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**Department
of Health**

KATHY HOCHUL
Governor

MARY T. BASSETT, M.D., M.P.H.
Acting Commissioner

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

January 11, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████
c/o Concord Nursing & Rehabilitation Center
300 Madison Street
Brooklyn, New York 11216

Eitan Nat, Administrator
Concord Nursing & Rehabilitation Center
300 Madison Street
Brooklyn, New York 11216



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,

Dawn MacKillop-Soller
Acting Chief Administrative Law Judge
Bureau of Adjudication

DXM: cmg
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH

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

[REDACTED]

Appellant,

from a determination by:

CONCORD NURSING AND
REHABILITATION CENTER

:

Respondent,

to discharge him from a residential health
care facility.

COPY

Hearing Before: Sean D. O'Brien
Administrative Law Judge

Held via WEB EX

Hearing Dates: January 5 & 7, 2022

Parties: Concord Nursing & Rehabilitation Center
300 Madison Street
Brooklyn, New York 11216
By: Eitan Nat, Administrator

By: [REDACTED]

JURISDICTION

By notice dated [REDACTED] [REDACTED] 2021, Concord Nursing and Rehabilitation Center, (the Facility) a residential health care facility subject to Article 28 of the New York Public Health Law, determined to discharge [REDACTED] (the Appellant) from the Facility. The Appellant appealed the determination to the New York State Department of Health (the Department) pursuant to 10 New York Codes Rules, and Regulations (NYCRR) Section 415.3(i).

HEARING RECORD

Facility Exhibits: 1-9

Facility Witnesses: Lizzana Mingo, Director of Social Work
Eitan Nat, Administrator

Appellant's Witnesses: [REDACTED]

Administrative Law Judge Exhibit 1: Notice of Hearing with Discharge Notice

A digital recording of the hearing was made part of the hearing record via WEB EX.

ISSUE

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

FINDINGS OF FACT

Citations in parentheses refer to testimony (T.) of witnesses and exhibits (Exhibit) found persuasive in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of cited evidence.

1. The Appellant is a competent [REDACTED]-year-old male who was admitted to the Facility from [REDACTED] Hospital on [REDACTED] 2021, for short-term rehabilitation. The Appellant's diagnoses include [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. (Exhibits 2, 3, 8; T. Mingo 26:11, 42:19).

2. By notice dated [REDACTED] [REDACTED] 2021, the Facility determined to discharge the Appellant on [REDACTED] [REDACTED] 2022, because "the continued safety of individuals in the facility

would be otherwise endangered..." due to the Appellant's repeated non-compliance with the Facility's smoke-free environment. (Exhibit 7; T. Mingo 15:00).

3. The Facility determined to discharge the Appellant to the [REDACTED] Nursing Home, [REDACTED] [REDACTED] [REDACTED] where he has been accepted. (Exhibits 5, 7; T. Mingo 16:10)

4. The Facility is a smoke-free facility, and upon his admission to the Facility the Appellant signed an agreement with the Facility which contained a no-smoking clause. Further, the Appellant signed a no-smoking contract with the Facility on [REDACTED] 2021. (Exhibits 1, 4; TT. Mingo 14:41, 14:55, 15:20, 15:39).

5. The Facility contains a number of residents who have respiratory problems and who use oxygen tanks. Smoking will aggravate their conditions and place their safety at risk. (T. Mingo 14:40, T. Nat 44:00, 44:30).

6. On several occasions the Appellant violated the terms and conditions of his stay at the Facility by violating the no-smoking agreements and smoke-free environment of the Facility. (Exhibits 2, 3, 4, 5; T. Nat 40:11, 44:30).

7. The Appellant did violate the terms and conditions of his stay at the Facility: on [REDACTED] 2021, he was observed by staff with a lighter in his room; on [REDACTED] 2021, the Appellant admitted to Facility staff that he was smoking in his room and had two lighters; and on [REDACTED] 2021, the Appellant had a lighter and admitted he was smoking in his room and thereby placed the safety of his roommate, who is on oxygen, in jeopardy. (Exhibits 2, 3, 4, 5; T. Mingo, 15:00, 15:51, T. Nat 40:11, 42:24, 42:58).

8. The Appellant was warned by Facility staff on more than one occasion that his actions were in violation of the no-smoking agreements and the smoke-free environment of the Facility. Per the terms of the no-smoking agreements the Appellant signed, he could be discharged from the Facility. (Exhibits 1, 2, 3, 4, 5, 6; T. Mingo, 14:42, 15:21, 15:46, T. Nat 40:37, 41:56).

9. The Appellant was offered smoking cessation products (nicotine patch and Nicorette gum) and programs by the Facility, but the Appellant declined both the products and the programs. (Exhibits 2, 3, 5, 8, 9; T. Mingo, 15:00, 22:03, 23:49, 24:00, 24:37).

10. The Appellant remains at the Facility pending the outcome of the appeal.

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. Public Health Law Sections 2801(2)(3); 10 NYCRR Section 415.2(k).

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

The Facility alleges the Appellant's discharge is permissible pursuant to 10 NYCRR Section 415.3(i)(1)(i)(a)(3), which states:

the safety of individuals in the facility is endangered....

Under the hearing procedures at 10 NYCRR Section §415.3(i)(2)(ii), the Facility bears the burden to prove a discharge necessary and the discharge plan is appropriate. Under

the New York State Administrative Procedures Act (SAPA) Section 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; less than preponderance of evidence, but more than mere surmise, conjecture or speculation and constituting a rational basis for decision, Stoker v. Tarantino, 101 A.D.2d 651, 475 N.Y.S.2d 562 (3rd Dept. 1984), appeal dismissed 63 N.Y.2d 649.

DISCUSSION

The Appellant was admitted to the Facility on [REDACTED] 2021, for short-term rehabilitation. Upon his admission to the Facility, the Appellant signed an admissions agreement which contained a no-smoking clause whereby the Appellant agreed not to smoke in the Facility and that he could be discharged for violating the smoke-free environment of the Facility. In addition, on [REDACTED] 2021, the Appellant signed a no-smoking contract with the Facility. (Exhibits 1, 4, 8; T. Mingo 14:14, 14:55, 15:20, 15:39 26:11.)

Lizzano Mingo, the Facility's Director of Social Work, testified that the Appellant violated the no-smoking agreements

and the smoke-free environment of the Facility on several occasions. In particular: on [REDACTED] [REDACTED] 2021, the Appellant was observed by staff with a lighter in his room; on [REDACTED] 2021, the Appellant had two lighters and admitted to Facility staff that he was smoking in his room and on [REDACTED] 2021, the Appellant had a lighter and admitted to smoking in his room and thereby placing the safety of his roommate, who is on oxygen, in jeopardy. (Exhibits 1, 2, 3, 4, 5; T. Mingo, 14:30, 15:00, 15:51, 22:53, T. Nat 40:11, 41:24, 42:58).

After each incident Facility staff warned the Appellant both verbally and in writing that the Appellant was in violation of the no-smoking agreements and smoke-free environment of the Facility. In addition, the Facility staff on, several occasions, offered the Appellant smoking cessation products and programs, but he declined the offers. The Appellant, however, did attend [REDACTED] counseling sessions regarding his [REDACTED] [REDACTED] (Exhibits 2, 3, 4, 5, 8, 9; T. Mingo 23:45, 24:00, 24:37, T. Nat 40:37, 41:54).

The Facility's Administrator, Eitan Nat, explained that the Facility is a smoke-free facility because of the type of population residing at the Facility. The Facility has over 137 residents and

a significant amount of them are on oxygen. Also, over eighty percent of the Facility's residents can be considered frail elderly. In addition, the Facility is a multi-storied structure with a ventilation system that is not designed for eliminating cigarette smoke. Administrator Nat testified that the Facility is a smoke-free environment for fire safety purposes and for the respiratory health of its residents. (T. Nat 40:37, 42:26, 44:30, 44:46, 46:20).

The Appellant has continuously refused to comply with the Facility's non-smoking agreements and smoke-free environment after being given several verbal and written warnings that he could be discharged for his smoking and for having lighters. The Appellant, by his actions has placed the safety of Facility residents and staff at risk. Therefore, the Facility has met its burden for establishing valid grounds for the discharge. 10 NYCRR Section 415.3(h) (1) (i) (b).

The Appellant needs the care of a residential health care facility and the proposed discharge location is such a facility. The Appellant's treating physician, Dr. Ayisha Munawar, has approved the discharge. The discharge location has a formalized smoking program which will allow the Appellant to smoke without

placing fellow residents at risk. The Facility attempted to find a residential care facility in Brooklyn which allowed smoking, but none had beds available. (Exhibits 6, 8; T. Mingo 27:11, 29:30).

CONCLUSION

Concord Nursing and Rehabilitation Center has proven that its determination to discharge the Appellant is correct and the discharge plan is appropriate.

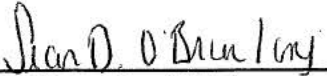
DECISION

The appeal by Appellant is therefore DENIED.

The Facility is authorized to discharge Appellant on [REDACTED] [REDACTED] 2022, in accordance with the [REDACTED] [REDACTED], 2021, Discharge Notice.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

**DATED: Albany, New York
January 11, 2022**



Sean D. O'Brien
Administrative Law Judge

To:

[REDACTED]
c/o Concord Nursing and Rehabilitation Center
300 Madison Street
Brooklyn, New York 11216

Eitan Nat, Administrator
Concord Nursing & Rehabilitation Center
300 Madison Street
Brooklyn, New York 11216

[REDACTED]
[REDACTED]
[REDACTED]