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**Department
of Health**

KATHY HOCHUL
Governor

JAMES V. McDONALD, M.D., M.P.H.
Commissioner

JOHANNE E. MORNE, M.S.
Executive Deputy Commissioner

June 26, 2024

CERTIFIED MAIL/RETURN RECEIPT

██████████ ██████████
c/o New Vanderbilt Rehab & Care Center
135 Vanderbilt Avenue
Staten Island, New York 10304

David Hersko, NHA
New Vanderbilt Rehab & Care Center
135 Vanderbilt Avenue
Staten Island, New York 10304

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,

Natalie J. Bordeaux
Chief Administrative Law Judge
Bureau of Adjudication

NJB: cmg
Enclosure

STATE OF NEW YORK
DEPARTMENT OF HEALTH

COPY

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

██████████ ██████████

Appellant,

from a determination by

New Vanderbilt Rehabilitation & Care Center,

Respondent,

to discharge him from a residential
health care facility.

DECISION
AFTER
HEARING

Hearing before:

Kathleen Dix
Administrative Law Judge
June 20, 2024
By WebEx Videoconference

Parties:

New Vanderbilt Rehabilitation & Care Center
135 Vanderbilt Avenue
Staten Island, NY 10304

By: David Hersko, Administrator

██████████ ██████████

c/o New Vanderbilt Rehabilitation & Care Center
135 Vanderbilt Avenue
Staten Island, NY 10304

JURISDICTION

By notice dated [REDACTED] 2024, New Vanderbilt Rehabilitation & Care Center, (Respondent), a residential health care facility subject to Article 28 of the Public Health Law (PHL), determined to discharge [REDACTED] [REDACTED] (Appellant) from care and treatment in its facility. The Appellant requested a hearing pursuant to Department regulations at 10 NYCRR 415.3 and federal regulations at 42 CFR 483.15. The hearing was held on June 20, 2024, via Webex videoconference.

HEARING RECORD

ALJ Exhibits:

- I. Notice of Hearing and Notice of Discharge/Transfer
- II. Resident Face Sheet (2 pages)

Facility's Exhibits:

1. Physician's Progress Note (1 page)
2. Progress Notes and Smoking Policy Documents (12 pages)
3. Email Acceptance to Assisted Living Facility (1 page)

Appellant's Exhibits:

- A. [REDACTED], 2024 Dr. [REDACTED] Email (1 page)

Facility's Witnesses:

1. David Hersko, Administrator
2. Nicole Gabriel-Alexander, Social Worker

Appellant's Witnesses:

1. [REDACTED] [REDACTED] Appellant

A digital recording of the hearing was made. (47:57 m.) The record remained open until June 25, 2024 for the receipt of a report from the Appellant's physician at [REDACTED]. The report was received on June 21, 2024.

ISSUES

Has the Facility established that its determination to discharge the Appellant is correct and that its discharge plan is appropriate?

FINDINGS OF FACT

1. Respondent is a residential health care facility, specifically a nursing home within the meaning of PHL § 2801.2 and 10 NYCRR 415.2(k), located on Staten Island, New York.

2. The Appellant is a [REDACTED]-year-old male who was admitted to the Respondent's facility on [REDACTED] 2022 following a hospitalization at [REDACTED]. His diagnoses include [REDACTED] (ALJ Exhibit II and Exhibit 1.)

3. By notice dated [REDACTED], 2024, the Respondent advised the Appellant of its determination to discharge him on [REDACTED], 2024, on the grounds that the health and/or safety of individuals in the facility would otherwise be endangered. The notice alleged that the Appellant "disregards the Facility's smoking policy and was found smoking [REDACTED] on the Facility's patio." (ALJ Exhibit I.)

4. The discharge notice advised the Appellant he would be discharged to [REDACTED], an assisted living facility located at [REDACTED]. (ALJ Exhibit I.)

5. The Appellant remains at the Respondent's facility pending the outcome of this hearing.

APPLICABLE LAW

A residential health care facility, or nursing home, 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. PHL § 2801; 10 NYCRR 415.2(k). Transfer and discharge rights of nursing home residents have been codified in PHL § 2803-z and set forth at 10 NYCRR 415.3(i) which provides, in pertinent part, that the facility shall:

- (1) (i) permit each resident to remain in the facility, and not transfer or discharge the resident from the facility unless such transfer or discharge is made in recognition of the resident's rights to receive considerate and respectful care, to receive necessary care and services, and to participate in the development of the comprehensive care plan and in recognition of the rights of other residents in the facility:

(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:

- ...
(3) the safety of individuals in the facility is endangered; or
(4) the health of individuals in the facility is endangered;

...
(vi) provide sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility, in the form of a discharge plan which addresses the medical needs of the resident and how these will be met after discharge, and provide a discharge summary pursuant to section 415.11(d) of this Title. . .

When alleging that a transfer or discharge is appropriate because the safety or health of individuals in the facility is endangered, the necessity of the transfer or discharge must be documented in the resident's medical record by a physician. 10 NYCRR 415.3(i)(l)(ii)(b) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(B).

The Respondent has the burden of proving that the discharge is necessary and that the discharge plan is appropriate. 18 NYCRR 415.3(i)(2)(iii)(b).

DISCUSSION

The Respondent, in seeking to discharge the Appellant, asserts that the Appellant's actions in disregarding its smoking policy have endangered the health and safety of other individuals in the facility. (ALJ Exhibit I.) The Respondent asserts that the Appellant has been found to be smoking in his room on multiple occasions, smoking during periods of time designated as non-smoking time pursuant to the Respondent's smoking policy, smoking [REDACTED] on the Respondent's facility's patio, and keeping smoking paraphernalia on his person. The Respondent's smoking policy requires that all smoking paraphernalia be kept by the Respondent's recreation department in a locked designated smoking cart. (Exhibit 2.) A Respondent physician's progress note dated [REDACTED], 2024 notes the Appellant's disregard of the Respondent's smoking policy as having prompted the discharge notice. (Exhibit 1.)

David Hersko, the Respondent's administrator, testified that in [REDACTED] 2023 the Respondent became a non-smoking facility but "grandfathered in" the then current

smoking patients, of which the Appellant is one. (Recording @ 4:06.) Rules and regulations were put into place governing the grandfathered in patients. They included a designated smoking area and designated smoking times, and also provided that for safety reasons, residents are not allowed to have their lighters and cigarettes with them because there are patients who are on oxygen. (Recording @ 5:04.)

Nicole Gabriel-Alexander, the Respondent's social worker, testified that every resident is advised of the Respondent's smoking policy and that every resident is encouraged to adhere to the smoking policy for the safety of each resident, staff member and visitor. When the smoking policy is not adhered to it presents a danger to not only the non-compliant person but others as well, both inside and outside of the Respondent's facility. (Recording @ 9:23.)

Respondent progress notes include an activity care plan note dated [REDACTED], 2024 noting the Appellant's noncompliance with the Respondent's smoking policy; a social services note dated [REDACTED], 2024 documenting a meeting with the Appellant on [REDACTED] 2024 to discuss his smoking [REDACTED] on the Respondent's facility's patio; another activities note dated [REDACTED], 2024 noting that the Appellant was caught smoking in his room on the previous Saturday (to wit: [REDACTED], 2024); a nursing note dated [REDACTED], 2024 noting that the Appellant was caught smoking in his room; and an activities note dated [REDACTED] 2024 noting that the Appellant continues to be non-compliant with the smoking policy, *i.e.*, smoking during non-smoking times, throwing a cigarette butt on the ground rather than in the smoking canister, and having smoking paraphernalia on his person and refusing to give it to staff to be put in the smoking cart. (Exhibit 2.)

Respondent staff have had numerous conversations with the Appellant about his non-compliance with the Respondent's smoking policy and the Appellant's conduct has not changed. When the Respondent updated its smoking contract in 2024 the Appellant refused to sign the new contract. (Recording @ 5:19.)

The Appellant complained at the hearing that the smoking area at the Respondent's facility consists of a cage "that you would put your dogs in," is small, and has no cover from the rain. He stated that he and other residents will not go into that cage to smoke but instead smoke near the designated smoking area. (Recording @ 11:56, 18:32.) In addition, the Appellant testified that he throws cigarette butts on the

ground. He denied smoking [REDACTED] on the Respondent's facility's patio (Recording @ 19:07, 19:20), but was in possession of a package of 3 cigars at the hearing which he testified he brought to show as evidence of what he smokes. He stated that once the hearing was over, he would turn them over to Respondent staff in compliance with the smoking policy. (Recording @ 19:31.)

The Appellant thus admitted at this hearing to smoking outside the designated area, admitted to throwing cigarette butts on the ground, and admitted to having smoking paraphernalia with him at the hearing in which he participated from inside the nursing home. These three behaviors alone are all violations of the Respondent's smoking policy.

The most serious endangerment involves the Appellant's smoking in his room. The Appellant denied smoking in his room or anywhere other than near the designated smoking area. He claimed that his clothing smells of smoke and was mistaken by staff as him smoking in his room. It is possible that one person may have mistakenly believed that the smoke they smelled upon entering the Appellant's room was coming from a lit cigarette when, in fact, the smell of smoke was coming from the Appellant's clothing. However, it defies credibility that various disciplines at the Respondent's facility would all make the same mistake on several different dates. The documentary evidence, which is found credible, shows that the Appellant was caught smoking in his room on multiple occasions.

It is clear from this record that the Appellant is noncompliant with the Respondent's smoking policy. However, a violation of a facility policy is not, in and of itself, grounds for discharge. There is a regulatory framework for a residential health care facility to follow prior to the discharge of a resident and the Appellant's conduct must be linked to a regulatory reason for discharge. Before the Respondent seeks to discharge the Appellant because the safety and health of individuals in the facility is endangered, the necessity of the transfer or discharge must be recorded in the resident's clinical record by a physician. 10 NYCRR 415.3(i)(1)(ii)(b) and (iii)(b); 42 C.F.R. § 483.15(c)(2)(ii)(B). In a Respondent progress note dated [REDACTED] 2024 the Respondent's physician opined that the Appellant is stable enough to be discharged to an assisted living facility and noted the Appellant's disregard of the Respondent's

smoking policy as having prompted the discharge notice. (Exhibit 1.) However, there is no medical evidence in the record from a physician documenting the events of the Appellant's violations of the smoking policy and how those events have made him a danger to himself or others. Thus, the connection between the Appellant's conduct and a regulatory reason for discharge is not supported by the medical evidence.

It appears, however, that the Respondent, may have grounds for a discharge based upon the Appellant's level of medical need. The [REDACTED] 2024 notice of discharge does not include as a basis for discharge that the Appellant's health has improved such that he no longer needs the services of a nursing home. To discharge the Appellant on these grounds, the Respondent must issue the proper notice alleging that ground.

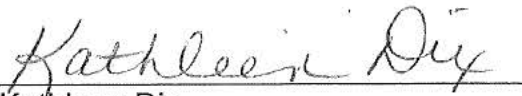
The Respondent has not established a valid ground for discharge of the Appellant. Finding no valid ground for discharge, the issue of the appropriateness of the discharge plan need not be addressed.

DECISION

The Respondent has failed to establish that the discharge of the Appellant is necessary.

1. New Vanderbilt Rehabilitation & Care Center is not authorized to discharge the Appellant pursuant to the Notice of Discharge dated [REDACTED], 2024.
2. This decision may be appealed to a court of competent jurisdiction pursuant to Article 78 of the New York Civil Practice Law and Rules.

Dated: Menands, New York
June 26, 2024


Kathleen Dix
Administrative Law Judge

To: David Hersko, Nursing Home Administrator
New Vanderbilt Rehabilitation & Care Center
135 Vanderbilt Avenue
Staten Island, NY 10304
dhersko@vanderbiltrehab.com

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