



April 17, 2024

[REDACTED]

RE:

[REDACTED]  
ACTION NO.: 24-BOR-1795

Dear [REDACTED]:

Enclosed is a copy of the decision resulting from the hearing held in the above-referenced matter.

In arriving at a decision, the State Hearing Officer is governed by the Public Welfare Laws of West Virginia and the rules and regulations established by the Department of Human Services. These same laws and regulations are used in all cases to ensure that all persons are treated alike.

You will find attached an explanation of possible actions you may take if you disagree with the decision reached in this matter.

Sincerely,

Kristi Logan  
Certified State Hearing Officer  
Member, State Board of Review

Encl: Recourse to Hearing Decision  
Form IG-BR-29

cc: [REDACTED]

**WEST VIRGINIA OFFICE OF INSPECTOR GENERAL  
BOARD OF REVIEW**

████████████████████

**Resident,**

v.

**Action Number: 24-BOR-1795**

████████████████████,

**Facility.**

**DECISION OF STATE HEARING OFFICER**

**INTRODUCTION**

This is the decision of the State Hearing Officer resulting from a fair hearing for ██████████ II. This hearing was held in accordance with the provisions found in Chapter 700 of the Office of Inspector General Common Chapters Manual. This fair hearing was convened on April 17, 2024.

The matter before the Hearing Officer arises from the March 26, 2024, decision by the Facility to discharge the Resident from ██████████.

At the hearing, the Facility appeared by ██████████, Facility Administrator. Appearing as a witness for the Facility was ██████████, Social Worker. The Appellant appeared by ██████████, Long Term Care Ombudsman. The witnesses were placed under oath and the following documents were admitted into evidence.

**Facility's Exhibits:**

- F-1 Progress Notes dated February 19, February 20 and March 26, 2024
- F-2 ██████████ Smoking Procedures/Agreement signed on November 13, 2023
- F-3 Sign In/Sign Out Log from March 20 – March 25, 2024

**Resident's Exhibits:**

None

After a review of the record, including testimony, exhibits, and stipulations admitted into evidence at the hearing, and after assessing the credibility of all witnesses and weighing the evidence in consideration of the same, the Hearing Officer sets forth the following Findings of Fact.

## FINDINGS OF FACT

- 1) The Resident was admitted to [REDACTED], hereinafter referred to as Facility, on June 18, 2022.
- 2) On November 13, 2023, the Resident signed a Smoking Procedures/Agreement with the Facility acknowledging that he would adhere to the procedures contained within the agreement (Exhibit F-2).
- 3) The Facility's Smoking Procedures/Agreement prohibits a resident from keeping matches or lighters on his/her person and/or in his/her room. All lighters, matches and cigarettes must be turned over to the nurse's station (Exhibit F-2).
- 4) On February 19, 2024, [REDACTED] Facility Administrator, discussed with the Resident the requirement of signing out when exiting the building to smoke (Exhibit F-1).
- 5) On February 20, 2024, [REDACTED] discovered the Resident had not signed out when exiting the building to smoke, and the smoking policy was again discussed with the Resident (Exhibit F-1).
- 6) On March 26, 2024, the Resident attempted to exit the building to smoke without signing out (Exhibit F-1).
- 7) The Resident admitted to [REDACTED] that he does not sign out when exiting the building and that he keeps his lighter and cigarettes on his person and would continue to do so (Exhibit F-1).
- 8) The Facility issued a 30-Day Notice of Discharge to the Resident on March 26, 2024, advising that he would be discharged on April 26, 2024, due to endangering other individuals in the facility. The destination of the discharge/transfer was "to be determined".

## APPLICABLE POLICY

Code of Federal Regulation – 42 CFR §483.15 provide that the nursing facility administrator or designee must permit each resident to remain in the facility, and not be transferred or discharged from the facility unless one of the following conditions is met:

### **(1) Facility requirements**

(i) The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless-

(A) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;

(B) 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;

(C) The safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(D) The health of individuals in the facility would otherwise be endangered;

(E) The resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Non-payment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for his or her stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; or

(F) The facility ceases to operate.

(ii) The facility may not transfer or discharge the resident while the appeal is pending, when a resident exercises his or her right to appeal a transfer or discharge notice from the facility, unless the failure to discharge or transfer would endanger the health or safety of the resident or other individuals in the facility. The facility must document the danger that failure to transfer or discharge would pose.

**(2) Documentation.** When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (c)(1)(i)(A) through (F) of this section, the facility must ensure that the transfer or discharge is documented in the resident's medical record and appropriate information is communicated to the receiving health care institution or provider.

(i) **Documentation in the resident's medical record must include:**

(A) The basis for the transfer per paragraph (c)(1)(i) of this section.

(B) In the case of paragraph (c)(1)(i)(A) of this section, the specific resident need(s) that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the need(s).

(ii) The documentation required by paragraph (c)(2)(i) of this section must be made by

(A) The resident's physician when transfer or discharge is necessary under paragraph (c)(1)(A) or (B) of this section; and

**(B) A physician when transfer or discharge is necessary under paragraph (c)(1)(i)(C) or (D) of this section.** (Emphasis added)

(iii) Information provided to the receiving provider must include a minimum of the following:

(A) Contact information of the practitioner responsible for the care of the resident

(B) Resident representative information including contact information.

(C) Advance Directive information.

(D) All special instructions or precautions for ongoing care, as appropriate.

(E) Comprehensive care plan goals,

(F) All other necessary information, including a copy of the resident's discharge summary, consistent with § 483.21(c)(2), as applicable, and any other documentation, as applicable, to ensure a safe and effective transition of care.

**(3) Notice before transfer.** Before a facility transfers or discharges a resident, the facility must -

(i) Notify the resident and the resident's representative(s) of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. The facility must send a copy of the notice to a representative of the Office of the State Long-Term Care Ombudsman.

(ii) Record the reasons for the transfer or discharge in the resident's medical record in accordance with paragraph (c)(2) of this section; and

(iii) Include in the notice the items described in paragraph (c)(5) of this section.

**(4) Timing of the notice.**

(i) Except as specified in paragraphs (c)(4)(ii) and (8) of this section, the notice of transfer or discharge required under this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(ii) Notice must be made as soon as practicable before transfer or discharge when -

- The safety of individuals in the facility would be endangered under paragraph (c)(1)(i)(C) of this section;
- The health of individuals in the facility would be endangered, under paragraph (c)(1)(i)(D) of this section;
- The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (c)(1)(i)(B) of this section;
- An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (c)(1)(i)(A) of this section; or
- A resident has not resided in the facility for 30 days.

**(5) Contents of the notice.** The written notice specified in paragraph (c)(3) of this section must include the following:

(i) The reason for transfer or discharge;

(ii) The effective date of transfer or discharge;

(iii) The location to which the resident is transferred or discharged;

(iv) A statement of the resident's appeal rights, including the name, address (mailing and email), and telephone number of the entity which receives such requests; and information

on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(v) The name, address (mailing and email) and telephone number of the Office of the State Long-Term Care Ombudsman;

(vi) For nursing facility residents with intellectual and developmental disabilities or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with developmental disabilities established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act of 2000; and

(vii) For nursing facility residents with a mental disorder or related disabilities, the mailing and email address and telephone number of the agency responsible for the protection and advocacy of individuals with a mental disorder established under the Protection and Advocacy for Mentally Ill Individuals Act.

**(6) Changes to the notice.** If the information in the notice changes prior to effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.

**(7) Orientation for transfer or discharge.** A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.

## DISCUSSION

Federal regulations permit the involuntary discharge or transfer of a resident if the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident. Documentation by a physician must be in the resident's medical record when the basis of transfer or discharge is due to the endangerment of others in the facility due to the clinical or behavioral status of the resident.

The Facility initiated discharge proceedings of the Resident when the Resident repeatedly failed to follow procedures when signing in and out to exit the building and by retaining his lighter and cigarettes instead of keeping these items at the nurse's station. ██████████ Facility Administrator, testified that she has discussed the Resident's non-compliance with him on several occasions.

The Resident's representative, ██████████, testified that the Resident forgets to sign in and out of the building and is not intentionally being non-compliant. ██████████ stated that the Resident is close to family members in his current placement, and it is his interest to remain there. ██████████ contended that the Resident would improve his adherence to the facility's rules and procedures.

The Facility provided Progress Notes made by ██████████ to document the Resident's non-compliance with the smoking policy. However, federal regulations require physician documentation when the basis of transfer or discharge is due to the endangerment of others in the facility due to the clinical or behavioral status of the resident.

Whereas the Facility failed to provide documentation by a physician recommending the Resident's discharge from the facility, the proposed discharge of the Resident cannot be affirmed.

### **CONCLUSIONS OF LAW**

- 1) Federal regulations permit the involuntary discharge or transfer of a resident if the clinical or behavioral status of the resident endangers others in the facility.
- 2) The Facility failed to provide documentation by a physician recommending the discharge of the Resident.
- 3) The Facility failed to follow federal regulations in the proposed discharge of the Resident.

### **DECISION**

It is the decision of the State Hearing Officer to **reverse** the proposal of [REDACTED] in the involuntary discharge of the Resident from its facility.

**ENTERED this 17<sup>th</sup> day of April 2024.**

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**Kristi Logan**  
**Certified State Hearing Officer**