

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
BY THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)	
)	
N H)	OAH No. 19-0460-PTD
)	

DECISION

I. Introduction

NH resides in the ABC Care Long Term Care Unit (ABC). ABC is a licensed assisted living facility. On April 26, 2019 ABC notified Mr. H it was seeking his involuntary transfer due to chronic violation of its policy regarding marijuana consumption on site.¹ Mr. H requested a hearing to challenge his discharge.²

The hearing was held on July 22, 2019 and remained open until August 1, 2019 for supplemental materials. Parties previously agreed that all decision deadlines would be extended by 30 days to accommodate their schedules.³

NH represented himself. Tammy Rose represented ABC. Both parties appeared by telephone.

This decision upholds the involuntary transfer notice.

II. Facts

The following facts were established by a preponderance of the evidence. They are taken from testimony of the parties and the documents submitted by ABC on June 11, 2019 and July 22, 2019. For ease of reference the documents submitted June 11, 2019 are referred to as Exhibit 1, while those submitted July 22, 2019 are referred to as Exhibit 2.

ABC is an assisted living home. It houses approximately 102 residents, many whom are part of a medically vulnerable population. Tammy Rose, the current director, oversaw the facility throughout the relevant time frame. Tristan Rood is the nursing director.

¹ Office of Administrative Hearings Case Referral Notice submitted May 24, 2019 at 3.
² Id. at 1.
³ The hearing date was also extended at their request adding an another

NH moved to ABC in April 2016.⁴ He is a paraplegic who uses a motorized wheelchair for mobility. He requires extensive assistance with most activities of daily living other than eating.

He signed a residential services agreement upon his arrival.⁵ The residential services agreement informed him that residents could be discharged or involuntarily transferred as a consequence for violating the Facility Smoking Policy.⁶ The smoking policy addressed marijuana as well as tobacco smoke. The marijuana portion of policy must strike a fine balance because, while private marijuana consumption has recognized state protection in Alaska,⁷ ABC's licensing and accreditation requirements prohibit violation of federal law on its premises.

The ABC marijuana policy has been updated several times.⁸ Mr. H has signed each update.⁹ He most recently signed the marijuana policy on August 9, 2018.

The policy has required marijuana be smoked off premises since its adoption, however. That portion of the policy states:

If the resident is to smoke medical marijuana, the resident must go off facility grounds to do so or to previously disclosed location away from other residents and staff. They must be deemed safe to complete this task independently unless a family member or significant other will assist. At no time should facility staff assist in this process.¹⁰

Marijuana may be ingested in the resident's room in the form of edibles or oils so long as the resident complies with rules controlling proper storage.¹¹

Ms. Rose had her first conversation with Mr. H about violation of the marijuana policy in February 2017. He was in contravention of then-existing policy because he did not have a medical marijuana identification card.¹² Mr. H signed this policy on February 20, 2017.¹³ Mr. H obtained the required medical card after meeting with Ms. Rose.

⁴ Ex. 2., p 1.

⁵ Ex. 2., p. 8.

⁶ Id.

⁷ See e.g. *Raven v. State*, 537 P.2d 494 (Alaska 1975); AS 17.38.010-900.

⁸ Ex. 1.

⁹ Ex. 1, pp. 6-9.

¹⁰ Ex. 1, p.1.

Ex. 1, p. 1, sec. 4; p. 4, sec. 4; p. 6, sec. 4; pp. 8-10.

¹² Ex. 1, pp. 2 and 3 (Facility Ex. ABC Policy and Procedure Medical Marijuana Adopted 4/12, reviewed 1/16).

¹³ Ex. 1, p. 2.

To smoke marijuana off premises as required, an ABC resident has three choices. A resident may exit the front door and walk to the public sidewalk; may go through the garden, out a gate, and off the property to the side; or may exit the rear door and cross the parking lot to a city-owned verge near the road. The area behind the parking lot is the location preferred by ABC and residents. This unofficial marijuana smoking area is approximately fifteen car lengths from the back door of the facility.

ABC is not a smoke-free facility. Residents who qualify are permitted to smoke tobacco. The designated tobacco smoking areas are in the garden or at covered areas near the front and back doors. The tobacco smoking areas are on ABC property.

Mr. H violated the marijuana policy many times prior June 16, 2018. He did so by smoking marijuana in the designated tobacco smoking area and on other parts of the ABC grounds. There has never been an allegation Mr. H smoked marijuana within the interior of the ABC facility, however.

On June 16, 2018 Ms. Rose served Mr. H a Notice of Discharge.¹⁴ A Notice of Discharge¹⁵ is a document providing formal notice to a resident they will be involuntarily discharged or transferred from the facility after 30 days. Ms. Rose gave Mr. H the notice because his chronic violation of the marijuana policy was endangering the health of other residents.

Ms. Rose and Mr. H had another meeting after the notice was given to him. He agreed to change his behavior, and she agreed to give him another chance on the condition he sign a performance contract specific to his marijuana use. Although the agreement was never drafted, Mr. H's progress notes from the meeting indicate he was informed another violation would lead to another Notice of Discharge.¹⁶

According to Ms. Rose, Mr. H violated this agreement within a few weeks. After that, he violated it repeatedly throughout the summer of 2018. That summer ABC had several marijuana consumers in addition to Mr. H. Mr. H was not the only resident who violated the marijuana policy. According to Ms. Rose, the rule regarding off-site marijuana smoking was in danger of wholesale disregard.

¹⁴ Ex. 1, p. 11.

¹⁵ This decision also refers to this as a notice of involuntary transfer as the terms were used interchangeably during the hearing.

¹⁶ Id.

Ms. Rose, therefore, convened a meeting with all smokers in August 2018. Mr. H attended the meeting. Ms. Rose made a presentation regarding the danger to all residents from violation of the marijuana policy. She reminded them ABC had a medically vulnerable population. She told them she had received complaints about marijuana smoke near the doors from residents and guests alike. In addition, she told them about ABC's reliance on federal funding. Federal law prohibits marijuana on the premises. If violations of marijuana smoking on the premises were documented, ABC could lose accreditation and funding. Residents would lose financial support and housing. All the attendees at the meeting, including Mr. H, re-signed the marijuana policy and promised to abide by it.¹⁷

Between September 2018 and March 2019 Mr. H continued to repeatedly violate the marijuana policy. Ms. Rose described those violations, including one which occurred outside her window while she did administrative paperwork. Tristan Rood, the assistant nursing director, also testified regarding Mr. H and the marijuana policy. She stated she observed Mr. H commit numerous violations of the policy before and after August 2018.

Ms. Rose gave Mr. H another Notice of Discharge on March 19, 2019. The Notice read:

Pursuant to 42 CFR § 483.15 Admission, transfer, and discharge rights (enclosed,) at this time we are serving you this letter as our official Notice of Intent to Discharge you, Mr. [N. H.]. The transfer or discharge is appropriate as the safety of individuals in the facility is endangered; due to repeated violations of our facility Marijuana policy. We have made several attempts enforce this policy, only to have repeated documented violations reported by staff, resident and visiting family members. The date of discharge is 30 days from the date of this notice, May 26, 2019. This notice is consistent with our policy as stated in the Admissions Agreement, and it meets all Federal and State regulations governing the discharge of a resident.¹⁸

Mr. H acknowledged he regularly violated the marijuana policy prior to the March 19, 2019 Notice of Discharge. Ms. Rose treated him very fairly in his opinion. However, due to his use of a wheelchair, it is extremely difficult for him to comply with the policy in the winter. He cannot safely get to and from the back of the parking lot. ABC staff are not permitted to assist him to that area to smoke marijuana, and if he gets stuck, he is unable to return without

¹⁷ Ex. 1, p. 9.

¹⁸ Office of Administrative Hearings Case Referral Notice submitted May 24, 2019 at 3.

help. He prefers to smoke rather than use tinctures or ingest edible marijuana products even though he can use those in his room.

Both Mr. H and Ms. Rose agreed that he has not violated the marijuana policy since the March 19, 2019 Notice of Discharge. Mr. H testified he has come up with a reliable modification of his smoking habit. He should not have any problems during the upcoming winter.

Mr. H hoped his last few weeks of compliance coupled with his modifications would justify permitting him to stay at ABC despite his earlier rule-breaking. He offered to completely cease smoking marijuana. He had only positive things to say about Ms. Rose and the quality of care at ABC. In addition, he has toured another housing situation and realizes the superiority of conditions at his current home.

Ms. Rose also had only positive things to say about Mr. H personally, but she did not retract the current Notice of Discharge.

III. Discussion

a. Overview

A nursing facility resident has a number of rights established by federal law. One of those rights is he cannot be discharged involuntarily from that facility, unless certain conditions are satisfied.¹⁹ The relevant condition for this case is whether “health of individuals in the facility would otherwise be endangered” should he not be transferred.²⁰ “Health” includes the physical, mental and psychosocial well-being of residents.²¹

Assisted living home and nursing home residents also have rights protected by Alaska state law. AS 47.33.360 provides:

An assisted living home may not terminate a residential services contract with a resident of the home against the resident’s will, except

- (1) for medical reasons;
- (2) for engaging in a documented pattern of conduct that is harmful to the resident, other residents, or staff of the home;
- (3) for violation of the terms of the residential services contract, including failure to pay costs incurred under the contract;

¹⁹ 42 U.S.C. § 1396r(c)(2)(A); 42 C.F.R. § 483.12(a)(2).

²⁰ 42 C.F.R. § 483.15(c)(1)(i)(D).

²¹ 42 U.S.C. § 1396r(b)(4)(A)

(4) when emergency transfer out of the home is ordered by the resident's physician;

(5) when the home is closing; or

(6) when the home can no longer provide or arrange for services in accordance with the resident's needs and the resident's assisted living plan.

ABC has the burden of proof in this case.²² It must establish that transfer of Mr. H is appropriate under federal and state law. ABC asserted that health of other individuals in the facility would otherwise be endangered if Mr. H continued to reside in the facility. ABC claimed discharge/involuntary transfer was therefore appropriate under 42 C.F.R. § 483.15(c)(1)(i)(D) and AS 47.33.360(a)(2). In addition, Mr. H had repeatedly violated the terms of his residential services contract so discharge/involuntary transfer was also appropriate under AS 47.33.360(a)(3).

There was no dispute that Mr. H violated the marijuana policy. Mr. H admitted he engaged in repeated violations over a period of years prior to the final Notice of Discharge. Nor is there any dispute that ABC is monitored by federal agencies for whom marijuana consumption on the premises could be grounds for administrative sanction up to and including loss of accreditation. Federal officials, in fact, arrived in Ms. Rose's office for a surprise inspection during the hearing.

Thus, only two questions remained for resolution. First, did Mr. H's use of marijuana "endanger the health" of other residents or constitute a "pattern of conduct that is harmful to the resident, other residents, or staff of the home" as meant by 42 C.F.R. § 483.15(c)(1)(i)(D) and AS 47.33.360(a)(2)? Second, if his conduct does not rise to that level, may he nevertheless be involuntarily transferred pursuant to AS 47.33.360(a)(3) because his conduct violated his residential services contract?

b. The Indirect Threat of Harm to Other Residents from N.H.'s Marijuana Violations Does Not Trigger 42 C.F.R. § 483.15(c)(1)(i)(D) and AS 47.33.360(a)(2)

The few reported instances which address involuntary transfer due to endangering other residents all involve situations where the resident has directed violent or abusive behavior at specific other residents or staff. For example, in *Robbins v. Iowa Dept. of Inspections and Appeals*, 567 N.W.2d 653 (Iowa 1997) involuntary transfer was affirmed where the resident

²² 7 AAC 49.135

intentionally ran into others with his wheelchair, restrained their movements, and directed abusive language at residents and staff. It is not necessary another resident be physically harmed or suffer a severe adverse reaction before a finding of endangerment can be made, but assisted living homes are expected to demonstrate they first attempted measures less drastic than involuntary transfer to address the problem before resorting to removal. Failure to demonstrate they did so can lead to a ruling they failed to sustain their burden, because involuntary transfer is the remedy of last resort.²³

There is no allegation Mr. H engaged in any form of violent, threatening, or abusive behavior toward other residents or staff. It must also be noted that ABC does not seek to transfer him because other residents have been exposed to his marijuana smoke. ABC permits tobacco smoke on its premises. There was no assertion that Mr. H's marijuana smoke presented a separate and distinct health risk to the other residents.

The danger Mr. H is alleged to present is of an indirect nature. If he continues his conduct, ABC could be sanctioned. If ABC is sanctioned, there could be impact on the other residents.

Research has not revealed the existence of prior precedent on the issue of indirect harm used as the basis for an involuntary transfer. It is not surprising that there are no reported decisions from this, or other jurisdictions, addressing the issue of whether one resident's smoking of marijuana endangers the health or is harmful to other residents of an assisted living facility in this manner. Possession and consumption of marijuana has until recently been so widely criminalized that the issue simply has not been before adjudicative bodies.

Thus, the issue of whether this indirect risk of harm qualifies as "endanger[ing] the health" of other residents or constitutes a "pattern of conduct that is harmful to the resident, other residents, or staff of the home" must be decided purely as a matter of statutory interpretation. The cardinal rule of statutory interpretation is to ascertain and effectuate the real and actual

²³ *In the Matter of the Involuntary Transfer of J.S. by Hall*, 512 N.W. 2d 604 (Minn. App. 1994). In that case, the Commissioner of Health determined a nursing facility could not involuntarily transfer a resident because the facility had failed to prove that the transfer was required to protect others or necessary for her welfare. The Minnesota Court of Appeals affirmed the Commissioner's determination, but noted that it was a "close case." *Id.* at 612. It was clear the appellate court would have affirmed her removal as a danger to others, but was required to give deference to the Commissioner's finding. With regard to the request to discharge because the facility "was not equipped to care for unstabilized mentally ill residents," the court affirmed the Commissioner's decision the facility had not adequately proven that it had tried to properly address J.S.'s conduct through means less drastic than involuntary transfer and therefore, had not proven transfer was justified. *Id.* at 609-11.

intent of the legislature.²⁴ The analysis begins with the plain meaning of the statute. The language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, and policy supporting enactment of the statute. Alaska no longer strictly follows the “plain meaning” rule of statutory interpretation, but if the intent of the legislative body is clear from the words of the statute, the inquiry normally ends unless something in the legislative history indicates a contrary intent.²⁵

Both 42 C.F.R. § 483.15(c)(1)(i)(D) and AS 47.33.360(a)(2) are parts of comprehensive statutory schemes.²⁶ The purpose of those statutory schemes is to provide protections for a vulnerable population by regulating nursing facilities, including involuntary transfers and discharges. Involuntary discharges and transfers are restricted, and when they do occur are subject to procedural controls ensuring a resident's health and safety. Given the emphasis on resident protections, the conduct for which an assisted living facility can base involuntary discharge should be narrowly construed.²⁷

“Health” includes the physical, mental and psychosocial well-being of residents.²⁸ “Harmful to residents” should address similar concerns.²⁹ Unlike situations where a resident’s behavior harms, abuses, threatens, or disturbs another and that impact can be identified, in this case ABC did not identify any specific resident whose physical, mental or psychosocial well-being was affected by Mr. H’s conduct or fear of its repercussions.

ABC’s concern was focused on a potential for future harm, not its current existence. Appropriately read the law does not include situations where at least one specific instance of impact or imminent impact on another resident cannot be identified. To do so would undermine the protections the law is designed to create. Thus, this decision concludes that ABC’s concern regarding potential future harm- while understandable- does not establish sufficient proof that Mr. H has endangered the health or engaged in a pattern of conduct that is harmful to other residents or staff as required by law.

Accordingly, ABC may not discharge/involuntarily transfer Mr. H on that basis.

²⁴ See, e.g. *Alaska Railroad Co. v. Native Village of Eklutna*, 1142 P.3d 1192 (Alaska 2006); *Y.J. v. State*, 130 P.3d 954, 959 (Alaska App. 2006).

²⁵ *E.g. Ganz v. Alaska Airlines Inc.*, 963 P.2d 1019 (Alaska 1998).

²⁶ 42 C.F.R. § 483.1-480, Requirements for States and Long-Term Care Facilities; AS 47.33.005-990, Assisted Living Homes.

²⁷ See, e.g. *In the Matter of the Involuntary Transfer of J.S. by Hall*, *supra*.

²⁸ 42 U.S.C. § 1396r(b)(4)(A).

²⁹ AS 47.33.360(a)(2).

c. *Mr. H's conduct did violate the terms of his residential services contract, and there is no indication the violations were used as a pretext for his removal*

As indicated above, 42 C.F.R. § 483.15(c)(1)(i)(D) and AS 47.33.360(a)(2) are parts of comprehensive statutory schemes designed to protect a vulnerable population. The Alaska legislature has also recognized that the nursing facility must be able to retain some flexibility regarding internal discipline and financial responsibility, however. Thus, AS 47.33.360(a)(3) permits the facility to involuntarily transfer a resident for violation of the terms of the residential services contract.³⁰

Mr. H repeatedly violated the terms of his residential services contract by smoking marijuana on ABC property. He did so after he was warned and given numerous opportunities to change his behavior over an extended period. He was given an alternative to consume edible marijuana in his room if it was inconvenient for him to travel to the off-site marijuana smoking area: he chose not to accept that substitute. He was informed and understood the basis for the restriction regarding where marijuana could be smoked, i.e. that he jeopardized the housing for more than 100 people should federal enforcement authorities become aware that ABC was in non-compliance with federal law regarding marijuana on licensed premises.

Mr. H was also well aware that discharge/involuntary transfer was a potential consequence for violation of the rule. The residential services agreement he signed upon his arrival and the annual policy and procedure updates he signed all contained the warning discharge could occur. A prior notice of discharge for the same reason had been rescinded. Additional violations occurred. The entirety of his history demonstrates Mr. H has engaged in a pattern of willful violation of his residential services agreement.

³⁰ Although this basis for involuntary transfer does not appear in the statute's federal counterpart this decision sees no irreconcilable conflict between the two. "There is a presumption against federal preemption of state law and the preemption doctrine 'enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' Additionally, '[w]here co-ordinate state and federal efforts exist within a complementary administrative framework, and in pursuit of a common purpose' as [is the circumstance here], 'the case for federal preemption becomes a less persuasive one.'"³⁰ Because Congress has not expressly declared an intent to preempt state law in this area nor is the federal law so complete that there is no room for state action, this decision concludes AS 47.33.360(3) may be enforced as written.

At least one other state permits involuntary transfer for failure to comply with the terms of the residential services contract contained in its statutory scheme. *See, Slepicka v. Illinois, Dept. of Public Health*, 21 N.E.3d 368 (Ill. 2014) (nursing home resident involuntarily transferred for failure to pay fees entitled to review, but only in correct forum).

It is important to be vigilant that discharge/involuntary transfer notices for violations of residential services contracts are not used as a sham or pretext to remove troublesome or less-profitable residents.³¹ No such concern exists here. There was no suggestion ABC acted from an improper motive. ABC made repeated attempts to modify Mr. H's conduct and permit him to stay. Ms. Rose and Mr. H expressed only positive attitudes toward one another.

ABC met its burden of proof that Mr. H violated the terms of his residential services contract. ABC also demonstrated it made unsuccessful attempts to properly address Mr. H's conduct through less drastic means. There is no indication the violations were used as a pretext for his removal. Accordingly, his involuntary transfer is upheld.

V. Conclusion

For the reasons contained here, the decision to involuntarily discharge Mr. H is upheld.

Dated August 27, 2019.

Carmen E. Clark
Administrative Law Judge

Adoption

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

Dated this 19th day of September, 2019

Jillian Gellings
Project Analyst

³¹ See, *State v. Neiswanger Management Services LLC*, 179 A.3d. 941 (Md. App. 2018) (state sought injunction relief against nursing facility using service contract violations as excuse to involuntarily remove more difficult and less profitable patients).