

STATE OF RHODE ISLAND
EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES
APPEALS OFFICE

[REDACTED]

v.

DOCKET No. 24-4846

[REDACTED]

DECISION

I. INTRODUCTION

A hearing was held telephonically on the above-titled matter on Wednesday, September 4, 2024. The Appellant, [REDACTED], initiated this matter to appeal the 30-Day Discharge Notice (30-Day Notice) issued by [REDACTED], a Long-Term Care Nursing Facility (NF), on July 26, 2024. The notice stated that the Appellant's behavior is endangering the health and/or safety of other individuals in this facility. The Appellant disagrees with the NF and is seeking to have the discharge rescinded so she may remain at the NF. For the reasons discussed in more details below, the Administrative Hearing has been decided in favor of the Appellant.

II. JURISDICTION

The Executive Office of Health and Human Services (EOHHS) is authorized and designated by R.I.G.L. 42-7.2-6.1 and EOHHS regulation 210-RICR-10-05-2 to be the entity responsible for appeals and hearings related to transfers or discharges for all residents of Nursing

Facilities, regardless of whether Medicare, Medicaid or private parties pay for a 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 from a long-term care facility and/or whether the notification of the intent to discharge from a long-term care facility was in accordance with the State and Federal 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 are asserted by the proponent are more probably true than false. (2 Richard J. Pierce, Administrative Law Treatises 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 NF Director of Social Services [REDACTED] (NF Representative) attended the hearing and provided testimony relevant to the Appellant's involuntary discharge. The NF offered the following evidence as a full exhibit at the hearing:

- Exhibit #1: [REDACTED] screen result dated July 15, 2024.

The Appellant, [REDACTED], attended the hearing and testified on her own behalf. Also in attendance, the Alliance for Better Long-Term Care Ombudsman Lori Light (Ombudsman). The Appellant and the Ombudsman did not present any evidence at the hearing.

VI. RELEVANT LAW/REGULATIONS

Pursuant to 210-RICR-50-00-7.4, entitled “Discharge Criteria”, states in part that a resident can be discharged if the safety of individuals in the long-term care facility is endangered due to the clinical or behavioral status of the resident or if the health of individuals in the long-term care facility would otherwise be endangered. Subpart 7.6(B), entitled “Pre-Transfer/Discharge Notice”, states in part the written notice of the intent to discharge must include the location to which the resident is transferred or discharged. Pursuant to 210-RICR-10-05-2, entitled “Appeals Process and Procedures for EOHHS Agencies and Programs”, specifically subpart 2.4.8(D), entitled “Institutional and Community-Based Long Term Care Resident Involuntary Discharges and Transfers”, for the notice to be valid, it must include, in plain language, “[w]here the resident will be re-located.” Finally, section 2.4.8(H), requires the provider and the resident to attempt and exhaust all available informal dispute resolution options prior to discharge.

VII. FINDINGS OF FACT

1. The Appellant resides at the NF that issued the 30-Day notice. She has been a resident since 2019.
2. NF issued the 30-Day Notice to Appellant on July 26, 2024, with an effective date of August 26, 2024.
3. The Appellant filed a timely appeal, received in the EOHHS Appeals Office on

August 9, 2024.

4. A telephonic hearing was scheduled on September 4, 2024.

5. The 30-Day Notice informed the Appellant that she was being discharged on August 26, 2024, because of her behavior, specifically that THC vape pens were found in Appellant's possession on multiple occasions. Appellant had a positive toxicology screen for cannabinoid, and the Appellant had several falls as a result of substance use.

6. NF Representative testified that on May 9, 2024, Appellant was sent to the emergency room for an unrelated matter, where she disclosed using marijuana to medical professionals.

7. On May 31, 2024, NF Representative had a conversation with the Appellant about smoking marijuana in the facility after NF staff confiscated a vape pen from Appellant's room. The NF Representative did not report that the Appellant admitted to marijuana use at the facility during that or any other conversation.

8. On June 5, 2024, Appellant fell in her room. The Facility suspected that the Appellant was using substances at the time, however, the Appellant consented to a room search and no contraband was found.

9. On July 8, 2024, Appellant had an "altered mental state" and "slurred speech". She was subsequently sent to a medical facility for a medical evaluation, where she was tested for cannabinoid. According to Exhibit #1, the Appellant tested positive for cannabinoid on July 9, 2024.

10. On July 9, 2024, a vape pen was found in plain view inside Appellant's room.

11. Per Ombudsman, Appellant has Multiple Sclerosis (MS) and needs assistance to walk.

12. Appellant conceded to smoking marijuana to alleviate the pain from her MS, however, however, there is no evidence or testimony that she smoked in the facility.

13. Ombudsman argued that a location to which the Appellant will be transferred or discharged was not provided on the 30-Notice or at hearing.

VIII. DISCUSSION

The record consists of evidence and testimony from the NF Representative, as well as testimony from the Appellant and Ombudsman. Per State Law, Federal regulations, and EOHHS regulations, a nursing facility may involuntarily transfer/discharge a resident when the resident's continued presence in the Facility endangers the safety of other individuals in the Facility. Prior to the transfer/discharge, the Facility must provide the resident with a formal written notice of intent to transfer/discharge; provide a copy of that notice to the Office of the State Long Term Care Ombudsman; and have the reasons for the transfer/discharge documented in the resident's medical record by a physician. Also, prior to issuing a notice, the provider and the resident must have attempted and exhausted all available informal dispute resolution options.

A full review of the record of hearing finds that a Pre-Transfer/Pre-Discharge 30 Day Notice was signed by the Appellant as being received by her on July 26, 2024. The Notice informed the Appellant that she would be discharged on August 26, 2024, however the Notice did not include a location as to where the Appellant will be discharged too, which is required. Furthermore, the 30-Day Notice details why the NF was discharging Appellant, such as her having in her possession a THC vape pen on multiple occasions, a positive toxicology screen for cannabinoid, and that she has fallen several times as a result of use of substance. However, the record lacks sufficient evidence to support such claims. There was no testimony or other evidence submitted that supports the claim that the Appellant was smoking in the facility. No

witnesses offered testimony that they saw her smoking or smelled marijuana in her room or in her presence. Although the NF confiscated Appellant's vape pens on two separate occasions, there was no evidence that the resident was using the vape pens on the property. NF noted on the 30-Day Notice that the Appellant fell on several occasions due to substance use, however the NF only provided details of one fall which occurred on June 8. In addition, when the NF's search of Appellant's room following the fall, they found no evidence of marijuana or marijuana use. In addition, there was testimony that the Appellant suffered from MS, which could be an alternative, equally plausible explanation for the Appellant's fall. NF Representative testified that she spoke with Appellant regarding her marijuana use in the facility, however the record lacked sufficient evidence to establish that they attempted and exhausted all available informal dispute resolution options prior to issuing the 30-Day Notice.

In summary, although the Appellant conceded to using marijuana, the record lacked sufficient evidence to prove where she used the marijuana. The NF did not provide their smoking policy, nor did they testify how Appellant's use of marijuana violated their policy. Moreover, the facility provided no evidence or testimony as to how, even assuming they could prove the appellant was smoking marijuana at the facility, the safety of any individual in the facility was endangered because of the Appellant's behavior. Finally, the 30-Day Notice is also invalid as it did not include a discharge/transfer location.

IX. CONCLUSION OF LAW

As to the NF's issuance of the 30-Day Notice, this Hearing Officer finds that the intended involuntary discharge of the appellant from the NF for endangering the health and/or safety of other residents is not supported by the evidence. This Hearing Officer further finds that the NF

has not taken appropriate steps to ensure a safe discharge in accordance with State and Federal regulations by means of the 30-Day Notice.

X. DECISION

Based on the foregoing finding of fact, conclusions of law, evidence, and testimony it is found that a final order be entered that there is not sufficient evidence to support the NF's discharge of the Appellant. The Appellant's request to rescind the 30-Day Notice is thereby granted.

APPEAL GRANTED

/s/Jenna Vilaro

Appeals Officer

NOTICE OF APPELLANT RIGHTS

This final order constitutes a final order of the Executive Office of Health and Human Services pursuant to RI General Laws § 42-35-12. Pursuant to RI General Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms.

CERTIFICATION

I hereby certify that I mailed, via regular mail, postage prepaid, a true copy of the foregoing to [REDACTED];
[REDACTED]
[REDACTED], and [REDACTED]
[REDACTED], copies were sent, via email, to Lori Light, Alliance for Better Long Term Care at lori@alliancebltc.org, on this 11th day of September, 2024.

Rebecca L. Alim