

resident's stay. The Administrative Hearing was held in accordance with the Administrative Procedures Act, R.I.G.L. §42-35-1 et. seq. and EOHHS regulation 210-RICR-10-05-2.

III. ISSUE

The issue is whether there is sufficient evidence to permit the involuntary discharge of the Appellant, in accordance with the Rules and Regulations as set forth below.

IV. STANDARD OF PROOF

It is well settled that in formal or informal adjudications modeled on the Federal Administrative Procedures Act, unless otherwise specified, a preponderance of the evidence is generally required to prevail. This means that for each element to be proven, the factfinder must believe that the facts asserted by the proponent are more probably true than false. (2 Richard J. Pierce, Administrative Law Treaties § 10.7 (2002) & see Lyons v. Rhode Island Pub. Employees Council 94, 559 A.2d 130, 134 (R.I. 1989) (preponderance standard is the "normal" standard in civil cases)).

V. PARTIES AND EXHIBITS

The ALR's Executive Director [REDACTED] (hereinafter "ALR Representative") and Registered Nurse [REDACTED] (hereinafter "[REDACTED]") attended the hearing and provided testimony relevant to the Appellant's involuntary discharge. Also in attendance was Regional Director of Operations [REDACTED]. The ALR offered the following evidence as a full exhibit at the hearing:

- Exhibit #1: Residency agreement signed September 30, 2020, Smoking Policy signed December 21, 2023, and Nurse's progress notes from February 8, 2023, through March 13, 2024.

The Appellant, [REDACTED], attended the hearing and testified on his own behalf. Also in attendance, the Alliance for Better Long-Term Care Ombudsman Lori Light (hereinafter “Ombudsman”), Veterans Administration (hereinafter “VA”) Home Based Primary Care Social Worker [REDACTED] (hereinafter “VA SW”), and Veterans Administration Home Based Primary Care Nurse Practitioner [REDACTED] (hereinafter “VA NP”) testified on behalf of the Appellant. The Appellant, Ombudsman, and VA representatives did not present any evidence at the hearing.

VI. RELEVANT LAW/REGULATIONS

The Rhode Island Code of Rules (“RICR”) for ALRs in effect at the time of the discharge notice, Rhode Island Department of Health (RIDOH) 216-RICR-40-10-2 entitled “Licensing Assisted Living Residences” requires ALRs to adhere to certain standards in connection with its residents. Specifically, §2.4.13 entitled “Management of Service” states the ALR must have a policy and procedure manual which includes, but is not limited to, an admission, discharge, and smoking policy. §2.4.14 entitled “Residency Requirements” states the ALR must disclose certain information to each resident prior to admission which includes executing a residency agreement. The residency agreement provides pertinent requirements such as, Resident’s rights and discharge criteria and policies. §2.4.18(B)(5)(c)(e) “Rights of Residents” further provides the discharge reasons including if a “resident is a danger to self, or the welfare of others; and whether the residence has attempted to make a reasonable accommodation without success to address the resident behavior in ways that would make termination of residency agreement or change unnecessary.”

The ALR shall also observe the standards stated in R.I. Gen. Laws Title 23 Health and Safety, Chapter 23-17.4 “Assisted Living Residence Licensing Act” specifically 23-17.4-16

“Rights of Residents.” (xviii) and (xix) further provide established guidance to discharges, counseling, and providing a safe and orderly move to another facility.

Similarly, the RICR for EOHHS in effect at the time of the discharge notice, 210-RICR-10-05-2 §2.4.8 entitled “Institutional and Community-Based Long Term Care Resident Involuntary Discharges and Transfers”, (C) allows for an involuntary discharge from an ALR when the safety of the resident and/or safety of the other residents or staff is endangered if the resident remains. Furthermore, a resident discharge from an ALR may be initiated in accordance with the RIDOH regulations. Section (D) provides the formal notice requirements of the intent to transfer/discharge.

VII. FINDINGS OF FACT

1. The Appellant resides at the ALR that issued the 30-Day notice. He has been a resident since September 30, 2020. The Residency Agreement states that he can be discharged if he is a danger to himself and the welfare of others. It also informs him of his Rights, Responsibilities, Admission and Discharge criteria. The ALR Representative testified the Smoking Policy is reviewed with any resident who smokes. The Smoking Policy prohibits smoking indoors at the ALR and limits it to designated outdoor areas.

2. The Appellant signed the Smoking Policy again on December 21, 2023, after two incidents that month involving a smoke smell around his apartment. The policy clearly states that smoking is not allowed in the ALR under any circumstances. The Appellant denied smoking each time, according to the Nurse’s progress notes. The notes further state the smoking policy was reviewed with the Appellant, he understood the no tolerance policy, and he could be asked to leave the residence if he continues to smoke in the ALR.

3. Based on the Appellant’s alleged refusal to abide by the Smoking Policy, the ALR

issued a 30-Day Notice on February 6, 2024, to the Appellant informing him he is being discharged, citing his “ongoing inappropriate behaviors that have substantially interfered with the rights and wellbeing of other residents and are also a danger to yourself.” The effective date was thirty (30) days from the date of his receipt of the letter. The notice further stated their attempts to accommodate him and provide counseling as required. He was given contact information for the Ombudsman, and a list of seven (7) potential ALRs, so the notice followed the regulations.

4. EOHHS received the Ombudsman’s appeal request on behalf of the Appellant on February 16, 2024.

5. A telephonic hearing was scheduled on March 12, 2024. The hearing was rescheduled to March 18, 2024, in-person at the ALR, at the Ombudsman’s request.

6. The ALR Representative testified the Appellant is smoking in the building and in his apartment, which has become excessive during the overnight shifts and is a safety issue.

7. The ALR Representative testified they had several conversations with the Appellant about smoking, re-educated him, and conducted a smoking assessment to review protocols, but they continue to find the Appellant smoking in his apartment.

8. The VA NP testified the Appellant’s has numerous diagnoses, which include traumatic brain injury, cirrhosis, PTSD, and dementia.

9. The VA NP testified the Appellant fell on ice at the ALR in February 2023 and fractured several bones in his face. The chief of neurology at the VA felt this compounded his previous traumatic brain injury, causing an additional burden to his short- and long-term memory.

10. The Ombudsman and VA SW testified they are concerned about a safe discharge.

11. The Appellant testified he has smoked in the ALR in the past, but now he gets his

cigarettes from the nurse and goes outside to smoke.

12. The ALR Representative testified they have reached out to the ALRs listed on the 30-Day Notice, as well as two (2) others supplied by the Ombudsman and are unable to find alternative placement for the Appellant at this time. She understands it must be a safe discharge and they are looking at other alternatives.

VIII. DISCUSSION

The record consists of evidence and testimony from the ALR representative, as well as testimony from the Appellant, Ombudsman, RN [REDACTED] and VA representatives. The nurse's progress notes document several incidents where the Appellant was smoking inside the ALR: December 10, 2023, (strong smell of cigarette smoke in the hallway outside of resident's room ...Spoke with [REDACTED] in his room and even stronger cigarette smell noted); December 15, 2023, (smell of smoke around [REDACTED] apt ... entered his room which was smokey but nothing else found, no lit cigarettes, etc.); and yet another time on January 9, 2024, where his room was "cloudy and smelling of cigarette smoke," which is after he signed the Smoking Policy again on December 21, 2023. After each documented incident, the Appellant was reminded about the strict no-smoking policy inside the ALR. The ALR Representative testified that despite having discussed the smoking issue with the Appellant several times, he ignores the policy, and his smoking presents a safety issue for himself, the other residents, and the staff. The ALR Representative further testified the Appellant's smoking incidents often occur on the lower-staffed overnight shifts. This presents a safety hazard, as the Appellant is in bed most of the time, he could fall asleep, and the cigarette could cause a fire.

Prior to admission, the ALR informed the Appellant of the discharge criteria, consistent with 216-RICR-40-10-2 §2.4.14. The Residency Agreement then was executed on September 30,

2020. According to §2.4.18(5)(c)(e), an ALR is allowed to discharge a resident, “If the resident is a danger to self, or the welfare of others; and the residence has attempted to make a reasonable accommodation without success to address the resident behavior in ways that would make termination of the residency agreement or change unnecessary; which would be documented in the resident’s record.” Furthermore, “The residence makes a good faith effort to counsel the resident if the resident shows indications of no longer meeting the residence criteria or if service with a termination notice is anticipated.” Similarly, 210-RICR-10-05-2 §2.4.8(C) finds a resident discharge is permitted when the health and safety of other residents or staff is endangered if the resident remains.

The 30-Day Notice issued to the Appellant clearly states that the ALR requested the Appellant stop his behaviors and that they counseled him on policies and expectations for continued residency, but their requests were ignored. When the Appellant signed the residency agreement, he confirmed that he understood his rights and responsibilities, admission, and discharge criteria, therefore, because the Appellant is not complying with the terms of the residency agreement, he no longer meets the criteria for residency. In review of 210-RICR-10-05-2 §2.4.8(D), the ALR satisfied the notice requirements.

There is no dispute that the Appellant has diagnoses that affect his short- and long-term memory. While the memory issue is contributing to his inability to follow the rules, his actions are putting himself, the other residents, and staff in danger. The ALR, Ombudsman and VA agree that there must be a safe and orderly discharge.

IX. CONCLUSION OF LAW

After careful review of the testimony and evidence presented at the Administrative Hearing, it is clear that:

1. The Appellant agreed to and signed a Residency Agreement when he moved into the ALR on September 30, 2020, which included the Smoking Policy.

2. Three (3) documented smoking incidents led to the 30-Day Notice issuance. The 30-Day Notice was issued only after the Appellant was repeatedly reminded, both verbally and in writing, about the strict Smoking Policy, which prohibits smoking indoors at the ALR. Prior to the issuance of the 30-Day Notice, the Appellant was also warned that if he continued to ignore the no-smoking policy, he would be discharged from the ALR.

3. The Appellant signed the Smoking Policy again on December 21, 2023, that makes it clear that smoking is not allowed inside the ALR under any circumstances.

4. After several attempts to counsel the Appellant, the ALR issued a proper 30-Day Notice, with appeal rights, to the Appellant.

5. The ALR established that the risk of fire caused by the Appellant smoking indoors, specifically in bed, jeopardizes the safety of the Appellant, other residents, and staff.

6. The ALR followed the discharge requirements in accordance with the RIDOH regulations, EOHHS regulations and Title 23 Health and Safety Chapter 23-17.4 for ALRs.

X. DECISION

After careful and considerate review of the Rules and Regulations for ALRs, as well as the testimony and evidence provided, the ALR may discharge the Appellant from the residence. The Appellant may continue to reside at the ALR until an appropriate place is found, and a safe

and orderly discharge can occur. The Appellant's request to rescind the 30-Day Notice is thereby denied.

APPEAL DENIED

/s/ Lori Stabile

Lori Stabile

Appeals Officer

CERTIFICATION

I hereby certify that I mailed, via regular mail, postage prepaid, a true copy of the foregoing to [REDACTED]

[REDACTED]; copies were sent, via email, to [REDACTED]

[REDACTED] and Lori Light, Alliance for Better Long Term Care at lori@alliancebltc.org on this 25th day of March, 2024.

