and two ("2"). The record was held open until January 26, 2023 to allow Respondent to provide additional evidence and to allow Petitioner to review the additional evidence and proffer any objections. On January 24, 2023, Respondent contacted the Office of Appeal Hearings ("OAH") and requested the mailing address to mail the additional evidence. The undersigned viewed this as a request for an extension of time to allow for mailing and review by Petitioner. Therefore, the undersigned extended deadline to February 1, 2023 to allow a total of seven (7) days, which consisted of five (5) days for mailing and two (2) days for Petitioner to review the additional evidence.

On January 27, 2023, Respondent provided one (1) additional evidence packet. As of February 1, 2023, the undersigned has not been informed that Respondent did not furnish Petitioner and his attorney with a copy of the additional evidence, nor did the undersigned receive any objections from Petitioner or his attorney. Therefore, the additional evidence packet was marked and entered as Respondent's Exhibit three ("3"). The record was closed on February 1, 2023.

Petitioner's Position

Petitioner did not provide testimony to state his position.

Respondent's Position

Respondent took the position that Petitioner has been caught smoking unsupervised and in non-designated smoking areas and has been caught with smoking paraphernalia inside of his room, which is an endangerment to the health and safety of its residents. Respondent is seeking to discharge Petitioner into the community.

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 August 9, 2022, Petitioner was admitted into the Facility, which allows smoking in designated areas. (Resp't Ex. 2 at 1; Hr'g R.)

2. Respondent was provided a copy of the Facility's smoking policy, which included the following procedure: "6. All residents who wish to smoke will sign an agreement attesting to abide by the smoking policies and procedures."

(*Id.* at 2.)

3. Respondent provided the Smoking Agreement/Notice of Policy ("Agreement") signature page, which was signed by Petitioner on August 16, 2022. The Agreement's signature page includes the following:

Smoking is allowed by the center to accommodate those who wish to smoke. However, for the safety of all residents and staff the center has promulgated a safe smoking policy. All residents who wish to smoke at the center will abide by the center's smoking policy...Violations of the policy will result in remedial action based upon the nature of the infraction. Remedial action includes but it not limited to warning, revocation of smoking privileges, police intervention, and/or discharge. This agreement represents your acknowledgement that the center has provided you a

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.

copy of the center's smoking policy and your agreement to abide by the terms set forth in the policy.

I, the undersigned, understand that these safety rules apply to me and the safety of the other residents and violations may result in subsequent education, warnings, and other remedial actions at the discretion of the Executive Director.

(Resp't Ex. 2 at 3; Hr'g R.)

4. The Facility has a designated area to smoke in the East Unit, which is at the rear of the building and behind the patio area, which has designated smoking times begin at 9:00 a.m. and end at 9:00 p.m. All smoking is to be supervised and all smoking paraphernalia are required to be retained by its staff and returned to staff after smoking, as smoking paraphernalia may not be stored in residents' rooms or be kept on residents' persons. Respondent's evidence did not include medical records or documentation to show that Petitioner was made aware of the specific smoking designated areas and designated smoking times. (Hr'g R.)

5. On September 21, 2022 at 14:07, Progress Notes ("Notes") included notes, which stated: "Resident was observed sitting at the back of facility near dumpsters Smoking. On admission resident was informed of the facility rules and policy regarding smoking. Resident was informed of designated smoking area and time that are allotted for smoking..." (Resp't Ex. 2 at 3; Hr'g R.)

6. Respondent stated that the designated smoking area is near the dumpster. (Hr'g R.)

7. On October 5, 2022 at 9:20, the Notes included an entry, which stated: "CNA reported to this writer that resident's room smelled like cigarette smoke...This writer ask resident if he's been smoking in his room and resident stated 'NO'. Resident educated

by nurse that for his safety and everyone else's safety smoking is not allowed in the building. There's a designated smoking area..." (Resp't Ex. 2 at 6.)

8. On October 12, 2022 at 21:01, the Notes included an entry, which stated:

Front alarm was heard going off and when investigating to see why it was going off. (Petitioner) and another resident were outside of building on front porch with another resident smoking. He stated he pushed the door to go outside and also let the other resident out so they can wait for their pizza. Resident was informed that it was against the company's policy for resident's smoke at the front of the building and smoking is to be done in the designated area and that residents are not to have smoking paraphernalia including cigarettes and lighters which is to be kept in activities.

(*Id.* at 8.)

9. Respondent's evidence does not include the reason for the transfer or discharge in Petitioner's medical records. (Hr'g R.)

10. On October 17, 2022, a Nursing Home Transfer and Discharge Notice ("the Notice") was issued with an effective date of November 17, 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 has smoking paraphernalia on his person and has been caught smoking in and around facility." The Notice was signed by Petitioner, the Facility's administrator and the Facility's physician, [REDACTED], [REDACTED]. (Resp't Ex. 1; Hr'g R.)

11. Petitioner denied Respondent's allegations and did not provide any other testimony. (Hr'g R.)

CONTROLLING LAW

12. 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.

13. 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.)

14. 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

15. 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.

16. 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.

17. 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."

18. 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 facility or medical records to show that Facility posted the specific designated smoking areas and the designated smoking times for Petitioner to be compliant with its smoking policy. The findings show that there were no medical records submitted documenting the reason the Facility is requesting a transfer. 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 03 day of February, 2023,

in Tallahassee, Florida.

[Redacted Signature]

Hearing Officer
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