



**State of West Virginia
DEPARTMENT OF HEALTH AND HUMAN RESOURCES
Office of Inspector General
Board of Review
4190 Washington Street West
Charleston, WV 25313**

Joe Manchin III
Governor

Martha Yeager Walker
Secretary

March 20, 2006

Case Name: _____

Dear Ms. _____:

Attached is a copy of the findings of fact and conclusions of law on _____'s hearing held February 27, 2006. The hearing request was based on the Department of Health and Human Resources' proposal to discharge Mr. _____ from the nursing facility, for violating the smoking policy.

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

Eligibility for Nursing Home Care is based on current policy and regulations. Some of these regulations state as follows:

Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--

- (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility;
- (ii) 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;
- (iii) The safety of individuals in the facility is endangered;
- (iv) The health of individuals in the facility would otherwise be endangered;
- (v) 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. 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
- (vi) The facility ceases to operate. (42CFR483.12 (a) (2) Transfer and Discharge Rights).

The information submitted at the hearing revealed: _____ Hospital failed to follow specific regulations relating to Mr. _____'s proposed discharge/transfer.

It is the decision of the State Hearings Officer to REVERSE the PROPOSAL of the Department to discharge Mr. _____ from the nursing facility.

Sincerely,

Ray B. Woods, Jr., M.L.S.
State Hearing Officer
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review
[REDACTED] Senior Assistant Attorney General
[REDACTED] RN/CEO – _____ Hospital
_____, Father

**WEST VIRGINIA DEPARTMENT OF HEALTH & HUMAN RESOURCES
BOARD OF REVIEW**

_____,

Claimant,

v.

Action Number: 05-BOR-6893

**West Virginia Department of
Health and Human Resources,**

Respondent.

DECISION OF STATE HEARING OFFICER

I. INTRODUCTION:

This is a report of the State Hearing Officer resulting from a fair hearing concluded on March 20, 2006 for _____. This hearing was held in accordance with the provisions found in the Common Chapters Manual, Chapter 700 of the West Virginia Department of Health and Human Resources. This fair hearing was originally scheduled on December 8, 2005 on a timely appeal filed November 8, 2005. _____, Esq. of Legal Aid of West Virginia was retained to represent Mr. _____. The hearing finally convened on February 27, 2006.

It should be noted here that the claimant's benefits have been continued pending a hearing decision.

II. PROGRAM PURPOSE:

The Program entitled Nursing Home Care is set up cooperatively between the Federal and State governments and administered by the West Virginia Department of Health & Human Resources.

A skilled nursing facility must operate and provide services in compliance with all applicable Federal, State and Local laws and regulations, and with accepted professional standards and principles, which apply to professionals providing services in such a facility.

III. PARTICIPANTS:

_____, Esq. – Legal Aid of West Virginia

_____, Father of _____

_____, Cousin of _____

_____ Senior Assistant Attorney General

██████████ RN/Chief Executive Officer (CEO) - _____ Hospital

Presiding at the Hearing was, Ray B. Woods, Jr., M.L.S., State Hearing Officer and a member of the State Board of Review.

IV. QUESTIONS TO BE DECIDED:

The question(s) to be decided is: Did _____ Hospital follow established guidelines under 42CFR483.12(a) Transfer and Discharge Rights, to support Mr. _____'s proposed discharge from the facility.

V. APPLICABLE POLICY:

42CFR483.12(a) Transfer and Discharge Rights

VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:

Department's Exhibits:

- D-1 West Virginia Division of Personnel, Smoking Restrictions in the Workplace Policy
- D-2 Letter to _____ from _____, August 23, 2004
- D-3 A Regulation Eliminating Smoking in Workplaces and Public Places, Effective 11-25-2004, *a.k.a.*, ██████████ County Clean Indoor Air Regulation of 2004
- D-4 _____ Resident Smoking Policy
- D-5 Safe Smoking Evaluation for _____, October 7, 2004
- D-6 Summary of Nursing Notes, August 11, 2005 through October 12, 2005
- D-7 Memorandum re: _____ Hospital's New Smoking Policy, April 8, 2005
- D-8 Notice of Proposed Involuntary Discharge/Transfer, October 13, 2005
- D-9 Not admitted
- D-10 Notice of Proposed Involuntary Discharge/Transfer, April 8, 2005
- D-11 Notice of Proposed Involuntary Discharge/Transfer, June 2, 2005
- D-12 Nurses Notes, September 20, 2005 through October 12, 2005

Claimants' Exhibits:

- C-1 Physician Notes, August 2, 2005 through October 18, 2005
- C-2 Social Services Notes, June 9, 2005 through November 8, 2005
- C-3 West Virginia Bureau for Behavioral Health Services, Health Facilities web page
<www.wvdhhr.org/bhhf/health.asp> visited February 24, 2006
- C-4 Excerpt from FY 2007 Executive Budget
- C-5 Printout from Wintersong Village web pages visited February 24, 2006
<www.thicare.com/WintersongVillage/default.aspx>
<www.thicare.com/WintersongVillage/features.aspx>
<www.thicare.com/WintersongVillage/clinical.aspx>

- C-6 Printout from randmcnally.com Driving distance from _____, WV to _____, OH
visited February 24, 2006
- C-7 Letter from _____
- C-8 Letter from _____

VII. FINDINGS OF FACT:

- 1) _____ Hospital is a public long term care facility located in _____ West Virginia, and operated by the West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities.
- 2) _____ Hospital has always allowed residents to smoke in and around its facility, provided that they follow its policies and all appropriate laws and regulations. When the West Virginia Division of Personnel issued its smoking restrictions banning all indoor smoking in all state facilities, including state hospitals (Ex. D-1), the Commissioner of the Department's Bureau for Behavior Health and Health Facilities received an exception for residents of long term care facilities (Ex. D-2), upon the request of Ms. _____
- 3) On October 25, 2004, the _____ County Board of Health issued its Clean Indoor Air Regulation of 2004 which effectively banned all smoking in facilities such as _____ Hospital because they are public places that must protect the health of non-smokers. (Ex. D-3).
- 4) On advice of counsel, _____ Hospital continued to allow current residents to smoke inside the building in designated areas, but did not permit new residents or residents who did not smoke at the time to smoke inside the building within such areas.. Instead, they were permitted to smoke outside at designated times and places. In response to the _____ County Regulations, _____ issued new smoking regulations. Smokers were only permitted to smoke in designated areas, both inside and outside the Hospital. Smoking times were scheduled during limited periods, and smoking residents must be supervised by a staff member. Visitors, employees and the general public were required to adhere to this smoking policy. (Ex. D-4).
- 5) Mr. _____ is a 53 year old male with a primary diagnosis of multiple sclerosis who must use a wheelchair. Mr. _____ was admitted to _____ on August 4, 1999. He is a dependent smoker (Ex. D-5), who has repeatedly failed to comply with the Hospital's current smoking policy, even though it is undisputed that he understands the policy and the consequences for not complying with it (Ex. D-6). He has repeatedly demonstrated both physical and verbal abuse to both _____ Hospital staff and even his own family. (Ex. 5, 6, & C-1 & 2).
- 6) Two previous Notices of Discharge were filed (Ex. D-10 & 11), but dismissed upon Mr. _____'s promise to comply with the smoking policy, he repeatedly refused to comply with the smoking policy. A third Notice of Discharge was filed October 13, 2005 (Ex. D-8) and Mr. _____'s representative filed an appeal of the discharge.
- 7) Ms. _____ testified about the various attempts to persuade Mr. _____ to comply with the smoking regulations. On occasion, Mr. _____'s cigarettes and lighter had

been removed from him.

8) _____ has tried to place a smoking apron on Mr. _____ to protect him and the other patients from possible fire in the event that it occurs during periods of non-compliance. Mr. _____ refuses to wear the smoking apron. Neither Mr. _____ nor any other resident have required medical treatment related to Mr. _____'s smoking.

9) _____ has been unable to discover the source providing Mr. _____ with cigarettes and matches which enable him to smoke unsupervised outside of the designated times and places. Mr. _____ refuses to divulge the source, and the family believes the Hospital staff are providing the cigarettes.

10) _____ is not a secure facility and there are numerous visitors, vendors, and general public in the Hospital every day. There are no restrictions on resident mobility throughout the hospital.

11) The Notice of Transfer/Discharge, dated October 13, 2005, was sent to _____'s father, Mr. _____. Mr. _____ was not provided a copy of the "Notice." The reasons given for the Transfer/Discharge are as follows:

"The resident continues to refuse to comply with the facility's "Smoking Policy", i.e., continues to obtain and keep cigarettes and lighters on his person and refuses to give them up when asked for them or to tell where he is getting the cigarettes and lighters. 2) In addition to blatantly smoking in designated areas where he can and has been observed, he has also been observed smoking in non-designated smoking areas. 3) The resident's failure to comply with this facility's "Smoking Policy" not only puts him at risk of injury or loss of life but also potentially jeopardizes every person in the facility. 4) The resident has been given multiple opportunities to change his behavior but continues to persist in non-compliance. Therefore, we have no choice but to proceed with pursuing discharge planning.

We will start looking for an alternative placement for Mr. _____ as quickly as possible. Finding placement locally may be difficult because of his behaviors, therefore, we may have to look for placement as far as out of state..."

12) The Notice of Transfer/Discharge dated October 13, 2005 did not contain the effective date of the transfer/discharge, or the location to which Mr. _____ was being transferred/discharged;

13) According to Ms. _____ Hospital planned to discharge Mr. _____ to _____ an _____ nursing facility. Ms. _____ further testified that _____ could provide all of the services located on _____'s web page (Ex. C-5).

14) The Physician's Progress Notes for the period August 2 through October 18, 2005, does not indicate that Mr. _____'s examining physician, Dr. _____ was aware of any problems related to Mr. _____'s smoking. As such, the progress notes do not indicate that a discharge is necessary to meet Mr. _____'s needs.

15) The testimony received from Mr. _____ and Ms. _____ was considered more emotional than factual. It did not provide any useful information.

16) Mr. _____ did not attend the hearing.

17) 42CFR483.12 (a) (1-7) Transfer and Discharge Rights states:

(1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.

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

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

(ii) 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;

(iii) The safety of individuals in the facility is endangered;

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

(v) 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. 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

(vi) The facility ceases to operate.

(3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a) (2) (i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by--

(i) The resident's physician when transfer or discharge is necessary under paragraph (a) (2) (i) or paragraph (a) (2) (ii) of this section; and

(ii) A physician when transfer or discharge is necessary under paragraph (a) (2) (iv) of this section.

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

(i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand.

(ii) Record the reasons in the resident's clinical record; and

(iii) Include in the notice the items described in paragraph (a) (6) of this section.

(5) Timing of the notice. (i) Except when specified in paragraph (a) (5) (ii) of this section, the notice of transfer or discharge required under paragraph (a) (4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

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

(A) the safety of individuals in the facility would be endangered under paragraph (a) (2) (iii) of this section;

(B) The health of individuals in the facility would be endangered, under paragraph (a) (2) (iv) of this section;

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a) (2) (ii) of this section;

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a) (2) (i) of this section; or

(E) A resident has not resided in the facility for 30 days.

(6) Contents of the notice. The written notice specified in paragraph (a) (4) 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 that the resident has the right to appeal the action to the State;

(v) The name, address and telephone number of the State long term care ombudsman;

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

(vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act.

(7) Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility.

VIII. CONCLUSIONS OF LAW:

- 1) _____ Hospital failed to comply with specific requirements listed in the Code of Federal Regulations, relating to their proposed discharge/transfer of Mr. _____. This is explained using the Regulations under 42CFR483.12 (a) (1-7) *Transfer and Discharge Rights*.
- 2) 42CFR483.12 (a) (1-7) Transfer and Discharge Rights states:
 - (1) Definition: Transfer and discharge includes movement of a resident to a bed outside of the certified facility whether that bed is in the same physical plant or not. Transfer and discharge does not refer to movement of a resident to a bed within the same certified facility.
 - (2) Transfer and discharge requirements. The facility must permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless--
 - (i) The transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the facility; **No Documentation Provided.**
 - (ii) 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; **Not Applicable.**
 - (iii) The safety of individuals in the facility is endangered; **Not Documented by a Physician.**
 - (iv) The health of individuals in the facility would otherwise be endangered; **Not Documented by a Physician.**
 - (v) 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. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid; **Not Applicable** or
 - (vi) The facility ceases to operate. **Not Applicable.**
 - (3) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in paragraphs (a) (2) (i) through (v) of this section, the resident's clinical record must be documented. The documentation must be made by--
 - (i) The resident's physician when transfer or discharge is necessary under paragraph (a) (2) (i) or paragraph (a) (2) (ii) of this section; **No Documentation Provided** and
 - (ii) A physician when transfer or discharge is necessary under paragraph (a) (2) (iv) of this section. **No Documentation Provided.**
 - (4) Notice before transfer. Before a facility transfers or discharges a resident, the facility must--
 - (i) Notify the resident and, if known, a family member or legal representative of the resident of the transfer or discharge and the reasons for the move in writing and in a language and manner they understand. _____ **Hospital did not notify Mr. _____, but did**

properly notify his legal representative, Mr. _____.

(ii) Record the reasons in the resident's clinical record; **The Nurses Notes from September 20, 2005 through October 12, 2005 lists three (3) incidents of smoking.**

(iii) Include in the notice the items described in paragraph (a) (6) of this section.

(5) Timing of the notice. (i) Except when specified in paragraph (a) (5) (ii) of this section, the notice of transfer or discharge required under paragraph (a) (4) of this section must be made by the facility at least 30 days before the resident is transferred or discharged. **The October 13, 2005 Notice of Discharge/Transfer did not specify a discharge/transfer date.**

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

(A) the safety of individuals in the facility would be endangered under paragraph (a) (2) (iii) of this section; **Not Documented by a Physician.**

(B) The health of individuals in the facility would be endangered, under paragraph (a) (2) (iv) of this section; **Not Documented by a Physician.**

(C) The resident's health improves sufficiently to allow a more immediate transfer or discharge, under paragraph (a) (2) (ii) of this section; **Not Applicable.**

(D) An immediate transfer or discharge is required by the resident's urgent medical needs, under paragraph (a) (2) (i) of this section; **Not Applicable** or

(E) A resident has not resided in the facility for 30 days. **Not Applicable.**

(6) Contents of the notice. The written notice specified in paragraph (a) (4) of this section must include the following:

(i) The reason for transfer or discharge; **Included.**

(ii) The effective date of transfer or discharge; **Not Included.**

(iii) The location to which the resident is transferred or discharged; **Not Included.**

(iv) A statement that the resident has the right to appeal the action to the State; **Included.**

(v) The name, address and telephone number of the State long term care ombudsman **Included.**

(vi) For nursing facility residents with developmental disabilities, the mailing address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act; **Not Applicable** and

(vii) For nursing facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act. **Not Applicable.**

(7) Orientation for transfer or discharge. A facility must provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. **Not Documented.**

IX. DECISION:

It is the decision of this State Hearing Officer to **REVERSE** the **PROPOSAL** of the Department in this particular matter.

X. RIGHT OF APPEAL:

See Attachment

XI. ATTACHMENTS:

The Claimant's Recourse to Hearing Decision

Form IG-BR-29

ENTERED this 20th Day of March, 2006.

Ray B. Woods, Jr., M.L.S.
State Hearing Officer