

FILED

APR 06 2015

OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES

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

[REDACTED]

APPEAL NO. 15N-00005

PETITIONER,

Vs.

ADMINISTRATOR

[REDACTED]

RESPONDENT.

RESPONDENT.

FINAL ORDER

Pursuant to notice, an administrative hearing was convened before the undersigned on March 9th, 2015 at 8:52 a.m. in [REDACTED] Florida.

APPEARANCES

For the petitioner: [REDACTED] pro se.

For the respondent: [REDACTED] Administrator for the facility.

ISSUE

At issue is whether the respondent's intent to discharge is correct based on its contention that the health and safety of others in the facility are endangered. The respondent carries the burden of proof at a clear and convincing standard of evidence.

PRELIMINARY STATEMENT

Appearing telephonically as a witness for the petitioner was [REDACTED]

Appearing as witnesses for the respondent were: [REDACTED], Social Worker;

[REDACTED], Social Worker; [REDACTED], Interim Director of Patient Care Services;

and [REDACTED], Nurse Practitioner.

By way of a Notice of Discharge December 12th, 2014, the respondent informed the petitioner of its intention to discharge the facility effective January 11th, 2015. The reasons stated on the notice were "The health of other individuals in this facility is endangered" and "The safety of other individuals is endangered."

On January 7th, 2015, the petitioner filed a timely appeal to challenge this intention.

Petitioner's Exhibit 1 and Respondent's Exhibits 1 and 2 were moved into evidence.

FINDINGS OF FACT

1. The petitioner, 51 years of age, was admitted to the facility on February 2nd, 2012.

2. On October 7th, 2014, the facility conducted a special residents' meeting to address and reiterate the facility's policy on alcohol and drug usage on the premises. This meeting was necessitated by the discovery of several residents who had alcohol and illegal drugs on their persons. These were residents who were non-ambulatory and therefore unable to leave the facility on their own; these residents also had not been

issued passes to leave the premises. The petitioner acknowledged having attended this meeting.

3. On December 10th 2014, acting on a tip from an anonymous resident made to the facility administrator, staff conducted a room search of the petitioner's room and found "multiple" unopened containers of alcohol among his possessions. The respondent believes that the petitioner has been the source of alcohol found on the other residents.

4. The petitioner asserts that the bottles of alcohol were brought to him by his son, who visited the petitioner on various occasions while home on military leave. The petitioner asserts that he does not drink, and that the bottles remained in his possession because he intended to return them to his son or other family members. The petitioner asserts that he has never sold or given away alcohol to other residents.

5. The respondent submitted into evidence as Respondent's Exhibit 2 a copy of the facility's written policy on smoking, drugs, and alcohol. The policy states, under the heading of "Illegal drug or alcohol", as follows:

A. The sale or consumption of illegal drugs such as marijuana or cocaine or alcohol on the property is prohibited.

B. the Police Department will be automatically notified and charges filed in each case of illegal drug sale or consumption.

C. Violations of policy shall be handled on an individual basis through the Interdisciplinary Care Plan Tem with final approval given by the Administrator.

D. The same actions may be taken for drug and alcohol violations as those listed for smoking violations (item "E" under smoking), including searches of resident's belongings and areas.

6. The respondent asserts that the unopened bottles that were discovered in the petitioner's room pose a threat to the safety of the other residents in that any resident who is out and about in a state of confusion could wander into the petitioner's room unattended and take an unopened container for himself..

PRINCIPLES OF LAW

7. 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 involuntary and certain emergency discharge procedures.

8. Additional regulations at 42 C.F.R. § 483.12(a) address nursing facility "Admission, transfer and discharge rights" for residents, in relevant part as follows:

... (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.

(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...

CASE ANALYSIS

9. The regulations inform that there are several reasons justifying discharge, including safety endangerment of other individuals. In this situation, the respondent contends that the safety of others was endangered. Discharge was planned for those reasons.

10. Establishing that reason for discharge is lawful is just one step in the discharge process. The nursing facility must also provide discharge planning, which includes identifying an appropriate transfer or discharge location and sufficiently

preparing the affected resident for a safe and orderly transfer or discharge from the facility. The hearing officer in this case cannot and has not considered either of these issues. The hearing officer has considered only whether the discharge is for a lawful reason.

11. Any discharge by the nursing facility must comply with all applicable federal regulations, Florida Statutes, and Agency for Health Care Administration requirements. Should the resident have concerns about the appropriateness of the discharge location or the discharge planning process, the resident may contact the AHCA health care facility complaint line at (888) 419-3456.

12. Upon review of the evidence in its totality, the hearing officer finds that respondent's suspicion that the petitioner was supplying other resident's with alcohol (thereby posing a threat to their safety) is not substantiated with sufficient evidence to conclude that such is the case.

13. The respondent's own policies on this subject merely address the sale and consumption of alcohol on facility grounds, neither of which was proven. The respondent's argument that other residents could wander in unattended and take a container for themselves was noted, but is not persuasive. As to safety endangerment, such an allegation must be supported by reliable evidence. If mere possession of unopened alcohol containers among the petitioner's belongings posed a safety threat to other residents, this allegation was not supported by substantive evidence.

14. After carefully considering all facts, arguments, and guidelines, the hearing officer concludes that the respondent has not established by a standard of clear and

convincing evidence that the health and safety of other residents is endangered at this time.

DECISION

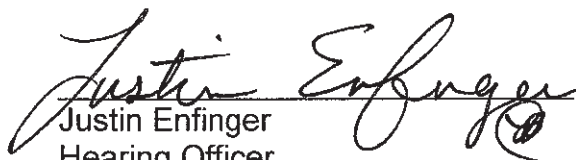
The appeal is granted. The facility may not proceed with this current discharge notice.

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 14th day of April, 2015,

in Tallahassee, Florida.



Justin Enfinger
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Harold Williams, Agency for Health Care Administration