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**Department
of Health**

KATHY HOCHUL
Governor

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

KRISTIN M. PROUD
Acting Executive Deputy Commissioner

November 23, 2022

CERTIFIED MAIL/RETURN RECEIPT

██████████, Appellant
c/o Troy Center for Rehabilitation and Nursing
49 Marvin Avenue
Troy, New York 12180

Mendy Shepard, Facility Administrator
Troy Center for Rehabilitation and Nursing
49 Marvin Avenue
Troy, New York 12180

Mary Keniry, JD LMSW
Long Term Care Ombudsman Program Director
Catholic Charities Senior and Caregiver Support Services
1462 Erie Boulevard 2nd Floor
Schenectady, New York 12305

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: nm
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

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

██████████,

Appellant,

from a determination by

Troy Center for Rehabilitation and Nursing,

Respondent,

to discharge Appellant from a residential health care facility.

COPY

DECISION

Before: Rayanne L. Babich
Administrative Law Judge (ALJ)

Date: November 10, 2022

Held at: New York State Department of Health
Webex videoconference

Parties: ██████████, Appellant
c/o Troy Center for Rehabilitation and Nursing
49 Marvin Avenue
Troy, New York 12180

Troy Center for Rehabilitation and Nursing
49 Marvin Avenue
Troy, New York 12180
By: Mendy Shepard, Facility Administrator

JURISDICTION

By notice dated ██████████ 2022, Troy Center for Rehabilitation and Nursing (Facility), determined to discharge ██████████ (Appellant), from care in its Facility. 10 NYCRR 415.3(i)(1)(iii)(a). The Appellant appealed the proposed discharge. 10 NYCRR 415.3(i)(2). The

Appellant appeared at the hearing and represented himself. Long-term care ombudsman, Mary Keniry, was present as the Appellant's advocate.

RECORD

- ALJ Exhibits: I – Letter with Notice of Hearing
- Facility Exhibits: 1 – Notice of Discharge, [REDACTED], 2022
- 2 – Admission Record
- 3 – Acknowledgement of Smoke-Free Facility, [REDACTED], 2022
- 4 – Notice of Smoking Violation, [REDACTED], 2022
- 5 – Nurse practitioner progress notes, [REDACTED] to [REDACTED], 2022
- 6 – Nursing progress notes, [REDACTED], 2021 to [REDACTED], 2022
- 7 – Social services progress notes, [REDACTED] to [REDACTED], 2022
- 8 – General progress notes, [REDACTED] to [REDACTED], 2022
- 9 – Care plan through [REDACTED], 2022
- Appellant Exhibits: None
- Facility Witnesses: Megan Coons, Director of Social Work
Mendy Shepard, Facility Administrator
- Appellant Witness: [REDACTED]

The hearing was digitally recorded. [R. 1:18:16.]

FINDINGS OF FACT

1. Troy Center for Rehabilitation and Nursing is a residential health care facility (nursing home). [Ex 1.]
2. The Appellant, age [REDACTED] was admitted to the Facility on [REDACTED], 2021 for short-term rehabilitation services. [Ex 2, 5.]
3. The Appellant's primary medical diagnoses include [REDACTED]
[REDACTED]. He requires the assistance of another person to care for his activities of daily living including bathing, transferring, toileting, and dressing. The Appellant is wheelchair dependent. He is also dependent on [REDACTED] three times per week. [Ex 2, 5; R. 45:23.]

4. The Facility has a non-smoking policy. Smoking is prohibited on all Facility property. [Ex 3, 4, 6, 7.]
5. The Appellant has been smoking at the Facility in violation of the smoking policy. Facility staff have observed the Appellant smoking and have found cigarettes and lighters in his possession. [Ex 4, 6, 7; R. 48:14.]
6. The Facility issued a Notice of Discharge on [REDACTED], 2022 and cited as grounds for discharge as the “health or safety of individuals in the facility would otherwise be endangered.” The discharge plan identified in the Notice is a transfer to [REDACTED], in [REDACTED] New York. The discharge location is a nursing home that will permit smoking on its property. [Ex 1.]
7. The Facility has two attending physicians and neither has evaluated the Appellant. Medical records submitted by Facility did not contain documentation from the Appellant’s physician regarding the proposed discharge. [Ex 1-9; R. 53:11.]

ISSUES

Has the Facility met its burden of proving that the health and safety of individuals in the Facility is endangered if the Appellant remains in the Facility and that the discharge plan is appropriate?

APPLICABLE LAW

1. Transfer and discharge rights of nursing home residents are set forth in 10 NYCRR 415.3(i), which provides, in pertinent part:
 - (1) With regard to the transfer or discharge of residents, the facility shall:

- (i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility. (a) The resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:
- (3) the safety of individuals in the facility is endangered; or
 - (4) the health of individuals in the facility is endangered;
2. When the discharge or transfer is necessary under 10 NYCRR 415.3(i)(1)(i)(3), a physician must "ensure complete documentation in the resident's clinical record" and "record the reasons in the resident's clinical record." 10 NYCRR 415.3(i)(1)(ii)(b) and (iii)(b).
3. The Facility has the burden of proving that the "discharge or transfer is/was necessary and the discharge plan appropriate." 10 NYCRR 415.3(i)(2)(iii)(b).
4. Federal regulations at 42 CFR 483.15 contain substantially identical provisions to the forgoing provisions of 10 NYCRR 415.3(i).

DISCUSSION

The Facility has failed to meet its burden of proof to establish the grounds for discharge and that its discharge plan is appropriate according to 10 NYCRR 415.3(i).

Grounds for Transfer

The Facility is seeking to discharge the Appellant on the grounds that he has endangered the health and safety of others by continuing to smoke cigarettes in the Facility despite the hazards that smoking presents. [Ex 1.] The Facility determined the Appellant needs another nursing home that permits smoking because the Facility has a non-smoking policy, and he refuses to comply.

The Appellant does not deny that he has been smoking in the Facility during his stay. He testified that he has been smoking for [REDACTED] years and it is too difficult for him to quit. [R. 1:10:44.]

Megan Coons, Director of Social Work, testified that smoking on Facility property is hazardous because there is flammable oxygen throughout the building, and the Appellant has been found [REDACTED] which poses a risk for fire. [Ex 1; R. 47:42, 55:44.] The Facility has provided several options to prevent the Appellant from smoking in the Facility. The Appellant has been offered smoking cessation interventions, which he declined. [Ex 5; R. 27:21.] The Facility has issued policy violations and conducted checks every 15 minutes, but these have not been successful. [R. 38:30, 49:07.] The Facility attempted to identify locations just beyond Facility property where the Appellant can smoke cigarettes, but he was unable to safely navigate his wheelchair on the terrain. [R. 49:13.] The Facility confiscated cigarettes and lighters, but the Appellant continues to purchase more while attending medical appointments in the community. [R. 39:14.] The Appellant is currently on a 1:1 status, where an aide or staff member from the Facility is always present, because it has become the only way to prevent the Appellant from smoking. [R. 27:44.] The Appellant's dedication to continue to smoke in the Facility has endangered the health and safety of others at the Facility.

Before the Facility seeks to discharge the Appellant, it must ensure that a physician documented the reasons for discharge in the medical record. 10 NYCRR 415.3(i)(1)(ii)(b) and (iii)(b). Ms. Coons testified that the Appellant's medical record does not contain documentation from either of the Facility's two physicians. [R. 53:22.] Despite the Appellant's significant medical and care needs, including [REDACTED], wheelchair dependency, and required assistance of another person for activities of daily living, the Appellant has never been evaluated by either of the physicians. [Ex 5-7; R. 44:52, 45:23, 52:47; 1:12:52.] Although the

Facility has submitted into evidence the progress notes from a nurse practitioner, none of these notes contain any reference to the reasons for discharge. [Ex 5.] The Facility has a regulatory obligation to ensure the documentation in the medical record is complete and that the Appellant's physician documents the reasons for discharge, and it failed to do so.

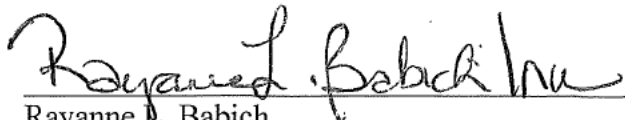
Discharge Plan

The Facility's discharge plan is to transfer the Appellant to another nursing home, [REDACTED] located in [REDACTED] New York, where he has been accepted for admission. [Ex 1; R. 59:13.] Ms. Coons testified that [REDACTED] permits smoking and provides services similar to those at the Facility. [R. 59:04.] Although the Appellant cannot be discharged because the Facility has failed to meet the documentation requirement, it is noted that the Appellant objected to the proposed discharge only because he determined it was too far away. The Appellant, along with representatives from the ombudsman office, should participate in identifying alternate locations. In addition, the Appellant may be better served if the Facility sends referrals to other local alternate placements.

ORDER

The Facility is not authorized to discharge the Appellant pursuant to the Notice of Discharge dated [REDACTED], 2022.

Dated: November 23, 2022
Albany, New York


Rayanne E. Babich
Administrative Law Judge

TO:

[REDACTED], Appellant
c/o Troy Center for Rehabilitation and Nursing
49 Marvin Avenue
Troy, New York 12180

Mendy Shepard, Facility Administrator
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