

FILED

FEB 12 2015

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

OFFICE OF APPEAL HEARINGS
DEPT. OF CHILDREN & FAMILIES

[REDACTED]

APPEAL NO. 14N-00166

PETITIONER,

Vs.

CASE NO.

Administrator

[REDACTED]

RESPONDENT.

FINAL ORDER

Pursuant to notice, the undersigned convened a nursing home discharge hearing in the above-reference matter on January 22, 2015 at 10:00 a.m., at [REDACTED] in Ormond Beach, Florida.

APPEARANCES

For the Petitioner: [REDACTED] petitioner's daughter/POA

For the Respondent: Argentina Johnson, Business Office Manager

STATEMENT OF ISSUE

At issue is whether the respondent's intent to discharge the petitioner from the facility due to the safety of other individuals in the facility being endangered is correct. The facility has the burden of proof to establish by clear and convincing evidence that the discharge is appropriate under federal regulations found at 42 C.F.R. § 483.12.

PRELIMINARY STATEMENT

By notice dated November 6, 2014, the respondent informed the petitioner they were seeking to discharge her from the facility due to "the safety of other individuals in this facility is endangered." The petitioner timely requested this administrative hearing to challenge the discharge.

██████████ Executive Director; ██████████ Assistant Director of Nursing; ██████████ Licensed Practical Nurse; and ██████████ Social Services Director appeared as witnesses for the respondent.

██████████ and ██████████ the petitioner's daughters and ██████████ Certified Ombudsman, appeared as witnesses for the petitioner.

Robert Dickson, Agency for Health Care Administration (AHCA), Field Office Manager, appeared by telephone.

The petitioner submitted one exhibit, entered as Petitioner Exhibit "1". The respondent submitted two exhibits, entered as Respondent Exhibits "1" through "2" respectively. The hearing officer entered the AHCA survey result report as Hearing Officer Exhibit "1". The record closed on January 22, 2014.

FINDINGS OF FACT

1. The petitioner has been a resident of the respondent's facility since June 30, 2012. The petitioner has several diagnoses of dementia. When she was admitted to the facility, residents were allowed to smoke.
2. On November 1, 2014, the facility became a smoke-free facility; residents were given a four month notice prior to this change.

3. Due to the petitioner residing in the facility prior to it becoming smoke-free, the petitioner was still allowed to smoke in designated areas and under supervision.
4. The respondent indicates that for at least a year, they have had issues with the petitioner lighting up and smoking in non-designated areas compromising the facility's fire safety. The most dangerous incident occurred on October 20, 2014 when the petitioner tried to light a cigarette and lit a tablecloth along with her cigarette.
5. The respondent asserts the family continues to provide cigarettes and lighters to the petitioner even after they were informed of their safety concern on several occasions.
6. The petitioner's daughters explained that the facility first discussed their concern with their father, who also has dementia, and their brother, who is mentally delayed. Once they were made aware of the issue, they have talked to their father and brother to ensure they do not leave any cigarettes or lighters with the petitioner. They have taken steps to ensure the petitioner doesn't have access to smoking supplies; however, they believe she gets these from other residents. The petitioner's family is trying to help her quit smoking.
7. On November 6, 2014, the facility issued a Nursing Home Transfer and Discharge Notice to the petitioner. The reason for the discharge was "the safety of other individuals in this facility is endangered." Said notice was not signed by a physician nor there was a physician's written order for discharge or transfer issued.
8. The petitioner's daughters would like the petitioner to remain in the facility as she's comfortable, she knows everyone there and it has become her home. They have not been able to find another facility willing to take her in as she has been deemed a safety hazard.

9. AHCA completed an onsite survey on November 25, 2014. No violations were identified as a result of the survey.

CONCLUSIONS OF LAW

10. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to s. 400.0255(15), Fla. Stat. In accordance with that section, this Order is the final administrative decision of the Department of Children and Families. The burden of proof is clear and convincing evidence and is assigned to the respondent.

11. The Code of Federal Regulations at 42 C.F.R. § 483.12, set forth the reasons a facility may involuntarily discharge a resident 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;

(ii) 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;

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

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

(v) 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. 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

(vi) The facility ceases to operate.

(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.

12. The above controlling federal regulation provides that the facility may involuntarily discharge a resident for one of the six enumerated reasons. The facility issued a discharge notice on November 6, 2014 indicating the petitioner would be discharged due to "the safety of other individuals in this facility is endangered."

13. Fla. Stat. § 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.** [emphasis added]

...
(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 know, 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.

14. The above controlling State law indicates that when a resident is discharged due to the safety of other residents or facility employees being endangered, the discharge notice must be signed by the resident's attending physician or the facility's medical

director or a physician's written order for discharge or transfer must be issued. The Nursing Home Transfer and Discharge Notice issued by the facility on November 6, 2014 was only signed by the facility administrator. The respondent also confirmed that the petitioner's physician had not issued a written order for her discharge or transfer.

15. Based on the evidence presented, the undersigned concludes the nursing facility has not complied with the controlling state regulations which require the Nursing Home Transfer and Discharge notice to be signed by the resident's physician or medical director, or included a written order for discharge or transfer by the resident's physician.

DECISION


Based upon the foregoing Findings of Fact and Conclusion of Law, the appeal is granted. The facility has not established that the discharge is permissible under state regulations and may not proceed with the discharge at this time.

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 12 day of Feb, 2015,

in Tallahassee, Florida.


Karina A. Sanchez
Hearing Officer
Building 5, Room 255
1317 Winewood Boulevard
Tallahassee, FL 32399-0700
Office: 850-488-1429
Fax: 850-487-0662
Email: Appeal.Hearings@myflfamilies.com

Copies Furnished To: [REDACTED] Petitioner
[REDACTED], Respondent
Mr. Robert Dickson,
Agency for Health Care Administration
[REDACTED]