

Feb 02, 2023

Office of Appeal Hearings  
Dept. of Children and Families

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

[REDACTED]  
[REDACTED]  
[REDACTED]

APPEAL NO. 22N-00099

PETITIONER,  
VS.

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

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on January 10, 2023 at 9:38 a.m.

**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**

[REDACTED],  
appeared as a witnesses for Respondent.

████████████████████████████████████████, appeared as an observer for the Office of Appeal Hearings (“OAH”).

Respondent submitted one (1) evidence packet, which was marked and entered as Respondent’s Exhibit one (“1”).

The record was held open until January 10, 2023 to allow Respondent to submit additional evidence. Respondent submitted one (1) additional evidence packet, which was marked and entered as Respondent’s Exhibit two (“2”). The record was closed on January 10, 2023.

### **Petitioner’s Position**

Petitioner took the position that he no longer smokes at the Facility.

### **Respondent’s Position**

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

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

1. On September 19, 2022, Petitioner was admitted into the Facility, which is a non-smoking facility. (Hr’g R.)

2. The “Non Smoking Safety Policy” (the “Policy”) dated February 15, 2022, revised October 22, 2022, states:

Policy: It is the facility policy to provide a safe environment for our residents, staff and visitors by providing a smoke free facility.

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<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.

Electronic cigarettes (e-cigarettes) and vapor pens are also covered by this policy...

...

#### POLICY INTERPRETATION AND IMPLEMENTATION

...

New admissions shall be informed upon admission that we enforce a smoke free safety policy.

...

Residents will be provided information and/or education on smoking cessation as requested or when deemed necessary.

If a resident wishes to change their preferences and smoke the facility will coordinate through social services a transfer to a smoking facility.

#### NONCOMPLIANCE

[V]iolations could include but not limited to:

Smoking in or on facility grounds

Maintaining supplies/lighting materials

Giving smoking materials to other residents

Level 1= First Offense. Warning with education...

Level 2=Second Offense. Final warning and education...

Level 3=Next and last offense. Resident will be issued an Intent to discharge notice according to the department of health regulations...

(Resp't Ex. 2 at 2-3.)

3. On September 19, 2022, Respondent stated that the Policy was reviewed with and signed by Petitioner upon his admission into the Facility. Respondent provided a copy of the Policy, post-hearing, which includes signature page containing Petitioner's and nurse's signatures. The signature page was signed by Petitioner and nurse and was dated on September 19, 2022, and states:

At time of admission and after reviewing and having the resident signed the above Spoking Policy and Procedures, admission nurse will complete the following:

Inquire if resident has smoking materials with them;

If resident has smoking material in their possession, nurse will confiscate and secure immediately;

complete the Smokers Screen in the UDA;

If resident is a smoker, even though not allowed to smoke in the facility, a Task for 'resident and room are free from ignition materials' must be added to resident's TASK in POC.

(*Id.* at 4; Hr'g R.)

4. On October 6, 2022, the Facility's advanced registered nurse practitioner ("ARNP") completed form 1823, the "Resident Health Assessment for Assisted Living Facilities" (the "Form") and opined that Petitioner's needs could be met in an assisted living facility based on her assessment. (*Id.* at 18-20.)

5. On October 31, 2022 at 7:45, Respondent's Behavior Chart (the "Chart") stated: "Approximately 1935, this resident was observed smoking in the courtyard. This writer educated resident on the standing policies here for a nonsmoking facility. Resident stated that he understood and has already signed the consent form." The Chart also included notes from October 31, 2022 at 16:46 which stated: "Staff observed a bottle of liquor under Residents blanket on bed. Res currently on patio and observed smoking...Resident educated on non-smoking policy at facility and risks of drinking while under the influence of narcotics...New smoking policy signed and verbal/written understanding of policy..." Respondent stated that the Policy was reviewed and signed by Petitioner on October 31, 2022; this was an undisputed relevant fact. (*Id.* at 5 and 20; Hr'g R.)

6. On November 2, 2022 at 11:41, the Chart included notes which stated: "This Nurse and [REDACTED] spotted a pack of cigarettes in Residents room. Resident educated on non-smoking policy. Cigarettes locked up." (*Id.*)

7. On November 4, 2022 at 20:06, the Chart included notes, which stated: "Resident observed being physically and verbally aggressive towards staff. Resident observed throwing bedside table at staff after retrieving burnt tray with burned items on it; lighter on tray. This writer also observed a dark liquid, with the smell consistent of an

alcohol beverage on bed side table.” Respondent stated that Petitioner was educated on the non-smoking policy and that he refused to sign the Policy on November 4, 2022. (*Id* at 6 and 20; Hr’g R.)

8. On November 8, 2022 at 18:34, the Chart included notes, which stated: “Resident...signed his self out of the facility at 2:14pm...it was reported resident had an fall out in the community and had apparently been drinking alcohol...he was brought back to facility by police officers...resident very agitated and yelling out cussing to staff..continue to be 1 on 1...” (*Id.* at 21; Hr’g R.)

9. Respondent stated that Petitioner was encouraged to wear a nicotine patch to help him to stop smoking cigarettes but has declined to wear them. (Hr’g R.)

10. On November 11, 2022 at 17:53, the Chart stated: “Resident return back to facility, refused to have nursing staff to check him for alcohol and cigarettes.” Respondent stated that the Policy was reviewed and signed by Petitioner and nurse on November 11, 2022. (Resp’t Ex. 2 at 7 and 21; Hr’g R.)

11. On November 14, 2022 at 16:47, the Chart included notes by social services, which stated: “[O]n 11/4/22, I participated in a conference call...It was suggested to send a referral on (Petitioner) to our sister facilities that permit resident smoking ...as his doctor has approved discharge to an ALF...” Respondent explained that a discharge notice was completed on November 3, 2022 but it was rescinded due to not having a discharge location for Petitioner. (*Id.* at 22; Hr’g R.)

12. On November 15, 2022, a Nursing Home Transfer and Discharge Notice (“the Notice”) was issued with an effective date of December 15, 2022. Respondent is seeking to discharge Petitioner due to: “The safety of other individuals in this facility is

endangered.” The Notice includes the explanation: “You continue to smoke and use incendiary devices in the facility after being instructed of the danger and not to do so. You have brought alcoholic beverages onto the premises against policy.” The Notice was signed by the Facility’s administrator and the Facility’s physician/designee, [REDACTED]. (Resp’t Ex. 1.)

13. Petitioner did not dispute that he smoked at the facility and stated that he thought he was able to smoke at the Facility. Petitioner stated that he stopped smoking at the facility approximately two months ago now that he knows he cannot smoke. Petitioner stated that he declined the offer of a cigarette from another resident who was smoking in the courtyard and was not sure if the other resident was still residing at the facility. (Hr’g R.)

14. Petitioner stated that most of his outbursts were caused by his anxiety and were not due to alcohol. Petitioner denied acting aggressively towards the other residents. Petitioner stated that he is supposed to be working with a social worker to assist him in finding another place to live. (*Id.*)

#### **CONTROLLING LAW**

15. 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.

16. 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;

...

(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...

17. 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**

18. Respondent's reasons for issuing Petitioner the Notice is: "The safety of other individuals in this facility is endangered." This is one of the six reasons provided in federal regulations for which a nursing facility may involuntarily discharge a resident.

19. 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.

20. 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 would otherwise be

endangered.” The findings show that Petitioner’s Chart documents his smoking infractions. The findings also show that the Nursing Home Transfer and Discharge Notice was signed by Petitioner’s physician. The findings also show that Petitioner does not dispute that he smoked at the facility, which is a non-smoking facility. Based on the evidence and testimony, the undersigned concludes that Petitioner has endangered the safety of the other residents. Therefore, the undersigned concludes that Respondent met its burden of proof by clear and convincing evidence that the safety of other individuals in the Facility are endangered.

21. 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**

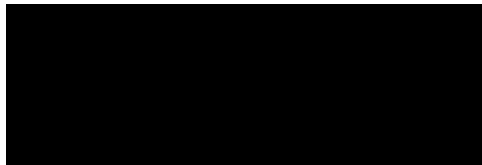
Based upon the forgoing Findings of Fact, Controlling Law and Conclusions of Law, the appeal is DENIED. The Facility’s action to discharge Petitioner is in accordance with Federal Regulations. The Facility may proceed with its proposed discharge action, as described in the Conclusions of Law and in accordance with all applicable Agency for Health Care Administration 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. Respondent 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   February  , 2023,

in Tallahassee, Florida.



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](mailto:Appeal.Hearings@myflfamilies.com)

Copies Furnished To:   
, Respondent  
  
Agency for Health Care Administration