



State of West Virginia  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
Office of Inspector General  
Board of Review  
2699 Park Avenue, Suite 100  
Huntington, WV 25704

Joe Manchin III  
Governor

Patsy A. Hardy, FACHE, MSN, MBA  
Cabinet Secretary

November 19, 2009

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Dear -----:

Attached is a copy of the findings of fact and conclusions of law on your hearing held June 17, 2009. Your hearing request was based on -----'s proposed nursing home resident discharge.

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 Health and Human Resources. These same laws and regulations are used in all cases to assure that all persons are treated alike.

Some of the regulations for nursing home discharge state that a facility may only discharge a resident under certain circumstances, and that a discharge location must be included in the contents of the discharge notice [42 CFR §483.12(a)(2); 42 CFR §483.12(a)(6)].

Information submitted at your hearing revealed that the facility issued a discharge notice without a discharge location, and relied solely on its own smoking policy as basis for discharge, without providing any of the valid regulatory discharge reasons.

It is the decision of the State Hearing Officer to **reverse** the proposed resident discharge by -----.

Sincerely,

Todd Thornton  
State Hearing Officer  
Member, State Board of Review

cc: Erika H. Young, Chairman, Board of Review  
-----, Administrator, -----  
-----, Health Care Surrogate

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

## **BOARD OF REVIEW**

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**Claimant,**

**v.**

**Action Number: 09-BOR-1200**

-----,

**Respondent.**

## **DECISION OF STATE HEARING OFFICER**

### **I. INTRODUCTION:**

This is a report of the State Hearing Officer resulting from a fair hearing concluded on November 19, 2009 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 convened on June 17, 2009 on a timely appeal, filed May 15, 2009.

### **II. PROGRAM PURPOSE:**

Medicaid Regulations at 42 CFR §483.12 provide for admission, transfer and discharge rights for residents of Nursing Facilities. A facility must permit each resident to remain in the facility and not be transferred or discharged unless at least one of six specified criteria is met. Further, facility may not discharge or transfer a resident until he or she has received proper and timely advance notice of the proposed action including the right to appeal.

### **III. PARTICIPANTS:**

-----, Claimant's Health Care Surrogate and Representative  
-----, Administrator, -----  
-----, Social Service Worker, -----  
-----, LPN, -----

Presiding at the Hearing was Todd Thornton, State Hearing Officer and a member of the State Board of Review.

All persons offering testimony were placed under oath.

### **IV. QUESTION TO BE DECIDED:**

The question to be decided is whether or not ----- was correct in its proposed nursing home resident discharge action.

**V. APPLICABLE POLICY:**

42 CFR §483.12(a)

**VI. LISTING OF DOCUMENTARY EVIDENCE ADMITTED:**

**Facility's Exhibits:**

- F-1 Facility letter dated November 28, 2006; Signature page dated January 29, 2009
- F-2 Smoking Policy Violations form
- F-3 Notice of discharge dated April 23, 2009
- F-4 Resident's Case file packet

**VII. FINDINGS OF FACT:**

- 1) -----, Administrator for the facility, testified that the Claimant was admitted as a resident on January 29, 2009. She testified that all residents are given a letter advising them of the facility's smoking policy (Exhibit F-1). The Claimant's Health Care Surrogate, -----, signed the attached signature page acknowledging this policy. After two documented incidents of smoking (Exhibit F-2), the facility issued a discharge notice to the Claimant's Health Care Surrogate, on or about April 23, 2009. This notice (Exhibit F-3) stated, in pertinent part:

Upon admission you were advised that our facility was non-smoking. You also signed a statement stating that our smoking policy and the possible consequences of violating this policy had been explained to you. Since ----- has violated the smoking policy on more than one occasion, she will be discharged from our facility. This letter is to serve as notice that she will be discharged from our building on or before May 22, 2009. Our Social Services Dept. will be glad to assist you with discharge planning.

- 2) -----, LPN for the facility, testified that the Nurse's Notes (Exhibit F-4) for April 20, 2009 and April 23, 2009 detail the two smoking incidents. Both incidents involved staff members or residents smelling smoke in the Claimant's room or bathroom. A search of the Claimant's room was completed following each incident, and the Claimant's personal belongings were searched after one of the incidents; neither search produced cigarettes or lighters. The Nurse's Notes from the April 23, 2009 incident stated that the Claimant explicitly denied smoking. The Claimant's Health Care Surrogate reiterated the Claimant's statement that she denied smoking. Ms. [REDACTED] testified that – as of the June 17, 2009 hearing – there have been no further smoking incidents after the second one; the Claimant's Health Care Surrogate contended that if the Claimant had been smoking, she would have continued to smoke after the second incident.

- 3) -----, Social Service Worker for the facility, testified that the Claimant was leaving the facility on a regular basis to receive cancer treatments. She testified that people bring in cigarettes for residents. The facility Administrator speculated that the Claimant could have brought in cigarettes when she returned from cancer treatments. The Administrator referred to the medical history section of the Preadmission Screening Evaluation included in the Claimant's file (Exhibit F-4). This evaluation is dated May 14, 2009, and states, in pertinent part:

She had recently been smoking up to three packages of cigarettes per day and she has been smoking since the age of seven. ----- reported that she had quit smoking, though reports from nursing personnel indicated that she continued to smoke opportunistically.

- 4) The Code of Federal Regulations, 42 CFR §483.12(a)(2), provides the allowable reasons for transfer or discharge from a nursing facility, and states (emphasis added):

(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.

- 5) The Administrator for the facility testified that incidents of smoking put the facility at risk for citations for being out of regulatory compliance. She testified that ----- is a non-smoking facility, allowing only residents living in the facility prior to the implementation of the rule.

- 6) The Code of Federal Regulations, 42 CFR §483.12(a)(4), states (emphasis added):

(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.**

The Code of Federal Regulations, 42 CFR §483.12(a)(6), states (emphasis added):

(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.

### **VIII. CONCLUSIONS OF LAW:**

- 1) The regulations that govern resident discharge from a nursing facility require notice to the Claimant advising him of the transfer or discharge location. The notice from the facility explained that staff would be available to help the Claimant with discharge planning, but did not provide a specific transfer or discharge location.
- 2) Nursing facilities are further limited, by regulations, to six specific reasons for resident transfer or discharge. Regardless of any other regulatory constraints on the facility, smoking is not a reason provided by the Federal regulations at 42 CFR §483.12(a)(2). The facility failed to give a reason – in testimony, its discharge notice or other documentary evidence – in which smoking would fit. The argument provided alluded that the facility could discharge for a policy violation established in-house even if it did not meet any of the six allowable reasons provided by regulations. Further, with the noted denial of smoking by the Claimant, the absence of discovered cigarettes, lighters, or an eyewitness to the alleged behavior makes the facility's claim of smoking itself dubious.
- 3) Without a valid reason for discharge or adequate discharge notification to the Claimant, the facility's proposed nursing home resident discharge is incorrect.

### **IX. DECISION:**

It is the decision of the State Hearing Officer to **reverse** -----'s proposed nursing home resident discharge.

### **X. RIGHT OF APPEAL:**

See Attachment

### **XI. ATTACHMENT:**

The Claimant's Recourse to Hearing Decision

**ENTERED this \_\_\_\_ Day of November, 2009.**

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**Todd Thornton**  
**State Hearing Officer**