

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

[REDACTED]

APPEAL NO. 11N-00092

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

FILED

JULY 19, 2011

OFFICE OF APPEAL HEARINGS
DEPARTMENT OF CHILDREN AND FAMILIES

RESPONDENT.

_____ /

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned hearing officer on June 7, 2011, at 9:05 a.m., at [REDACTED] Center, in [REDACTED], Florida.

APPEARANCES

For the Petitioner: [REDACTED]

For the Respondent: [REDACTED], administrator and executive director

ISSUE

The respondent will have the burden to prove by clear and convincing evidence that the petitioner's discharge in the notice dated April 22, 2011 is in accordance with the requirements of Code of Federal Regulation at 42 C.F.R. § 483.12(a)(2)(iii): "The safety of individuals in the facility is endangered".

PRELIMINARY STATEMENT

By notice dated April 22, 2011, the respondent informed the petitioner that he was to be discharged. On April 22, 2011, the petitioner timely requested a hearing to challenge the discharge.

The petitioner and the respondent's representative appeared in person.

Witnesses for petitioner appearing in person were resident's [REDACTED], [REDACTED] and [REDACTED]. Witnesses for respondent appearing in person were [REDACTED], social worker, and [REDACTED] director of nursing.

FINDINGS OF FACT

1. Effective June 14, 2010, the petitioner met a level of care of skilled for temporary placement in a nursing facility. The petitioner was admitted to the facility on June 30, 2010. Due to the petitioner's medical condition of lower paralysis, the petitioner uses a wheelchair for ambulation. [REDACTED] D.O. is the petitioner's treating physician. The petitioner is prescribed narcotic pain medication. One of the petitioner's pain medications is administered by medication patch. The petitioner smokes cigarettes. The respondent advised the petitioner of the facility's smoking policy.

2. The petitioner frequently leaves the facility. He goes to the store and buys his own cigarettes.

3. The respondent annotated the petitioner's medical record for his medical information, his compliance and noncompliance with smoking, verbal aggression and when the petitioner was lethargic. There were several notations in the petitioner's medical record that reported that the petitioner's pain medication patches were missing.

The respondent told the petitioner he should not be making his own coffee in the kitchenette. The administrator, the social worker and the director of nursing asserted that they had observed the petitioner violating the smoking policy. The medical record was annotated for the petitioner's non-compliance with the smoking policy:

On September 2, 2010, the petitioner was observed by staff taking cigarettes and a lighter out of his pocket and lighting up the cigarette. He gave a cigarette to another resident. The staff took the cigarettes and lighter and reminded the petitioner of the smoking policy.

On October 7, 2010, the respondent called the police due an alleged incident in which the petitioner self-administering medication through his nose with a straw. The respondent determined that due to the petitioner's frequent leaves of absence, the respondent would do a room and person search as needed.

On October 8, 2010, the respondent discussed the smoking policy with the petitioner.

On October 15, 2010, the respondent searched the petitioner's room and found one package of cigarettes. The respondent restated the smoking policy to the petitioner.

On November 5, 2010, the petitioner was observed smoking outside without supervision and with smoking items on his person.

On December 30, 2010 and March 10, 2011, the respondent documented in the petitioner's medical record that the petitioner was noncompliant with the smoking policy. The respondent determined that the petitioner was noncompliant as he holds his own smoking materials that he has purchased outside of the building and smokes outside of the designated smoking area. The respondent discussed goals and interventions with the petitioner.

4. On December 19, 2010, it was reported that the petitioner refused treatment for scabies.

5. On March 1, 2011, the petitioner verbally threatened another resident. The facility documented incidents of verbal aggression. Most incidents of the petitioner's verbal aggression with staff were regarding the petitioner's pain medication.

6. On March 14, 2011, the petitioner signed the [REDACTED] Supervised Smoking Program agreement. The respondent determined that due to his

medication he would need to smoke under the supervision of a staff member during the scheduled smoking time in the smoking area. All smoking materials will be held in a secure area and the residents may not keep smoking materials in their room or on their possession. On March 23, 2011, the petitioner was screened for safe smoking practices by a registered nurse. The screening indicated that the petitioner was able to demonstrate that he could safely ignite and hold a cigarette, use an ashtray and extinguish the cigarette. The screening also indicated that the petitioner was noncompliant with smoking in approved smoking areas or keeping smoking materials in a safe location designated by the respondent. The screening indicated that the petitioner is not always able to quickly recognize and physically respond as he is drowsy at times and is on narcotic pain medication that can cause sedation, drowsiness or dizziness.

7. The respondent continued to document the petitioner's non-compliance with the smoking policy as follows.

On March 17, 2011, the respondent documented in the petitioner's medical record that the petitioner refused to follow the smoking policy.

On March 22, 2011, the petitioner was observed smoking without supervision. The respondent reminded the petitioner of the smoking policy.

On March 23, 2011, the petitioner was observed with a package of cigarettes in his shirt pocket. The petitioner refused to give up the cigarettes. The respondent reminded the petitioner of the smoking policy.

On April 8, 2011, the petitioner was in the smoking area handing out cigarettes to other residents. The respondent reminded the petitioner of the smoking policy.

On April 9, 2011, the petitioner gave a cigarette to another resident.

On April 11, 2011, the respondent found a package of cigarettes in the petitioner's room.

8. On April 18, 2011, another resident reported that the petitioner was telling sexual joke that offended them. The petitioner reported he had a verbal confrontation with another resident, as the other resident made accusation about him.

9. On April 22, 2011, the respondent issued a Nursing home Transfer and Discharge Notice. The reason cited in the notice was that the safety of individuals in the facility is endangered. [REDACTED] the petitioner's treating physician, signed the discharge notice.

10. The respondent annotated the medical record for incidents of the petitioner's non-compliance with the smoking policy after the discharge notice was issued.

11. The respondent's position as follows. The petitioner requires supervision with smoking due to the narcotic pain medication the petitioner takes, as the medication make him drowsy. He keeps cigarettes and lighters in his room, smokes at will and gives cigarettes and lighters to other residents. The petitioner is a danger to himself and others, as the petitioner does not abide by the smoking rules.

12. The petitioner's position is as follows. He is aggressive when he is in pain and the facility will not give him his prescribed medication. He does admit to yelling at another resident and threatening to kick him; however, he could not kick the other resident. He voices his rebuttal, defends himself and has a right to free speech. He is verbally aggressive with two male residents as he is defending himself. He leaves the facility once or twice a day. He buys a package of cigarettes a day. He was caught with cigarettes once or twice, but he is capable of lighting and maintaining his own cigarettes. He is drowsy at times, but it is not from the narcotics and is from a lack of sleep. He did tell an offensive joke, but he is not the only one telling jokes and they are

all adults. Other residents there were not offended, only the one woman who is a problem. She reported him as retaliation. Staff member use foul language. Sometimes he makes his own coffee when no one is around to make it for him. He feels that he is being singled out when many of the other residents do not follow the rules.

13. The petitioner's three witnesses asserted as follows. They are not offended by the petitioner and the petitioner helps them. They have witnessed one of the two male residents who the petitioner is verbal aggressive toward as a result of that male resident tormenting the petitioner. The petitioner does smoke when he is not supposed to; however, there are many other who keep their own cigarettes and smoke when they want to. They understand the petitioner's frustration when he cannot get his medication when the pharmacy does not send the facility the medication. They are concerned for his safety crossing the street to go to the store.

CONCLUSIONS OF LAW

14. Federal regulations limit the reason for which a Medicaid or Medicare certified nursing facility may discharge a patient. In this case, the petitioner was sent notice indicating that he would be discharged from the facility in accordance with of Code of Federal Regulation at 42 C.F.R. § 483.12(a)(2)(iii): "The safety of individuals in the facility is endangered".

15. This proceeding is a de novo proceeding pursuant to Fla. Admin. Code § 65-2.056.

16. In accordance with Florida Administrative Code § 65-2.060(1) the burden of proof was assigned to the respondent.

17. The respondent has documented the petitioner's medical record for the petitioner's non-compliance with smoking rules, the petitioner's verbally abusive behavior, the respondent's attempts to counsel the petitioner and the respondent's attempts to provide intervention. The evidence demonstrates that the petitioner was not in compliance with the facility's smoking policy.

18. The hearing officer gives weight to the opinion of the treating physician. The treating physician's signature on the discharge notice indicates that the petitioner's treating physician concurred with the discharge, the reason for discharge, and the discharge location. There is no evidence by statement of the treating physician that the move would be detrimental to the petitioner's health.

19. The hearing officer concludes that the opinion of the treating physician that the petitioner's actions and behaviors endangers the petitioner and others in the facility. The hearing officer concludes that the respondent's action to discharge the petitioner is correct and in accordance with Federal Regulations.

DECISION

This appeal is denied as the respondent's action to discharge the petitioner is in accordance with Federal Regulations. The respondent may proceed with the discharge, as determined by the treating physician and in accordance with 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 Agency Clerk, Office of Legal Services, Bldg. 2, Rm. 204, 1317

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Winewood Blvd., Tallahassee, FL 32399-0700. 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 _____ day of _____, 2011,

in Tallahassee, Florida.

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Copies Furnished To: [REDACTED], Petitioner
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Ms. Patricia Reed Cauffman, Agency for Health Care Administration