

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

FILED

APR 01 2010

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DEPT. OF CHILDREN & FAMILIES

APPEAL NO. 10N-00004

PETITIONER,

Vs.

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned on February 9, 2010, at the nursing facility. The petitioner represented herself with assistance of her friend, _____ and _____ of the Long Term Care Ombudsman Council (LTCOC). The respondent was represented by _____, administrator, assisted by _____, LPN, unit manager.

ISSUE

At issue is whether discharge intent was correct based on safety endangerment of other individuals in the facility. The respondent bears the burden of proof.

FINDINGS OF FACT

1. The petitioner has resided at the facility for an extended period due to serious health problems. Despite her physical problems, her mental skills remain keen.

2. The petitioner smokes cigarettes. The facility's smoking policies have changed and become more restrictive over the past year. Area for smoking has moved and time permitted for smoking was reduced during April and May 2009. The petitioner attended several resident council meetings regarding the smoking policies. She was advised of and was aware of the new more restrictive smoking policies. She received counseling and education about the new policies and need for compliance. She acknowledged such.

3. The latest hour for smoking in the permitted area is now between 9:00 and 9:30 p.m. The facility smoking area is now closer to professional care-giving staff. The petitioner is aware of that.

4. The facility is not forbidding residents to smoke, but greater limitations have been imposed and nonsmoking programs have been instituted for those who would like to stop smoking. The petitioner is not trying to stop smoking.

5. The petitioner occasionally has difficulty sleeping and would like to smoke after that 9:00 – 9:30 p.m. time. She acknowledged that since the policy change, she has smoked in undesignated areas and times. The noncompliance has been repeatedly documented in the medical records.

6. On December 29, 2009, the respondent issued to the petitioner Nursing Home Transfer and Discharge Notice showing intent to discharge the petitioner.

to another nursing facility due to safety endangerment factors. During the hearing another nursing facility was named as another potential location. The respondent planned to discharge the petitioner to a location that has more permissive smoking policies.

7. The petitioner would prefer to remain at TRNC and remain at the facility where her good friend also lives. Her friend would also prefer the petitioner remain at TRNC.

8. A physician signed the discharge notice.

CONCLUSIONS OF LAW

Jurisdiction to conduct this hearing is established at federal regulations of 42 C.F.R. § 431.200. Additional regulations at 42 C.F.R. § 483.12 address nursing facility **Admission, transfer and discharge rights** for residents, in relevant part as follows:

(a) Transfer and discharge--

...

(2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--

(iii) The safety of individuals in the facility is endangered;

(iv) The health of individuals in the facility would otherwise be endangered;

(3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a)(2)(i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by--

(i) The resident's physician when transfer or discharge is necessary under paragraph (a)(2)(i) or paragraph (a)(2)(ii) of this section; and

(ii) A physician when transfer or discharge is necessary under paragraph (a)(2)(iv) of this section.

(4) Notice before transfer. Before a facility transfers or discharges a resident, the facility must--

(i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (a)(6) of this section.

(5) Timing of the notice.

(i) Except when specified in paragraph (a)(5)(ii) of this section, the notice of transfer or discharge required under paragraph (a)(4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice may be made as soon as practicable before transfer or discharge when--

(A) the safety of individuals in the facility would be endangered under paragraph (a)(2)(iii) of this section...

The regulations inform that safety endangerment of others in a facility can provide justification for discharge. The petitioner has reasonable concerns about where she wants to live and would prefer to remain at She has reasonable desires to manage her own time and activities. However, the facility also has a critical responsibility to provide a safe environment for other individuals in the facility and has directed a smoking policy in that interest.

The petitioner was advised that one of the requirements for residence at the facility is compliance with the smoking policies. She was educated, counseled, and she participated in council meetings addressing the problem. Noncompliance with the smoking procedures creates a potential safety problem for other individuals at the facility. This is a reasonable standard. If the petitioner

wishes a less restrictive smoking environment, relocation is appropriate. Despite the obvious difficulties of this circumstance, discharge has been justified.

DECISION


The appeal is denied and the respondent's action is affirmed.

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 Winewood Blvd., Tallahassee, FL 32399-0700. The party must also file another copy of the "Notice of Appeal" with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The party 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 14th day of April, 2010, in

Tallahassee, Florida.



JW Alper
Hearing Officer
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