

Jan 29, 2024

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. 23N-00120

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]  
[REDACTED]  
[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter at 9:09 a.m., on December 15, 2023.

**APPEARANCES**

For the petitioner: [REDACTED], *pro se*

For the respondent: [REDACTED] ("MF"),  
Executive Director,  
[REDACTED]

**STATEMENT OF ISSUE**

The petitioner appeals the respondent's action discharging him from [REDACTED] [REDACTED] (the "Facility") based on the respondent's claim that the petitioner's smoking within the facility endangers the health and safety of other residents in the facility. The respondent carries the burden of proof by clear and convincing evidence.

### **SUMMARY OF PROCEEDINGS**

██████████ (“CU”), roommate of the petitioner at ██████████, appeared as the petitioner’s witness. ██████████ (“SS”), Activities Coordinator at the Facility, appeared as a witness for the respondent.

The petitioner did not submit exhibits at the time of the hearing. The respondent submitted documents, which were entered into evidence and marked as Respondent’s Exhibits one (“1”) through three (“3”). The record remained open through December 20, 2023 for the petitioner to provide a written statement and the respondent to provide the Facilities smoking policy. The petitioner returned a document, which was entered into evidence and marked as Petitioner’s Exhibit one (“1”). The respondent submitted documents which were evidence and marked as Respondent’s Exhibits four (“4”) through six (“6”). The record was closed on December 20, 2023.

### **The Petitioner’s Position**

The petitioner took the position that he was not smoking in his room at Habana Health Center on October 28, 2023 when the smoker detector went off. The petitioner took the position that he was blamed without evidence or an investigation that he was smoking, which set off the smoke alarm.

The petitioner took the position that when he would reenter the Facility after a smoke break, he had tried to return his smoking paraphernalia to the respondent’s representative, but it is returned to him by the respondent’s representative.

The petitioner took the position that when he was informed on one occasion that he was smoking in an outside area that was not a designated smoking area, he followed the directive given to him and moved to the appropriate area.

### **The Respondent's Position**

The respondent took the position that the petitioner has been educated on the Facility's smoking policy and had signed the facility's smoking policy acknowledgement form, agreeing to abide by the Facility's smoking policy. The respondent took the position that the petitioner was smoking in his room on October 28, 2023 and set off the smoke alarm, which the fire department was alerted to. The respondent took the position that the petitioner had smoking paraphernalia on him when the fire department arrived at his room. The respondent took the position that smoking in the room is dangerous because several of the residents of the facility are using oxygen or have chronic obstructive pulmonary disease ("COPD").

The respondent took the position that the facility requires that the petitioner to return all smoking paraphernalia after their smoke break. The respondent took the position that the petitioner has broken this rule several times. The respondent took the position that when the petitioner smokes outside, he does not always smoke in the designated area. The respondent took the position that the facilities staff has had several conversations with the petitioner about not following the smoking policies.

### **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. The petitioner was admitted to the Facility on May 25, 2023 for long term care.  
(Resp't Test.)

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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.

2. On June 15, 2023, the petitioner signed the Facility's Safe Smoking Rules form. The form states in part: (Resp't Ex. 5.)

...

Smoking is only allowed in designated areas.

Smoking materials and flammable devices will at no time be stored in the residents rooms.

Smoking is strictly prohibited in the building.

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 actions at the discretion of the Executive Director.

3. The Facility's smoking area is located in a courtyard, outside of the building. (Resp't Test.)

4. The Facility requires all smokers to store all smoking materials to be locked in a box while the smokers are in the facility. When a smoker checks out to smoke, they will check out their smoking materials. (Resp't Test.)

5. The petitioner was told by representatives of the facility to not check in some of his smoking materials due to issues with theft. (Pet'r Test.)

6. SS testified that the petitioner does not follow the rules of the smoking policy and spoken to him many times about not following the smoking rules. (Resp't Wit. Test.)

7. On October 28, 2023, the fire alarm went off in the petitioner's room. The fire department responded to the fire alarm going off. The petitioner was found to have his cigarettes and lighter on him. (Resp't Test. and Resp't Ex. 4.)

8. CU testified that he is the roommate in the Facility of the petitioner and that on October 28, 2023, he was awoken by the smoke alarm going off. He testified that he

did not smell nor see smoke. He also testified that he did not witness the petitioner smoking on that date and has never witnessed the petitioner smoking in their room.

(Pet'r Wit. Test.)

9. On October 30, 2023, the petitioner was given a Nursing Home Transfer and Discharge Notice ("Notice") by the respondent. The form is signed by the Facility Administrator, a physician, and the petitioner. The reason for the transfer/discharge was "The health of other individuals in this facility is endangered" and "The safety of other individuals in this facility is endangered." The explanation provided is "Resident was found smoking in room causing fire alarm to go off." (Resp't Ex. 1.)

10. On November 30, 2023, the Facility conducted an education of the smoking policy with all the smokers in the facility. (Resp't Test.)

11. On one occasion after the Facility conducted its education of the smoking policy, the petitioner was with another resident with a cigarette in his hand outside of the Facility, where they encountered MF. The petitioner asked MF if he was in the correct area to smoke. When informed by MF that he needed to be further away from the building, the petitioner moved to the indicated area. (Pet'r Test. and Resp't Test.)

12. Outside of the October 28, 2023 incident, the facility did not document any of the other incidents with the petitioner. (Resp't Ex. 4 and Resp't Test.)

### **CONTROLLING LAW**

13. 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.

14. 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.]

15. Section 400.0255, Florida Statutes., 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...

(7) At least 30 days prior to any proposed transfer or discharge, a facility must provide advance notice of the proposed transfer or discharge to the resident and, if known, to a family member or the resident's legal guardian or representative, except, in the following circumstances, the facility shall give notice as soon as practicable before the transfer or discharge:

...

**(b) The health or safety of other residents or facility employees would be endangered, and the circumstances are documented in the resident's medical records by the resident's physician or the medical director if the resident's physician is not available.** (emphasis added)

(8) The notice required by subsection (7) must be in writing and must contain all information required by state and federal law, rules, or regulations applicable to Medicaid or Medicare cases. The agency shall develop a standard document to be used by all facilities licensed under this part for purposes of notifying residents of a discharge or transfer.

Such document must include a means for a resident to request the local long-term care ombudsman council to review the notice and request information about or assistance with initiating a fair hearing with the department's Office of Appeals Hearings. In addition to any other pertinent information included, the form shall specify the reason allowed under federal or state law that the resident is being discharged or transferred, with an explanation to support this action. Further, the form must state the effective date of the discharge or transfer and the location to which the resident is being discharged or transferred. The form must clearly describe the resident's appeal rights and the procedures for filing an appeal, including the right to request the local ombudsman council review the notice of discharge or transfer. A copy of the notice must be placed in the resident's clinical record, and a copy must be transmitted to the resident's legal guardian or representative and to the local ombudsman council within 5 business days after signature by the resident or resident designee.

...

(10) (a) A resident is entitled to a fair hearing to challenge a facility's proposed transfer or discharge. The resident, or the resident's legal representative or designee, may request a hearing at any time within 90 days after the resident's receipt of the facility's notice of the proposed discharge or transfer.

(b) If a resident requests a hearing within 10 days after receiving the notice from the facility, the request shall stay the proposed transfer or discharge pending a hearing decision. The facility may not take action, and the resident may remain in the facility, until the outcome of the initial fair hearing, which must be completed within 90 days after receipt of a request for a fair hearing.

...

(12) After receipt of any notice required under this section, the State Long-Term Care Ombudsman Program or local ombudsman council may request a private informal conversation with a resident to whom the notice is directed, and, if known, a family member or the resident's legal guardian or designee, to ensure that the facility is proceeding with the discharge or transfer in accordance with this section. If requested, the State Long-Term Care Ombudsman Program or the local ombudsman council shall assist the resident with filing an appeal of the proposed discharge or transfer.

...

(15) (a) The department's Office of Appeals Hearings shall conduct hearings under this section...

(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**

16. The respondent's reason for issuing the petitioner a transfer/discharge notice is, "The safety of other individuals in this facility is endangered" and "The health of other individuals in this facility is endangered." These are reasons listed in the above authority as a valid reason for a transfer/discharge.

17. Establishing that the reason for a discharge as 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.

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 the petitioner signed the Facility's Safe Smoking Rules form, which informs residents that they are not permitted to smoke within the building and all smoking materials must be turned in, and smoking is only permitted in designated areas. The Nursing Home Transfer and Discharge Notice listed the reason for discharge is "The health of other individuals in this facility is endangered" and "The safety of other individuals in this facility is endangered," and the explanation to support this action is "Resident was found smoking in room causing fire alarm to go off." The respondent provided no evidence that the petitioner was smoking in the room on October 28, 2023, when the fire alarm went off. CU, roommate of the petitioner, who was the only witness who could have witnessed the event testified that he did not see or

smell smoke during the October 28, 2023, incident. He also testified that he has never witnessed the petitioner smoking in their room. The respondent and its witness testified that the petitioner had violated the smoking rules on many occasions. However, the respondent did not present any documentary evidence to support this claim, or provide any specifics about those incidents. The respondent testified that they have not mechanisms to track violations.

19. The only other specific incident recalled by the respondent, was sometime after the Notice was issued to the petitioner. In this incident, the petitioner had a cigarette in his hand outside the facility. He asked MF if he could smoke in the spot he was in, when informed that he needed to move, he complied without hesitation.

20. The respondent also stated that the petitioner does not return all smoking material to the lockbox after his smoking breaks, as required by the Facilities smoking rules. The petitioner stated that he has been instructed to keep the smoking materials when he attempts to return them due to incidents of theft. This was not disputed by the respondent.

21. The standard of proof in nursing discharge hearings is at a level of clear and convincing. After careful review of the cited authorities, the testimonies from the petitioner, the respondent and their respective witnesses and the documentary evidence presented for the hearing, the undersigned concludes the respondent failed to meet its burden of proof at a level of clear and convincing.

**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. The 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 29 day of January, 2024,

in Tallahassee, Florida.



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