

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

**FILED**

NOV 16 2015

OFFICE OF APPEAL HEARINGS  
DEPT OF CHILDREN & FAMILIES

[REDACTED]

APPEAL NO. 15N-00084

PETITIONER,

vs.

Administrator

[REDACTED]

RESPONDENT.

\_\_\_\_\_ /

**FINAL ORDER**

Pursuant to notice, an administrative hearing in the above-referenced matter convened on October 14, 2015, at approximately 2:30 p.m. in [REDACTED] Florida. All parties appeared in-person.

**APPEARANCES**

For Petitioner: [REDACTED] Petitioner

For Respondent: Terrye Dubberly, Administrator,  
[REDACTED]

**ISSUE**

Respondent seeks to discharge Petitioner from its nursing home facility (NHF), alleging that "the safety of other individuals in this facility is endangered" by Petitioner. Respondent bears the burden of proving, by clear and convincing evidence, that this discharge is appropriate per federal regulations (42 C.F.R. § 483.12).

**PRELIMINARY STATEMENT**

Via Nursing Home Transfer and Discharge Notice dated August 14, 2015, Respondent notified Petitioner that he was to be discharged from its NHF effective September 14, 2015, due to an asserted safety risk. On or about August 21, 2015, the Petitioner requested a hearing to challenge the Respondent's action.

Terrye Dubberly, Administrator of [REDACTED]

[REDACTED] represented the Respondent. Ms. Dubberly presented six additional witnesses from the NHF: Angela Dees, Social Services Director; Sheila Cooper, Social Services Specialist I; Allison Prieto, RN, Unit Manager; Susan Rose, Director of Therapy; Violet Sotelo, RN, Unit Manager; and Karen Callahan, RN, Assistant Director of Nursing.

The Petitioner acted as his own representative. Petitioner expected his sister to join the hearing via teleconference; however, when she failed to do so, Petitioner confirmed that he wished to proceed without her. Petitioner noted he had requested Respondent provide him with a copy of any documentation to be used at hearing, and was denied same. Respondent did not initially intend to introduce documentary evidence, but decided to do so as the hearing progressed. Petitioner was provided a copy of same and given time to review the documents before they were accepted into evidence.

Deborah Allison, Health Facility Evaluator with the Agency for Health Care Administration (AHCA), observed the proceedings via teleconference. Respondent's Exhibits 1 through 4, inclusive, Petitioner's Exhibit 1, and a composite Hearing Officer Exhibit were entered into evidence.

**FINDINGS OF FACT**

1. The Petitioner has been a resident of Respondent's facility since August 12, 2015. He was admitted for wound care and pain management, following discharge from the hospital. He underwent amputation surgery in April of 2014, and hoped to begin physical therapy while in the facility to assist in preparation for a prosthesis.

2. Although the facility was unable to state Petitioner's admitting diagnoses, Petitioner stated that he is diagnosed with [REDACTED]. He was admitted as (and remains) a Medicare patient, and is competent, with neither a guardian advocate nor a power of attorney designated to act on his behalf.

3. On or about August 12, 2015, Petitioner signed a "Genesis HealthCare Admission Agreement." Petitioner's signature is not dated, and there are no initials in the designated space for receipt of an Admission Packet. The only portions of the Admission Agreement completed include check boxes where Petitioner indicates that he gives the facility permission to do his laundry, but does *not* give permission for the NHF to open his financial or personal mail, arrange for salon, telephone, television, cable, other services, or bill him for fees associated with those services. The Admission Agreement makes no mention of a smoking policy.

4. On or about August 14, 2015 (two days after Petitioner was admitted), [REDACTED] issued to Petitioner a Nursing Home Transfer and Discharge Notice, checking a box to indicate that the reason for discharge was "The safety of other individuals in this facility is endangered," and typing in an explanation which states:

Safety of others at risk due to smoking in room. Failure to execute admission/financial disclosure documents.

5. The Discharge Notice was signed by the NHF Administrator on August 13, 2015 (perhaps misdated), and given to Petitioner on August 14, 2015. However, because the reason stated in the Notice (safety of other individuals endangered) requires a physician's signature, the NHF obtained said signature from Robert Kitos, MD, on August 18, 2015. It does not appear that Petitioner was issued a copy of the Notice that includes the physician signature.

6. On or about August 21, 2015, the facility assisted Petitioner with completing a request for hearing. The transcribed reason for challenging the discharge notes:

They are trying to illegally discharge me for refusing the sign an arbitration agreement. The admissions office said my "packet wasn't complete" for that reason, but it is illegal for them to require me to sign an arbitration agreement waiving my right to a jury trial in the event of litigation. They are also trying to discharge me for keeping my vapor pens in my room when in fact, vapor pens are not cigarettes, nor do they emit smoke. They are only water vapor, and have no effects on any one at all. So that is illegal too!

7. At hearing, Respondent clarified that it did not intend to proceed with discharge based on failure to execute documentation, but did wish to pursue discharge due to Petitioner's smoking, and also due to behavioral issues exhibited by the Petitioner. Since the behavioral issues were not included on the Discharge Notice, the undersigned informed both parties that the hearing would proceed with regard to the smoking issue, only.

8. It is Respondent's position that Petitioner violated Oakhurst's smoking policy on 11 separate occasions by having smoking equipment in his possession and/or by smoking an e-cigarette indoors. Of these 11 alleged violations (mostly hearsay, as discussed, below), four purportedly occurred on August 12, 2015, three on August 17,

2015, and the remainder on or after August 21, 2015. Of note, the only violations alleged to occur prior to Respondent's Notice of Discharge were those on August 12, 2015 – the day Petitioner was admitted to the facility.

9. The facility was unable to produce evidence that the facility has a written smoking policy of any kind, but claimed Petitioner underwent a Smoking Evaluation upon admission (discussed further, below). Respondent provided testimony to indicate Oakhurst's policy is that no one is permitted to smoke (regular cigarettes or e-cigarettes) indoors, and that smoking equipment is to be kept at the nurse's station. In general, residents are required to pick up their cigarettes, lighters, etc. from the nurse's station prior to exiting the facility to smoke outdoors, and are to return all equipment to the nurse's station once they have finished their smoke break.

10. Respondent noted that Petitioner was informed of the smoking policy upon his admission to the facility, verbalized understanding of same, and surrendered one of his two e-cigarettes to be held at the nurse's station. However, Respondent also testified that after Petitioner complained about the facility taking his e-cigarette, and accused them of losing it, facility staff returned it to him. On a separate occasion, the facility also allowed Petitioner to keep a pack of regular cigarettes on his person. It appears that despite having returned both a pack of cigarettes and the e-cigarette to Petitioner, thus giving him permission to possess both, staff continued to report him for having smoking equipment in his room.

11. In support of its position that Petitioner knew of and willfully violated its smoking policy, Respondent submitted into evidence the Admission Agreement (discussed, above), a Smoking Evaluation, and an Interdisciplinary Health Education Record.

12. On or about August 25, 2015 (11 days after Discharge Notice), Respondent completed a "Smoking Evaluation" form, erroneously checking the box to indicate that this evaluation was completed upon admission. Allison Prieto, as the NHF evaluator, assessed Petitioner as follows (all emphasis original):

<b>MEDICAL</b>	<b>YES</b>	<b>NO</b>
Does the patient use oxygen?		√
<b>COGNITIVE</b>	<b>YES</b>	<b>NO</b>
Does the patient have dementia?		√
Does the patient have poor memory?		√
Is the patient unable to demonstrate the location of the designated smoking area?	√	
<b>BEHAVIOR</b>	<b>YES</b>	<b>NO</b>
Does the patient have a history of fire setting or arson?		√
Does the patient have a history of unsafe smoking habits?		√
Does the patient have a history of sharing/selling cigarettes or smoking material?		√

On the same form, following this checklist, is the statement:

**Supervised smoking is required if any "Yes" answers above. Check one below.**

- √ Independent smoking is allowed.
- Supervised smoking is required.
- Patient is not allowed to smoke.

Although the question "Is the patient unable to demonstrate the location of the designated smoking area?" was marked "Yes," the NHF still determined that Petitioner was permitted to smoke independently.

13. The bottom portion of the Smoking Evaluation contains the following information:

OBSERVATION	YES	NO
Is the patient able to safely hold a cigarette?	√	
Does the patient have the ability to light a cigarette?	√	
Does the patient properly dispose of ashes or butts?	√	
Can the patient smoke safely without use of a smoking apron?	√	

I understand that by my signature, I am acknowledging the Center smoking policy and the outcome of my smoking evaluation. I further understand that failure to comply with the smoking rules may result in termination of my smoking privileges and/or initiation of a discharge plan.

The form is signed, not by Petitioner, but by Allison Prieto, RN.

14. On an unknown date, Ms. Prieto also completed an "Interdisciplinary Health Educator Record." Ms. Prieto testified at hearing that such records are completed when a patient requires additional education regarding health care or facility procedures. The record submitted into evidence notes the "educational need" to be "safety precaution" and the method of education to be discussion between Ms. Prieto and the Petitioner. Two hand-written notes by Ms. Prieto are included on this form. The first, undated note states:

Discussed [with] Resident on admission about facility policy & protocol on e-cigarettes & not being able to use them indoors. Res. verbalized understanding.

Ms. Prieto testified that this was written upon Petitioner's admission, August 12, 2015.

The second note, dated September 17, 2015 states:

Resident education on skin care, not spending more than 2 hours in the w/c at any given time, comply [with] turning & repositioning, refrain from digging & scratching skin to promote wound healing.

15. Ms. Prieto testified that she believed she'd conducted additional education sessions with the Petitioner, one after each alleged violation. However, the facility did not have any records documenting same.

16. Out of the 11 alleged smoking violations, only two were directly observed by one of the seven facility employees present at hearing. The first was an incident upon admission (August 12, 2015), during which Petitioner was observed with e-cigarettes, allegedly educated as to Oakhurst's smoking policy, then found to be smoking one of the e-cigarettes later that same day. Petitioner was moved to a different unit within the facility on August 14, 2015. The second alleged violation (smoking the e-cigarette in his room) was witnessed on August 17, 2015. All other incidents remain unsubstantiated, as Respondent offered neither testimony from those who had witnessed the acts, nor business records to corroborate same.

17. Respondent argues that use of e-cigarettes is a danger to others in the facility, as some patients within Oakhurst utilize oxygen and oxygen is stored at various locations in the NHF. Respondent is concerned that the flame from regular cigarettes and/or combustion from e-cigarettes might ignite oxygen tanks and cause a fire.

18. Petitioner argues that e-cigarettes are not harmful, as they are purely water vapor with nicotine, which help to calm his nicotine cravings. He states that they are operated by batteries and do not ignite by combustion. He has never received any written smoking policy, but does recall a couple of discussions with Ms. Prieto regarding smoking rules. Petitioner contends that there is a personality conflict between himself and some of the NHF staff, and alleges that he does not get along with some of the

individuals who testified against him at hearing. He is unhappy with the service and care he has received while residing at [REDACTED]

### CONCLUSIONS OF LAW

19. The Department of Children and Families, Office of Appeal Hearings has jurisdiction over the subject matter of this proceeding and the parties, pursuant to § 400.0255(15), Fla. Stat. In accordance with that section, this Order is the final administrative decision of the Department of Children and Families.

20. The burden of proof (clear and convincing evidence) is assigned to the Respondent.

21. Federal Regulations appearing at 42 C.F.R. § 483.12, set forth the reasons a facility may involuntarily discharge a resident as follows:

Admission, transfer and discharge rights.

(a)(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.

22. Per documentation and testimony, Petitioner was admitted to

Respondent's facility for wound care and pain management. While Respondent

asserts that Petitioner was educated regarding [REDACTED] smoking policy upon admission, the smoking policy, itself, appears rather vague. In fact, it seems that the facility varies its policy based upon patient response, as once Petitioner complained, he was permitted to keep both regular and e-cigarettes in his possession, despite the purported policy of keeping all smoking paraphernalia at the nurse's station.

23. As [REDACTED] smoking policy is not formalized in writing, and seems subject to change, it is also unclear how patients would be able to refer back to the policy to ensure compliance with same, or how staff are guided in determining whether a particular incident actually constitutes a violation. Indeed, written policy is a requirement of federal law. Per 42 C.F.R. § 483.10:

(b) Notice of rights and services.

(1) The facility must inform the resident both orally and in writing in a language that the resident understands of his or her rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility. The facility must also provide the resident with the notice (if any) of the State developed under section 1919(e)(6) of the Act. Such notification must be made prior to or upon admission and during the resident's stay. Receipt of such information, and any amendments to it, must be acknowledged in writing.

(emphasis added)

24. Although Petitioner signed the facility's Admission Agreement, he did not initial to acknowledge receipt of the "Admission Packet," and neither the list of documents contained within the packet nor the agreement, itself, make mention of any smoking policy.

25. Although all of Petitioner's witnessed violations occurred prior to completion of his Smoking Evaluation when Respondent completed said evaluation on August 25, 2015, it found Petitioner fit to smoke independently, without supervision. It is unclear why the facility would wait so long after admission to evaluate a known smoker, or why it would then permit independent smoking if it felt Petitioner had a demonstrated lack of ability to comply with the NHF's unwritten smoking policies.

26. Of note, the evaluator completed the Smoking Evaluation form in contravention to the instructions on the form, itself. More importantly, although the Smoking Evaluation contains a designated space for a patient to sign and confirm understanding of a smoking policy, said form is signed, *not* by the Petitioner, but by the facility nurse.

27. Review of all of Respondent's documentary evidence reflects a lack of thoroughness in completion and maintenance of records. The Admission Agreement, Smoking Evaluation, and Interdisciplinary Health Education Record are incomplete, undated, contain errors, or remain unsigned by Petitioner. Even the Notice of Discharge reflects an issuance date of August 14, 2015, is signed by the NHF Administrator on August 13, 2015, and was executed by the physician on August 18, 2015. To the degree that the forms are poorly executed, reliability of both the forms, themselves, and the testimony based upon the events reported, therein, is called into question.

28. While the undersigned makes no ruling as to the inherent danger of utilizing e-cigarettes within the facility, she is unable to conclude that the facility has any clear, universally disseminated smoking policy, that the policy is uniformly enforced, or that Petitioner had sufficient notice of and/or was reminded of the policy so as to remain in

compliance with same. Nonetheless, Petitioner is strongly encouraged to exercise good judgement and cautioned *not* to utilize this Order as justification for or permission to smoke e-cigarettes or regular cigarettes while within the facility.

29. After considering the entire record, the undersigned concludes that Respondent has not met its burden to prove, by clear and convincing evidence, that the Petitioner presents a continued risk to the safety of his fellow residents.

30. The undersigned has no jurisdiction to review Petitioner's complaints regarding the care he is receiving at [REDACTED]. Should Petitioner wish to pursue further action related to these complaints, or to follow up with the Agency for Health Care Administration (AHCA), he is directed to the following:

- AHCA's Health Care Facility Complaint Line: 888-419-3456
- AHCA's Alachua Field Office: 386-462-6201.

### DECISION

Based upon the foregoing Findings of Fact and Conclusion of Law, the Petitioner's appeal is GRANTED. The facility has not established, at this time, that discharge is permissible under federal regulations.

### 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.

FINAL ORDER (Cont.)

15N-00084

Page 13 of 13

DONE and ORDERED this 16<sup>th</sup> day of November, 2015,

in Tallahassee, Florida.

*Patricia C. Antonucci*

Patricia C. Antonucci  
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:

 Petitioner

  
Respondent

Ms. Kriste Mennella, Agency for Health Care Administration  
