



Department of Health

ANDREW M. CUOMO
Governor

HOWARD A. ZUCKER, M.D., J.D.
Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

March 12, 2019

CERTIFIED MAIL/RETURN RECEIPT

Geraldine Albers, Administrator
Carillon Nursing & Rehabilitation Center
830 Park Avenue
Huntington, New York 11743

██████████
c/o Carillon Nursing & Rehabilitation Center
830 Park Avenue
Huntington, New York 11743

Katie Barbieri and Angela Bellizzi, Esq.
225 Crossway Park Drive
Woodbury, New York 11797

RE: In the Matter of ██████████ – Discharge Appeal

Dear Parties:

Enclosed please find the Decision After Hearing in the above referenced matter. This Decision is final and binding.

The party who did not prevail in this hearing may appeal to the courts pursuant to the provisions of Article 78 of the Civil Practice Law and Rules. If the party wishes to appeal this decision it may seek advice from the legal resources available (e.g. their attorney, the County Bar Association, Legal Aid, etc.). Such an appeal must be commenced within four (4) months from the date of this Decision.

Sincerely,

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH: nm
Enclosure

**STATE OF NEW YORK
DEPARTMENT OF HEALTH**

In the Matter of an Appeal pursuant to
10 NYCRR §415.3 by

[REDACTED]

Appellant,

from a determination by

Carillon Nursing & Rehabilitation Center,

Respondent,

to discharge him from a residential health care facility.

COPY

DECISION

Hearing Before:

Ann H. Gayle
Administrative Law Judge

Held at:

Carillon Rehabilitation and Nursing Center
830 Park Avenue
Huntington, New York 11743

Hearing Date:

March 8, 2019

Parties:

Carillon Rehabilitation and Nursing Center
By: Katie Barbieri, Esq., and Angela Bellizzi, Esq.

[REDACTED]
Pro Se

Pursuant to Public Health Law (“PHL”) §2801 and Title 10 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“10 NYCRR”) §415.2(k), a residential health care facility or nursing home such as Carillon Rehabilitation and Nursing Center (“Carillon,” “Respondent” or “Facility”) is a residential facility providing nursing care to sick, invalid, infirm, disabled, or convalescent persons who need regular nursing services or other professional services but who do not need the services of a general hospital.

Transfer and discharge rights of nursing home residents are set forth at 10 NYCRR §415.3(h). Respondent determined to discharge █ (“Appellant” or “Resident”) from care and treatment in its nursing home pursuant to 10 NYCRR §415.3(h)(1)(i)(a)(1) and (3) which provide, in pertinent part:

- (a) The resident may be transferred only when the interdisciplinary care team, in consultation with the resident or the resident's designated representative, determines that:
 - (1) the transfer or discharge is necessary for the resident's welfare as the resident's needs cannot currently be met by the services available at the facility;
 - ...
 - (3) the safety of individuals in the facility is endangered.

Appellant appealed the discharge determination to the New York State Department of Health, and a hearing on that appeal was held. Pursuant to 10 NYCRR §415.3(h)(2)(iii)(b), the Facility has the burden of proving that the transfer is necessary and the discharge plan is appropriate. SAPA § 306(1) provides that the standard of proof shall be by substantial evidence. “Substantial evidence means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact; it is less than a preponderance of the evidence but more than mere surmise, conjecture or speculation. . . . Put differently, there must be a rational basis for the decision. (Citations omitted)” (*Stoker v. Tarentino*, 101 A.D.2d 651, 652, 475 N.Y.S.2d 562, 564 [App. Div. 3d Dept. 1984], mod. 64 N.Y.2d 994, 489 N.Y.S.2d 43.

A digital recording of the hearing was made part of the record. Appellant appeared and testified on his own behalf. Camille Mikorenda, Social Worker, Haley Wyckoff, R.N., Nurse Manager, Anthony Antonucci, M.D., Medical Director, and Geraldine Albers, Administrator, testified for Respondent.

The following documents were accepted into evidence by the Administrative Law Judge (“ALJ”) as ALJ, Facility, and Resident Exhibits:

ALJ:

- I: Notice of Hearing with the Facility’s Discharge Notice attached

Facility:

- 1: █ 2018 agreement
- 2: █ 2019 agreement
- 3: Cover sheets and fax confirmations re PRIs – 49 pages
- 4: Page 9 of the Welcome Booklet and Resident Information Guide

Resident:

- A: █ 19 email re smoking in NH
- B: █/19 email re Brookside NH – Tolerant of smokers
- C: Page 10 of the Welcome Booklet and Resident Information Guide

ISSUE

Has Carillon Rehabilitation and Nursing Center established that the transfer is necessary and the discharge plan is appropriate?

FINDINGS OF FACT

Citations in parentheses refer to testimony (“T”) of witnesses and exhibits (“Ex”) found persuasive in arriving at a particular finding. Any conflicting evidence was considered and rejected in favor of the cited evidence.

1. Respondent, Carillon Rehabilitation and Nursing Center is a smoke-free residential health care facility located in Huntington, New York. (Ex I)

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2. Appellant, █ age █ was admitted to the Facility on █, 2018, for short-term rehabilitation. Appellant began smoking at the Facility in █ 2018. On █ 2018, Appellant signed an agreement acknowledging that he would not smoke “anywhere on the grounds of the facility.” On █ 2019, Appellant signed a similar agreement, a “final warning,” in which he agreed to be discharged from Carillon if he violated Carillon’s non-smoking policy by smoking “one more time at the facility.” (Ex 1; Ex 2; T Mikorenda)

3. By notice dated █, 2019, Respondent advised Appellant that it had determined to discharge him on the grounds that the discharge was for Appellant’s welfare as his needs cannot currently be met by the services available at the Facility, and that the health and/or safety of individuals in the facility would otherwise be endangered. The discharge location is █
█”) in █. (Ex I; T Mikorenda)

4. It is the professional opinion of Appellant’s caregivers at the Facility, including the Facility’s medical director, that discharge to █ a skilled facility which offers similar services as Carillon, is appropriate for Appellant. (T Mikorenda, Wyckoff, Antonucci)

5. Appellant has remained at Carillon Rehabilitation and Nursing Center pending the outcome of this proceeding.

DISCUSSION

Appellant acknowledged Respondent’s determination in its first grounds for transfer/discharge, *i.e.*, that Appellant’s needs cannot currently be met by the services available at the Facility because Carillon is a smoke-free facility and he wishes to continue to smoke on the premises, but Appellant did not agree with the Respondent’s additional grounds for discharge, *i.e.*, that the health and/or safety of individuals in the facility would otherwise be endangered. Since Respondent need prove only one of its grounds for discharge, and with Appellant’s

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acknowledgment of the first grounds for discharge, the only issue left for this decision is whether the discharge location, *i.e.*, █ is an appropriate discharge plan. I find that it is.

Appellant resided in the █ of his █ home prior to his admission to the Facility. When Appellant was found on several occasions to be smoking on the Facility's premises, and Respondent learned that Appellant could not return to his █ home as that space is currently being utilized as a █ only, Respondent began sending PRIs to other skilled facilities. Initially, Respondent sent PRIs to facilities close to Carillon in Suffolk County, but when those facilities did not accept Appellant, Respondent sent PRIs to █ County facilities, then farther and farther from Suffolk County to █ and the █ █ accepted Appellant. Appellant does not wish to go to █ which is approximately █ miles from his █ home, as it would be difficult for his friends and family to visit him. Appellant represented that he would accept a decision on this appeal that discharges him from Carillon, and he would leave Carillon on the day of discharge, but he would not go to █ Appellant did not disclose where he would go upon discharge.

Appellant is working with █) to secure permanent housing in Suffolk County, but it is unclear how long the process will take. Ms. Mikorenda testified that █ in conjunction with social workers in █ County, would continue to work with Appellant toward securing housing in Suffolk County while he resides at █ in █ County. Ms. Mikorenda represented that she would resend PRIs to skilled facilities closer to Carillon while Appellant continued to reside at Carillon.

DECISION

I find that the Facility has proved by substantial evidence that the discharge is necessary.

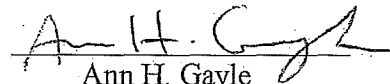
The appeal by Appellant is therefore DENIED.

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Respondent, Carillon Rehabilitation and Nursing Center, is authorized to discharge Appellant in accordance with the █, 2019 Discharge Notice. The discharge shall occur no sooner than █, 2019, in order to give Appellant an opportunity to make arrangements to secure a discharge location other than █. Appellant may leave the Facility sooner than █ 2019, if he secures a home in the community, or for any other reason Appellant chooses to leave.

This Decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

Dated: New York, New York
March 13, 2019


Ann H. Gayle
Administrative Law Judge

TO: █
c/o Carillon Rehabilitation and Nursing Center
830 Park Avenue
Huntington, New York 11743

Geraldine Albers, Social Worker
Carillon Rehabilitation and Nursing Center
830 Park Avenue
Huntington, New York 11743

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