

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

Office of Appeal Hearings
Dept. of Children and Families

[REDACTED]

APPEAL NO. 24N-00049

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, the undersigned convened a telephonic nursing home discharge hearing in the above-referenced matter on August 15, 2024, at 1:31p.m.

APPEARANCES

For the petitioner: [REDACTED] *pro se*

For the respondent: [REDACTED]
Senior Nursing Home Administrator,
[REDACTED]

STATEMENT OF ISSUE

The petitioner appeals the respondent's action to discharge her 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.

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 6, 2022, the petitioner was admitted to the Facility. She was not a smoker at the time of admission. (Resp't Ex. 2; Resp't Test.)
2. On January 28, 2023, the petitioner indicated that she had a desire to smoke. A smoking evaluation was completed on the same day. The petitioner was to be supervised by a staff, volunteer, or family member always when smoking. She was to request smoking materials from staff. Additionally, the petitioner was educated on the Facility's smoking policy for residents (Resp't Exs. 4.)
3. On October 21, 2023, the petitioner was educated on the smoking policy and was given the smoking policy. (Resp't Test; Resp't Exs.5 through 7.)
4. The respondent's smoking policy informs that residents are not permitted to give smoking items to other residents, any resident with smoking privileges requiring monitoring shall have the direct supervision of a staff member, family member or volunteer worker at designated smoking times and residents may not store any smoking items in their room or on their person, including cigarettes, e-cigarettes, tobacco etc. Additionally, the Facility's smoking policy, informs residents that smoking is only permitted in designated resident smoking areas, which are located outside of the building. Smoking is not allowed inside the Facility under any circumstances. (Resp't Ex. 6.).

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.

5. On December 1, 2023, the petitioner was evaluated on the Facility's smoking policy. Additionally, the petitioner and her son were informed that residents are not permitted to store any smoking paraphernalia in their rooms or on their person. This would include cigarettes, lighters and vape pens. The petitioner was educated on the consequences of breach of smoking policy. (Resp't Exs. 8 and 9.)
6. On December 5, 2023, the petitioner was evaluated again for smoking. It was determined that she must be always supervised by staff, volunteer, or a family member when smoking. (Resp't Ex. 10.),
7. On January 9, 2024, a nursing staff observed the petitioner on the smoking porch pulling out a cigarette from under her breast. The petitioner was redirected and reminded of the Facility's smoking policy. (Resp't Exs. 12 and 13.)
8. On January 15, 2024, a staff smelled smoke in the petitioner's room. She admitted to having an e-cigarette/vape pen and turned it in to the NHA upon request. (Resp't Ex. 14.)
9. On January 17, 2024, the Advance Practice Nurse Practitioner ("ARNP") determined that the petitioner had major depressive disorder. The ARNP discussed the incident of January 15, 2024, and the smoking policy was again discussed. (Resp't Test; Resp't Ex. 15.)
10. On January 22, 2024, the petitioner signed the resident smoking agreement and was given a copy of the smoking policy. The smoking policy informs that residents are not permitted to keep cigarettes, electronic cigarettes, pipes, tobacco, lighters, and other smoking items in their possession inside the facility. (Resp't Exs. 19 and 20.)

11. On April 15, and April 24, 2024, the petitioner was again given the resident smoking agreement and smoking policy. (Resp't Exs. 23 through 26.)
12. On May 6, 2024, the petitioner was given a Nursing Home Transfer and Discharge Notice ("Notice") by the respondent. The notice was signed by the Facility Administrator, a physician, and the petitioner. The reason for the transfer/discharge was "The safety of other individuals in this facility is endangered." (Resp't Ex. 27.)
13. The petitioner has quit smoking. (Pet'r Test.)
14. The petitioner has quit smoking before. (Resp't Test.)

CONTROLLING LAW

15. The Department of Children and Families, Office of Appeal Hearings, has jurisdiction over the subject matter of this proceeding and the parties; this order is the final administrative decision of the Department of Children and Families pursuant to Section 409.285, Florida Statutes.
16. Florida Statutes Section 400.0255, Resident transfer or discharge; requirements and procedures; hearings, states in part:
 - (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, or an individual employed by the nursing home who is designated by the nursing home administrator to act on behalf of the administration, 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.

(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.

(15)(a) The department's Office of Appeals Hearings shall conduct hearings under this section. The office shall notify the facility of a resident's request for a hearing.

(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.]

17. 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 - [Emphasis added.]

CONCLUSIONS OF LAW

18. The respondent's reason for issuing the petitioner a transfer/discharge notice is, "The safety of other individuals in this facility is endangered" This is one of the permitted discharge reasons listed in the above authority

19. 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.

20. The above controlling authorities require 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 smoking policy, 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 safety of other individuals in this facility is endangered," The respondent and its witnesses testified that the petitioner had violated the Facility's smoking policy on two occasions (1) when petitioner carried a cigarette (given to her by someone) on her person to the smoking area and (2) when she was found with the vape pen/electronic cigarette in her room.

21. The standard of proof in nursing discharge hearings is at a level of clear and convincing. The evidence submitted establishes that the petitioner did violate the

respondent's smoking policy by being in possession of cigarette and e-cigarette. After careful review of the cited authorities, testimonies, and evidence the undersigned concludes the respondent met 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 DENIED. The Facility's action to discharge the 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. 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 03 day of September, 2024,
in Tallahassee, Florida.

Christiana Gopaul Narine

Christiana Gopaul Narine
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

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

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

[REDACTED]

PETITIONER,

APPEAL NO. 24N-00049

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FLORIDA DEPT OF CHILDREN AND FAMILIES

CASE NO.

[REDACTED]

RESPONDENT.

CERTIFICATE OF SERVICE

This is to certify that a copy of the attached notice or order was provided to Petitioner at the above address and to the following individuals by either regular U.S. or electronic mail:

I HEREBY CERTIFY that these copies were furnished on September 03, 2024.

/s/ Karina Sarmiento

Karina Sarmiento

Agency Clerk, Office of Appeal Hearings

Department of Children and Families

Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190