

Feb 18, 2025

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-00091

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 November 5, 2024 at 3:15 p.m. and reconvened the hearing on January 23, 2025 at 3:02 p.m. All parties appeared telephonically from different locations.

APPEARANCES

For Petitioner: [REDACTED] Petitioner’s sister and Power of Attorney (“POA”)

For Respondent: [REDACTED], Esquire, [REDACTED]

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

At hearing on November 5, 2024, Petitioner did not appear. [REDACTED] (“KB”), Petitioner’s sister and POA, appeared and represented Petitioner. [REDACTED] (“EH”) (“Pet’r Wit.”), Petitioner’s sister, appeared as a witness for Petitioner. Respondent did not appear. On record, it was confirmed that Petitioner still resided at the Facility and the appeal was still needed. Petitioner confirmed that the Nursing Home Transfer and Discharge Notice (“Discharge Notice”) dated August 26, 2024 and listing the discharge reasons as “your needs cannot be met in this facility”, “the health of other individuals in this facility is endangered”, and “the safety of other individuals in this facility is endangered” was the issue under appeal. As the burden of proof is Respondent’s, the hearing was continued to allow Respondent to appear and provide its evidence and testimony.

On November 6, 2024, an Order Commanding Respondent’s Appearance was issued to all parties instructing Respondent to appear and be ready to proceed at the rescheduled hearing.

On November 7, 2024, a new Notice of Hearing (“NOH”) was issued to all parties rescheduling the hearing to January 23, 2025 at 3:00 p.m.

On November 12, 2024, Respondent filed a Notice of Appearance (“NOA”) for [REDACTED], Esquire and [REDACTED], Esquire with [REDACTED] to appear and represent Respondent at the rescheduled hearing.

At hearing on January 23, 2025, the undersigned, KB, and EH reappeared. Petitioner did not appear. [REDACTED] appeared and represented Respondent. [REDACTED] (“JP”) (“Resp’t Wit. 1”), Activities Director, [REDACTED] (“VR”) (“Resp’t

Wit. 2”), Director of Nursing, and [REDACTED] (“WA”) (“Resp’t Wit. 3”), Social Services Director for the Facility appeared as witnesses for Respondent. On record, Petitioner raised the issue of the hearing decision not being issued within ninety (90) days of the appeal, by November 30, 2024, as required by Section 400.0255(15)(b) F.S. Upon reviewing the case, Petitioner did not object to the rescheduled hearing date prior to reconvening the hearing which prevented the issue from being timely reviewed and/or addressed. Additionally, not issuing the hearing decision within ninety (90) days was not prejudicial to Petitioner as he remained at the Facility. Therefore, the proper action for the undersigned to take is to issue this Final Order. Petitioner submitted forty-one pages of evidence. The undersigned took administrative notice of 400.0255 Section Florida Statute (“F.S.”) and admitted the hearing request as Petitioner Exhibit one (“1”). Respondent submitted sixty (60) pages of evidence which were marked and entered as Respondent’s Exhibits one (1”) through six (“6”). The record was left open through close of business on February 3, 2025 for Respondent to provide additional evidence and allow Petitioner to provide a rebuttal to Respondent’s additional evidence.

As of close of business on February 3, 2025, no additional evidence and/or rebuttal had been received from either party. The record closed on February 3, 2025.

Petitioner’s Position

Petitioner took the position that the Facility is retaliating against him because he has a pending lawsuit against the Facility, and this is the third attempt to discharge him due to retaliation. Petitioner argued that he was not informed that the August 26, 2024 Discharge Notice was for violating the Facility’s smoking policy as required under Section 400.0255 F.S. and the Discharge Notice is facially defective as result. Petitioner

argued that the Facility is not following its smoking policy for other residents and only targeting him for discharge under the smoking policy. Petitioner argued that staff are not available to watch residents in the smoking area. Petitioner argued that the Facility allows family members to supervise residents in the designated smoking area in violation of the Facility's own smoking policies. Petitioner argued that he has never smoked outside of the designated smoking area. Petitioner argued that his right to have a decision issued within ninety (90) days of the appeal being filed, as defined by Section 400.0255(15)(b) F.S., has been violated.

Respondent's Position

Respondent took the position that Petitioner has been educated on the Facility's smoking policies and procedures. Respondent argued that Petitioner violated the Facility's smoking policy on at least seven (7) separate occasions endangering the health and safety of other individuals in the Facility and that Petitioner's needs cannot be met at the Facility. Respondent argued that the August 26, 2024 Discharge Notice is not facially defective under Section 400.0255 F.S.

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. Petitioner has Multiple Sclerosis ("MS") and is required to wear a smoking bib/apron when he smokes as he is at risk for burning himself and/or dropping his cigarette due to his MS. (Hr'g R.)

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.

2. On December 13, 2023, Petitioner signed the Facility's Notice of Smoking Policy form. Residents are prohibited from possessing cigarettes, lighters, vapors and any other smoking materials on their person or in their room. Residents are only allowed to smoke during designated times and in designated areas. A staff member must be present during smoking periods. Petitioner must leave his cigarettes and lighter with the staff member. The Facility has eight time periods where residents can smoke at designated times, 8:30a.m. to 9:00 a.m., 9:30 a.m. to 10:00 a.m., 11:30 a.m. to 12:00 p.m., 1:30 p.m. to 2:00 p.m., 3:15 p.m. to 3:30 p.m., 4:30 p.m. to 4:45 p.m., 6:30 p.m. to 7:00 p.m., and 8:00 p.m. to 8:30 p.m. in the designated areas. The smoking policy and smoking hours are posted throughout the Facility, in each resident's room, in the designated smoking area, and a copy is given to each resident. The Facility has these smoking policies to ensure residents do not harm themselves and/or others when smoking and because some residents are on oxygen which can be flammable when exposed to a fire/spark, residents ambulate in the Facility with oxygen, and oxygen is stored throughout the Facility. (Resp't Ex. 2; Hr'g R.)

3. On February 28, 2024, the Facility has a smoking policy and procedure meeting with all residents who are identified as smokers, including Petitioner. The summary of the meeting from Petitioner's file addressed; all residents who smokes must turn in all smoking items, cigarettes or lighters. These items are not allowed on themselves or in their rooms. Smoking items must be turn in to the staff member and random inspections will be conducted in the smoker's room. Failure to comply or smoking without staff supervisions are grounds for 30-day discharge notice. (Resp't Ex. 3 at 3; Hr'g R.)

4. On April 9, 2024, the Facility filed a Discharge Notice for violating smoking policy. Only Petitioner's smoking policy violations after April 10, 2024 will be considered. (Hr'g R.)

5. On April 19, 2024, VR had a care conference with KB and EH to discuss the Petitioner's smoking as he continues to keep his cigarettes and lighter in his room and does not smoke his cigarettes during the designated time, instead choosing whatever time. (Resp't Ex. 3 at 8; Hr'g R.)

6. On June 24, 2024, VR observed Petitioner smoking outside of the designated smoking time, possessing smoking paraphernalia not provided by the Facility, and smoking without supervision. (*Id.* at 13; Hr'g R.)

7. On August 26, 2024, the Facility filed a Discharge Notice listing the reason(s) for discharge as "your needs cannot be met in this facility", "the health of other individuals in this facility is endangered", and "the safety of other individuals in this facility is endangered" with the comment "30 Day Discharge Notice" under the brief explanation to support this action section. The Facility had the form signed by WA and Nurse Practitioner [REDACTED]. Petitioner refused to sign. WA and JP contacted KB to notify her of the Discharge Notice. (*Id.* at 16; Resp't Ex. 6; Hr'g R.)

8. On September 1, 2024, Petitioner filed his appeal. (Pet'r Ex. 1.)

9. On September 26, 2024, JP and VR observed Petitioner smoking outside of the scheduled smoking times, smoking without supervision, smoking without his safety bid/apron, and providing a cigarette to a fellow resident who was not approved/evaluated to smoke. The incident was reported to KB. (*Id.* at 19; Hr'g R.)

10. On October 10, 2024, JP observed Petitioner smoking outside of the schedule smoking times and without supervision. (*Id.* at 21; Hr’g R.)

11. On November 8, 2024, VR observed Petitioner smoking outside of the designated smoking times and near a resident using oxygen. (*Id.* at 23; Hr’g R.)

12. KB is aware that Petitioner has violated smoking policy but does not recall specific dates. (Hr’g R.)

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, 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.

...

15. 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, 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.

(4)(a) Each facility must notify the agency of any proposed discharge or transfer of a resident when such discharge or transfer is necessitated by changes in the physical plant of the facility that make the facility unsafe for the resident.

(b) Upon receipt of such a notice, the agency shall conduct an onsite inspection of the facility to verify the necessity of the discharge or transfer.

(5) A resident of any Medicaid or Medicare certified facility may challenge a decision by the facility to discharge or transfer the resident.

(6) A facility that has been reimbursed for reserving a bed and, for reasons other than those permitted under this section, refuses to readmit a resident within the prescribed timeframe shall refund the bed reservation payment.

(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:

(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.

(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.

...

(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. A hearing decision must be rendered within 90 days after receipt of the request for hearing.

...

CONCLUSIONS OF LAW

16. Respondent's reason for issuing Petitioner a transfer/discharge notice is "your needs cannot be met in this facility", "the health of other individuals in this facility is

endangered”, and “the safety of other individuals in this facility is endangered”. These are three (3) of the reasons listed in the above authority as a valid reason for a transfer/discharge. Additionally, the August 26, 2024 Discharge Notice was properly completed as the reasons for discharge were selected and the Discharge Notice was signed by WA and a nurse practitioner in accordance with Section 400.0255, F.S. Therefore, the Discharge Notice is valid and not facially defective.

17. The evidence established that Petitioner agreed to abide by the Facility’s smoking policy when he signed the Facility’s Notice of Smoking Policy form on December 13, 2023 and attended the smoking policy and procedure meeting on February 28, 2024. Additionally, the evidence and testimony established that KB was aware that Petitioner had violated the Facility’s smoking policy.

18. The evidence established that Petitioner violated the Facility’s smoking policy on five (5) occasions after April 10, 2024 and Petitioner’s medical records were documented with these violations as required.

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 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.

20. 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 Petitioner's discharge/transfer reason for "your needs cannot be met in this facility", is proper.

21. The undersigned concludes that Respondent met its burden of proof by clear and convincing evidence that Petitioner's discharge/transfer reason(s) for "the health of other individuals in this facility is endangered" and "the safety of other individuals in this facility is endangered", is proper.

22. 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 DENIED. The Facility's action to transfer/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 AHCA requirements.

NOTICE OF RIGHT TO APPEAL

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 18 day of February , 2025,
in Tallahassee, Florida.

Hearing Officer

2415 North Monroe Street
Tallahassee, FL 32303-4190
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: _____ Petitioner
_____, Respondent
Agency for Health Care Administration

_____, Esq.

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

[REDACTED]

PETITIONER,

APPEAL NO. 24N-00091

Vs.

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:

[REDACTED]

[REDACTED], Esq.
Respondent Attorney, [REDACTED]
[REDACTED]

I HEREBY CERTIFY that these copies were furnished on February 18, 2025.

/s/ [REDACTED]

Agency Clerk, Office of Appeal Hearings
Department of Children and Families
Suite I, Room 129, 2415 North Monroe Street, Tallahassee, FL 32303-4190