



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

January 7, 2019

CERTIFIED MAIL/RETURN RECEIPT

Shragi Weisz, NHA
Martine Center for Rehab and Nursing
12 Tibbits Avenue
White Plains, New York 10606

██████████
c/o Martine Center for Rehab and Nursing
12 Tibbits Avenue
White Plains, New York 10606

RE: In the Matter of ██████████ – Discharge Appeal

Dear

Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: nm
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH.

COPY

In the Matter of an Appeal, pursuant to
10 NYCRR 415.3, by

[REDACTED]

Appellant,

from a determination by

MARTINE CENTER FOR
REHABILITATION AND NURSING

to discharge him from a residential health care facility.

DECISION

Before: Tina M. Champion
Administrative Law Judge

Held at: Martine Center for Rehabilitation and Nursing
12 Tibbits Avenue
White Plains, New York 10606

Date: December 19, 2018

Parties: [REDACTED]
Assisted by: [REDACTED], Power of Attorney
[REDACTED] Friend

Martine Center for Rehabilitation and Nursing
By: Lori Gest, Director of Social Services

JURISDICTION

By notice dated [REDACTED] 2018, Martine Center for Rehabilitation and Nursing (Facility), a residential care facility subject to Article 28 of the New York Public Health Law (PHL), determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the discharge determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) 415.3(h).

The hearing was held in accordance with the PHL; Part 415 of 10 NYCRR; Part 483 of the United States Code of Federal Regulations (CFR); the New York State Administrative Procedure Act (SAPA); and Part 51 of 10 NYCRR.

Evidence was received and witnesses were examined. An audio recording of the proceeding was made.

HEARING RECORD

ALJ Exhibits: I – Letter with Notice of Hearing and 30-Day Notice (11/16/18)
II – Updated 30-Day Notice (12/17/18)

Facility Exhibits: 1 – No-Smoking Safety Agreement ([REDACTED]/18)
2 – Progress Note ([REDACTED] 18)
3 – OT Discharge Summary ([REDACTED]/18)
4 – PT Discharge Summary ([REDACTED]/18)
5 – Progress Notes ([REDACTED] 18 and [REDACTED]/18)
6 – Welcome Agreement ([REDACTED] 18)

Appellant Exhibits: none

Facility Witnesses: Lori Gest, Director of Social Services
Nora Eusebio, Director of Nursing

Appellant Witnesses: Appellant testified on his own behalf

FINDINGS OF FACT

1. The Appellant is a [REDACTED]-year-old male who was admitted to the Facility on [REDACTED] 2018, after a hospital admission for [REDACTED] Testimony [T.] Gest.)
2. The Appellant has smoked cigarettes for [REDACTED] years. (T. James.)
3. The Appellant received physical therapy (PT) and occupational therapy (OT) services from the Facility and was discharged from both several months prior to the hearing. (Facility Exs. 3-4.)
4. On [REDACTED] 2018, the Facility issued a 30-Day Notice to the Appellant which proposed discharge to "[REDACTED] DSS District Office for Shelter Placement" in [REDACTED], [REDACTED]. (ALJ Ex. I.)
5. The Facility stated in the 30-Day Notice that the Appellant will be transferred because the Appellant's health has improved sufficiently and the Appellant no longer requires the services of the facility. (ALJ Ex. I.) It also states as a reason for discharge that the Appellant is in violation of the Facility No-Smoking Policy and a No-Smoking Agreement signed by the resident in [REDACTED] 2018. (ALJ Ex. I.)
6. The Appellant timely appealed the Facility's discharge determination and proposed discharge location.
7. On [REDACTED], 2018, the parties jointly contacted the Administrative Law Judge by telephone and advised that they had reached an agreement and that the Appellant was going to be discharged to another skilled nursing facility that allowed smoking. The Facility issued an updated 30-Day Notice as a result of the agreement and stated that the Appellant was being discharged to [REDACTED] in [REDACTED] New York, on [REDACTED], 2018, because of his violation of the Facility's No-Smoking Policy and a No-Smoking Agreement signed

by the resident in [REDACTED] 2018. On [REDACTED], 2018, the Appellant refused to transfer to [REDACTED]

[REDACTED]. (ALJ Ex. II; T. Gest, James.)

8. The Appellant has remained at the Facility during the pendency of the appeal.

ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

APPLICABLE LAW

A residential health care facility, also referred to in the Department of Health Rules and Regulations as a nursing home, is a facility which provides regular nursing, medical, rehabilitative, and professional services to residents who do not require hospitalization. (PHL § 2801[2][3]; 10 NYCRR 415.2[k].)

A resident may only be discharged pursuant to specific provisions of the Department of Health Rules and Regulations. (10 NYCRR 415.3[h][1].)

The Facility alleged in its November 2, 2018, 30-Day Notice that the Appellant's discharge is permissible pursuant to 10 NYCRR 415(h)(1)(i)(a)(2), which states:

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.

Under the hearing procedures at 10 NYCRR 415.3(h)(2)(iii), the Facility bears the burden to prove a discharge is necessary and appropriate. Under SAPA § 306(1), a decision in an administrative proceeding must be in accordance with substantial evidence. Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support conclusion or fact. It is less than a preponderance of evidence but more than mere surmise, conjecture or

speculation, and it constitutes a rational basis for a decision. (Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 [3d Dept. 1984], appeal dismissed 63 N.Y.2d 649.)

DISCUSSION

The discharge notice at issue in this matter is the 30-Day Notice issued by the Facility on November 2, 2018. (ALJ Ex. I.) The subsequent 30-Day Notice dated December 17, 2018, was issued by the Facility solely to memorialize a settlement agreement between the parties stemming from the original [REDACTED] 2018, discharge notice, which agreement the Appellant declined to follow. (ALJ Ex. II; T. Gest.) It will not be considered in this appeal.

Reason for Discharge

The Facility has determined that the Appellant's health has improved sufficiently and the Appellant no longer requires the services of a skilled nursing facility. (ALJ Ex. I.)

The Appellant was admitted to the Facility on [REDACTED] 2018, after a hospital admission for [REDACTED] (T. Gest.) He has received OT and PT from the Facility and was discharged from both therapies due to achieving the "Highest Practical Level". (Facility Exs. 3-4.) The Appellant was evaluated by a Facility medical doctor on [REDACTED] 2018. (Facility Ex. 2.) The medical doctor found that the Appellant was independent with his activities of daily living (ADLs) and does not require any skilled nursing care. (Facility Ex. 2.) The medical doctor also determined that the Appellant could "be safely discharged to community adult living center/shelter with [outpatient follow-up] with his [primary care physician]." (Facility Ex. 2.) Progress notes from the physical therapy and nursing units at the Facility in [REDACTED] 2018 also indicate that the Appellant is alert and oriented to person, place and time, that he is able to make his needs known, that he ambulates independently with a cane, and that he is capable of administering his own

medications. (Facility Ex. 5.) The Director of Nursing, Nora Eusebio, testified that the Appellant receives no skilled nursing at the facility and is stable. (T. Eusebio.)

The Appellant offered no evidence of medical concerns indicating that he is inappropriate for discharge. (T. James.) The evidence supports that Appellant's health has improved sufficiently such that he no longer needs the services of a skilled nursing facility.

The Facility has also determined that the Appellant should be discharged from the Facility based upon alleged violations of the Facility No-Smoking Policy and a No-Smoking Agreement that he signed in [REDACTED] 2018. Given that the Appellant's health has improved sufficiently such that he no longer needs the services of a skilled nursing facility, it is not necessary to address this reason for discharge.

Discharge Location

The Facility has proposed discharging the Appellant to "the [REDACTED] DSS District Office for Shelter Placement" in [REDACTED] (ALJ Ex. 1.) As stated above, a Facility medical doctor noted on [REDACTED] 2018, that the Appellant was appropriate for discharge to a community shelter and both testimony and documentary evidence establish that the Appellant does not require any further skilled nursing or therapy. (Facility Exs. 2-5; T. Eusebio.) Also as stated above, the Director of Nursing testified that the Appellant does not receive any skilled nursing. (T. Eusebio.)

The Director of Social Services, Lori Gest, credibly testified that other skilled nursing facilities may see a skilled nursing need for the Appellant and may accept the Appellant even though Martine Center for Rehabilitation and Nursing does not feel that the Appellant needs skilled nursing; however, the only other skilled nursing facility that she was able to identify that would accept Appellant and allow him to smoke as he desires is [REDACTED].

(T. Gest.) The Appellant currently refuses to transfer there because he has "heard" it is not a "good" facility and it is "unacceptable." (T. James.) She further testified that the Appellant is not eligible for Adult Homes or Assisted Living due to an active diagnosis of [REDACTED].

(T. Eusebio.)


The Appellant testified that he does not want to be discharged because he feels safe at the Facility, but he did not offer any evidence indicating that the shelter is inappropriate. The evidence supports that the Facility's plan to discharge the Appellant to a shelter is appropriate.

DECISION

Martine Center for Rehabilitation and Nursing has established that its determination to discharge the Appellant was correct, and that its transfer location is appropriate.

1. Martine Center for Rehabilitation and Nursing is authorized to discharge the Appellant in accordance with its discharge plan on or after [REDACTED], 2019.
2. This decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules.

DATED: Albany, New York
January 4, 2019


Tina M. Champion
Administrative Law Judge

TO:

[REDACTED]

Shragi Weisz, NHA
Martine Center for Rehabilitation and Nursing
12 Tibbits Avenue
White Plains, New York 10606