

Apr 08, 2024

Office of Appeal Hearings  
Dept. of Children and Families

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

[REDACTED]

APPEAL NO. 23N-00131

PETITIONER,

VS.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, the undersigned convened an in-person hearing in the above-referenced matter on February 22, 2024 at 1:55 p.m. in [REDACTED], Florida. The undersigned reconvened the hearing telephonically on March 12, 2024 at 8:31 a.m. and all parties appeared telephonically for this hearing.

**APPEARANCES**

For Petitioner: [REDACTED], pro se

For Respondent: [REDACTED], Administrator, Metro West Nursing and Rehab Center

**STATEMENT OF ISSUE**

Petitioner appeals Respondent’s action discharging him from [REDACTED] and Rehab Center (the “Facility”) due to “The health of other individuals in this facility is endangered.” and “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 January 23, 2024, Petitioner contacted the Office of Appeal Hearings (“OAH”) by phone and requested to have an in-person hearing.

On January 26, 2024, an Order Transferring Hearing Officer (“OTHO”) was issued which transferred the appeal to the undersigned and indicated that a new hearing date and time would be established, and that the parties would be notified of the new hearing date and time under a separate cover. A new Notice of Hearing (“NOH”) was issued to all parties rescheduling the hearing to February 22, 2024 at 2:00 p.m. and indicating the hearing would occur in person at the Facility.

At hearing on February 22, 2024, Petitioner appeared and represented himself. [REDACTED] (“RD”), Administrator at the Facility, appeared and represented Respondent. [REDACTED] (“RC”) (“Pet’r Wit. 1”), East Central District Manager, Ombudsman Program and [REDACTED] (“JB”) (“Pet’r Wit. 2”), Resident Counsel at the Facility, appeared as witnesses for Petitioner. [REDACTED] (“CD”) (“Resp’t Wit. 1”), Social Services Director at the Facility, appeared as a witness for Respondent. The hearing was begun before it was discovered that the Facility and or RD had not provided the evidence to Petitioner prior to the hearing. Petitioner requested time to review the evidence and the request was granted. The parties were informed that the hearing was continued, and that the reconvened hearing would occur telephonically due to the inadequate meeting space at the Facility. The parties did not object.

On February 26, 2024, a new NOH was issued to all parties rescheduling the hearing to telephonic on March 12, 2024 at 8:30 a.m.

At hearing on March 12, 2024, the undersigned, Petitioner, RD, RC, JB, and CD reappeared. Petitioner did not submit any evidence to the OAH but did submit evidence to RD and CD. Respondent submitted three (3) and twenty-four (24) pages of evidence, which were accepted into evidence and marked as Respondent's Exhibits one ("1") through three ("3"). The record was left open through close of business on March 13, 2024 for Respondent to submit their evidence consisting of Respondent's "Safe Smoking Agreement". Post hearing, Petitioner submitted the additional evidence which was entered and marked as Petitioner Exhibit one ("1").

The record closed on March 13, 2024.

#### **Petitioner's Position**

Petitioner took the position that he does not smoke at the Facility. Petitioner argued that he smokes while receiving dialysis offsite on Mondays, Wednesdays, and Fridays. Petitioner argued that he attempts to comply with the Facility's non-smoking policy but due to problems obtaining his cigarettes and lighter from staff when he leaves for dialysis, he returns to the Facility with these items and does not always return them to staff. Petitioner argued that he has never endangered the health and safety of others in the Facility. Petitioner argued that Respondent's non-smoking policy is discriminatory as employees have a designated smoking area. Petitioner argued that he only wishes to remain at the Facility until his death.

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

Respondent took the position that the Facility has, on numerous occasions, reviewed and educated Petitioner on its smoking policy. Respondent argued that Petitioner continues to violate the non-smoking policy by having cigarettes and/or a

lighter on his person or in his room. Respondent argued that employees do have a designated smoking area away from the Facility building. Respondent argued that residents are not allowed to smoke in this area and must comply with non-smoking policy. Respondent argued that due to Petitioner's continuous violations of the Facility's smoking policy, he is endangering the health and 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 was first admitted to the Facility on September 4, 2018 and readmitted on September 18, 2019. (Hr'g R.)
2. The Facility is non-smoking and there are no smoking areas and/or smoking allowed for residents. This is undisputed. (Hr'g R.)
3. On June 5, 2023, Petitioner was discharged from the Facility against medical advice. Several hours later, Petitioner returned to the Facility and was readmitted. (Resp't Ex. 2; Hr'g R.)
4. Between June 6, 2023, and November 30, 2023, there are no documentation that Petitioner was counseled for smoking and/or possessing smoking paraphernalia, was provided and/or signed a non-smoking policy for the Facility, and no testimony from a physician was provided during the hearing or medical records documenting the need for transfer due to health and safety concerns were provided. (Resp't Ex. 3; Pet'r Ex. 1; Hr'g R.)

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<sup>1</sup> Citations within the Findings of Fact, Controlling Law, and Conclusions of Law in this order follow Florida Rules of Appellate Procedure 9.800 and *The Bluebook: A Uniform System of Citation* as the standard for citation.

5. On December 1, 2023, the Facility issued Petitioner a Nursing Home Transfer Discharge Notice (“the Notice”), listing the following reason for discharge or transfer, “The health of other individuals in this facility is endangered.” and “The safety of other individuals in this facility is endangered.” The notice was signed by Petitioner, the Facility Administrator RD, and [REDACTED] (“MB”), Physician/MD. (Resp’t Ex. 1.)

### **CONTROLLING LAW**

6. Section 400.0255(15), Florida Statutes (“F.S.”), provides the Department of Children and Families, OAH, 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.

7. Title 42 Code of Federal Regulations (“C.F.R.”) 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]

8. 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.

...  
(a) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility, and the circumstances are documented in the resident's medical records by the resident's physician; or

(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.

...

(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

9. Respondent's reason 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 (2) of the reasons listed in the above authority as a valid reason for the Notice.

10. In accordance with the above authority, the Facility Administrator RD and Physician MB signed the Notice.

11. 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 health of other individuals in this facility is endangered." and "The safety of other individuals in this facility is endangered."

12. 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 after Petitioner's readmission on June 5, 2023, there were no records submitted by Respondent 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, electronic cigarettes, or lighters. The findings show while physician did sign the notice, no testimony was

given by a physician to substantiate and no medical records submitted documenting the reason the Facility is requesting a transfer and/or that Petitioner is a danger to the health and safety of other residents. Based on the evidence provided by the Facility, the undersigned cannot conclude that Petitioner has endangered the safety and health of the other residents.

13. 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.

14. After careful review of the evidence and cited authorities, 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 and that’s its discharge/transfer reason, is proper.

15. 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 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. 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 08 day of April, 2024,

in Tallahassee, Florida.



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Copies Furnished To:  Petitioner  
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Agency for Health Care Administration  
