

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

[REDACTED]

APPEAL NO. 10N-00203

PETITIONER,

Vs.

Administrator

[REDACTED]

RESPONDENT.

FILED

Mar 2, 2011

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN AND FAMILIES

FINAL ORDER

Pursuant to notice, an administrative hearing was convened by the undersigned at 2:30 p.m. on January 25, 2011 at the nursing facility. The petitioner represented himself with testimony available from his daughter, [REDACTED]. Her friend, [REDACTED] was also present. The respondent was represented by [REDACTED], director of nursing, with testimony available from [REDACTED], social service director, as well.

ISSUE

At issue was whether intent to discharge was correct based on safety endangerment of other individuals in the facility. The respondent bears the burden of proof at a standard of clear and convincing evidence.

FINDINGS OF FACT

1. The petitioner has serious health problems following an accident and he has resided at the nursing facility for approximately a year.

2. The petitioner is not legally incompetent and does not have a guardian. He wishes to pursue activities including use of tobacco and alcohol and certain verbal expressions. He prefers to choose his own time and place for using substances. He likes to keep his cigarettes and lighter near him, rather than place them in the authorized safe place and use them in designated areas/times. For purposes of residents' safety, the respondent requires compliance with facility smoking policies/places/procedures. The petitioner says "I don't believe in them" (facility smoking rules).

3. The petitioner also prefers personal freedom of movement. He uses a wheelchair and is physically capable of exiting the facility and conducted business. His physician has removed his leave of absence (LOA) privilege. After that privilege or option was removed, the petitioner nonetheless left the facility against medical advice and went to a nearby store and purchased alcohol for himself and another resident. The doctor had determined that he should not drink alcohol. His efforts to drink the alcohol and share it with the other resident were stopped when he returned to the facility and the alcohol was taken from him.

4. He uses highly derogatory language to describe people of another race and people who are large. His expressions are very (emotionally) hurtful to others. He believes he is using accurate descriptions and does not apologize for offending people. Other residents find his expressions and behavior offensive to the point of "frightening."

5. On December 1, 2010, the respondent issued the petitioner a notice of intent to discharge as "safety of other individuals in this facility is endangered." The notice was signed by a physician. Location for discharge was shown as his daughter's home,

but the home has not been modified to accommodate the petitioner. The daughter is not able to accommodate the petitioner at this time.

6. In view of that problem, the respondent located another facility in [REDACTED] for the petitioner to move to. The petitioner may wish to go there. Another option would be a less restrictive but accessible environment and such a location may become available.

7. As of date of hearing, the respondent continued to intend a discharge, while recognizing need for safe discharge location.

CONCLUSIONS OF LAW

8. Jurisdictional boundaries to conduct this hearing have been assigned to the Department by Federal Regulations appearing at 42 C.F.R. § 431.200. Florida Statute 400.0255 addresses "Resident transfer or discharge; requirement and procedures; hearing..." with section (15) (b) informing that the burden of proof is one of clear and convincing evidence. Federal regulations limit the reason for which discharge may occur and provide for certain emergency discharge procedures.

9. 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—

(i) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility.

...

(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 there are several reasons justifying discharge including safety endangerment of other individuals.

10. In this situation, the respondent determined that safety of others was endangered, and discharge was planned. Smoking practices and retention of lighting materials were controlled at the nursing facility. Flammable materials could pose a safety danger to other individuals at the facility. Residents were permitted to smoke in certain areas, but were not permitted to keep lighters readily available. Staff assistance and some level of supervision were required for smoking purposes. The petitioner apparently understood the standards but did not agree with them and did not wish to

follow the smoking procedures. It is possible the petitioner would prefer a less restrictive residence.

11. Use of alcohol is also controlled in the nursing facility. Some residents take medications or have health problems which are not compatible with alcohol. At times, the petitioner's doctor has told him he could have a couple of drinks, but in the past few months, alcohol has been medically restricted. Buying and providing alcohol for another resident who should not have alcohol could endanger safety.

12. The petitioner was aware of the facility standards about smoking and alcohol use. He did not agree with facility policy. Noncompliance with the smoking and alcohol requirements is a potential safety endangerment for other individuals in the facility. The discharge intent was justified.

DECISION

Based upon the foregoing findings and conclusions, the appeal is denied and the intent to discharge is upheld.

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 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]