



endangerment to the health and safety” of other residents and employees based on her repeated violations of Woonsocket Health’s smoking policy. Id. at ¶¶ 6-7; see also Notice of Discharge, Appellant’s Ex. C. Ms. Trinko appealed the Notice of Discharge to the EOHHS, and an Administrative Hearing was held on May 26, 2015. (Compl. ¶¶ 8-10).

At the Administrative Hearing, the EOHHS considered issues relating to whether Woonsocket Health’s discharge of Ms. Trinko was proper and in accordance with the Medicaid Code of Administrative Rules (Medicaid Code), sections 0376.40.10-NF Patient Appeal Rights<sup>2</sup> and 0376.40.10.15-Pre-Transfer/Discharge Notice.<sup>3</sup> Representatives from Woonsocket Health argued that Ms. Trinko had been discharged for violating the facility’s smoking policy, which constituted a danger to the other residents and staff at the facility. (Compl.¶ 11). Conversely, Ms. Trinko argued, inter alia, that her discharge was improper because the allegation that she was an endangerment to the

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<sup>2</sup>Section 0376.40.10 of the Medicaid Code states in part: “[s]ection 1919 (e)(3) of the Social Security Act requires States to provide appeal hearings for all nursing facility residents who wish to challenge their transfers or discharges. By statute, the appeals process cannot be limited to only Medical Assistance eligible nursing facility residents. Therefore, DHS will conduct administrative hearings for any NF resident who wishes to appeal a transfer or discharge from the facility. . . .”

<sup>3</sup> Section 0376.40.10.15 of the Medicaid Code states in part: “[b]efore effecting a transfer or discharge of a resident, a nursing facility must:

- “Notify the resident (and, if known, an immediate family member or legal representative of the resident) of the transfer or discharge and of the reasons for the move; and,
- “Record the reasons in the resident’s clinical record (including any required documentation).

“The nursing facility must notify the resident by use of a PRE-TRANSFER or PRE-DISCHARGE NOTICE (DHS-100NF) at least thirty (30) days in advance of the resident’s transfer or discharge. At the time the patient receives the Pre-Transfer or Pre-Discharge Notice, s/he receives at the same time a NOTICE OF YOUR TRANSFER AND DISCHARGE RIGHTS (DHS-200NF) and a copy of REQUEST FOR A HEARING (DHS-121NF).”

health and safety of other residents was not sufficiently documented in her clinical record because it was devoid of a notation from her primary physician, which she argued was required by the Medicaid Code. Additionally, Ms. Trinko asserted that Woonsocket Health was actually attempting to discharge her for improperly reporting certain thefts that had occurred at the facility, as well as for other behavioral issues unrelated to smoking. Id. at ¶¶ 12-13.

On June 3, 2015, the EOHHS issued its decision (the Decision) against Ms. Trinko, concluding that she “. . . was issued a proper pre-transfer/discharge notice and has been in violation of the smoking regulations on numerous documented occasions. . . .” See Decision at 6. In reaching its conclusion, the EOHHS made the following six findings of fact:

- “1. The appellant was sent a letter dated March 9, 2015 informing her that in 30 days, she was to be discharged for endangerment to the health and safety of residents and employees because of continual violations of smoking policy.
- “2. The appellant filed a request for hearing received by the Agency on March 11, 2015.
- “3. The appellant still resides at the facility that issued the discharge notice.
- “4. A hearing was scheduled for February 24, 2015 and was rescheduled per the appellant’s request.
- “5. A hearing was scheduled for April 14, 2015 and was rescheduled as requested by appellant’s attorney.
- “6. The hearing took place on May 26, 2015.” Id. at 4.

The EOHHS additionally provided a discussion of the evidence in its Decision, which included, inter alia:

- Testimony from Woonsocket Health’s Administrator of Clinical Services, Denise Lacoste, and Director of Social Services, Pauline Mburbu, who both stated that Ms. Trinko had continuously violated the smoking rules despite the facility warning her and working with her, and thus it had been determined that she was a danger to the health and safety of other residents and employees. Therefore, Woonsocket Health believed it had no choice but to discharge Ms. Trinko. Id. at 2.
- Testimony from Ms. Trinko’s attorney stating that none of the smoking assessments that had been performed on Ms. Trinko by Woonsocket Health—including one done March 12, 2015, three days after she received her Notice of Discharge—indicated any safety issues. In fact, they all indicate that Ms. Trinko was able to smoke independently. Id. at 3; see also Compl. ¶ 38.
- Testimony from Ms. Trinko stating that she understood the smoking policy at Woonsocket Health, but believed she was actually being discharged because she called the police three times to report that someone was stealing from her. See Decision at 3.
- Testimony from a representative of the Alliance for Better Long Term Care, Valentine Cerbo, who stated that she was concerned about another facility taking Ms. Trinko due to her age, illnesses, and lack of family in Rhode Island. Id. at 4.

Ms. Trinko timely filed the present appeal of the EOHHS’ Decision on July 1, 2015. The EOHHS and Woonsocket Health each filed memoranda in opposition to Ms. Trinko’s Complaint.

## II

### Standard of Review

The Superior Court’s review of an agency appeal is governed by § 42-35-15. Section 42-35-15(a) reads in part that “[a]ny person . . . who has exhausted all administrative remedies available to him or her within the agency, and who is aggrieved by a final order in a contested case is entitled to judicial review under this chapter.” Additionally, § 42-35-15(g) provides:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant

have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

"(1) In violation of constitutional or statutory provisions;

"(2) In excess of the statutory authority of the agency;

"(3) Made upon unlawful procedure;

"(4) Affected by other error or law;

"(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

"(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 42-35-15(g).

The Superior Court “sits as an appellate court with a limited scope of review” when reviewing decisions by administrative agencies such as the EOHHS. Mine Safety Appliances Co. v. Berry, 620 A.2d 1255, 1259 (R.I. 1993). “[T]he Superior Court may not, on questions of fact, substitute its judgment for that of the agency whose action is under review. . . even in a case in which the court might be inclined to view the evidence differently and draw inferences different from those of the agency.” Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000) (internal citations omitted). Indeed, standing in its appellate role, this Court is “limited to an examination of the record to determine whether ‘some’ or ‘any’ legally competent evidence exists to support” the agency decision. Mine Safety Appliances Co., 620 A.2d at 1259 (citing Sartor v. Coastal Res. Mgmt. Council, 542 A.2d 1077, 1082-83 (R.I. 1988)); see also § 42-35-15(f) (stating in part that “[t]he review shall be conducted by the court without a jury and shall be confined to the record”); Arnold v. R.I. Dep’t of Labor and Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003) (holding that legally competent evidence is

“relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance”) (internal citations omitted). Accordingly, this Court may not reverse the EOHHS’ Decision unless it is “totally devoid of competent evidentiary support in the record.” Bunch v. Bd. of Review, R.I. Dep’t of Emp’t & Training, 690 A.2d 335, 337 (R.I. 1997).

### III

#### Analysis

On appeal, Ms. Trinko advances three arguments in her opposition to the EOHHS’ Decision. First, Ms. Trinko contends that Woonsocket Health provided no records from her physician indicating that she was a continuous violator of the smoking policy, or that her behavior was dangerous to other patients, which she asserts is required by the Medicaid Code. Secondly, Ms. Trinko argues that even if such documentation from her physician was not required, her discharge was nevertheless improper due to the vagueness of the underlying smoking policy and the arbitrariness of its enforcement. Lastly, Ms. Trinko asserts that her discharge was not based on violations of the smoking policy, but rather stemmed from other behavioral issues.<sup>4</sup>

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<sup>4</sup> Ms. Trinko additionally contends that in its response to her appeal, Woonsocket Health submitted and relied on evidence that was not part of the Administrative Hearing Record. However, at a status conference on February 26, 2016, the parties agreed that no evidence outside of the Administrative Hearing Record shall be considered, and an Order stipulating to this agreement was issued by the Court on the same day. Therefore, the Court need not address this issue and will confine its review to the Administrative Hearing Record.

## A

### **The Lack of a Notation from Ms. Trinko's Physician in her Clinical Record does not Make the EOHHS' Decision Clearly Erroneous or in Violation of Statutory Law**

As a threshold matter, Ms. Trinko contends that the EOHHS' Decision upholding her discharge is clearly erroneous and in violation of statutory provisions—particularly the Medicaid Code—based on the absence of her physician's notation in her clinical record stating the basis for her discharge. According to Ms. Trinko, § 0376.40.10.05 of the Medicaid Code requires that a nursing home resident fall into one of three categories (discussed *infra*) before a discharge is permitted. Assuming the resident does fall into one of the three designated categories, both §§ 0376.40.10.05 and 0376.40.10.10 of the Medicaid Code require the resident's physician to document the resident's clinical record with the reason for discharge. Ms. Trinko argues that only after these initial steps are fulfilled can the final step be taken, which is providing the resident with adequate notice of the discharge and its basis under § 0376.40.10.15.

In this case, Ms. Trinko alleges that since the Notice of Discharge states that she was being discharged, at least in part, for health reasons related to her alleged violations of the smoking policy, her physician was required to document the basis for her discharge in her clinical record pursuant to § 0376.40.10.10. Ms. Trinko asserts that a review of the Administrative Hearing Record reveals no evidence showing any documentation submitted by her primary physician, Dr. Jibrán Khan. Further, Ms. Trinko notes that Woonsocket Health's representative indicated through testimony at the Administrative Hearing that no such evidence would be introduced. *See* Admin. Appeal Hr'g Tr. 4. Thus, Ms. Trinko argues that Woonsocket Health's discharge of her was in violation of the Medicaid Code.

Ms. Trinko's argument in this regard is misguided and overstates the requirements of the Medicaid Code. Initially, the Court notes that § 0376.40.10.05 of the Medicaid Code requires that the basis for discharging a nursing home resident be documented in the resident's clinical record by the resident's physician if:

- "The transfer or discharge is necessary to meet the resident's welfare and the resident's welfare cannot be met in the facility;
- "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;
- "The health of individuals in the facility would otherwise be endangered." Medicaid Code § 0376.40.10.05.

However, in a subsequent paragraph, § 0376.40.10.05 separately states that "[t]he basis of the transfer or discharge must be documented in the resident's clinical record if the safety of individuals in the facility is endangered." Accordingly, there is no requirement that Ms. Trinko's physician document the reason for her discharge in her clinical record if it is based on the fact that she is endangering the safety of other individuals at Woonsocket Health.

Considering this, Ms. Trinko is correct that a discharge based solely on her endangering the health of other individuals at Woonsocket Health would require a notation in her clinical record from her physician stating how her actions constituted a health risk. However, such a notation is not necessary if her discharge was based on safety reasons, as § 0376.40.10.05 simply requires that such a basis be documented in the resident's clinical record, but not necessarily by the resident's physician. Here, Ms. Trinko's clinical record is replete with references that her smoking jeopardized the safety of other residents, despite several attempts by staff to curb this behavior. See Clinical Notes, Admin. R. Ex. 9 at 1-6, 10-11, 13-15, 17, 18-20, 26-28.

Consequently, even considering the lack of notation from Ms. Trinko's physician in her clinical record, the EOHHS was nevertheless provided with competent evidence to conclude that Ms. Trinko's discharge was proper under the Medicaid Code because she posed a safety risk to other residents at Woonsocket Health. As such, the Decision of the EOHHS was not clearly erroneous or in violation of statutory law, as competent evidence existed on the Administrative Hearing Record for the EOHHS to find that Ms. Trinko's discharge was based on the safety risk she posed to other residents and staff at Woonsocket Health. See Mine Safety Appliances Co., 620 A.2d at 1259. Therefore, Ms. Trinko's argument that her discharge violates the Medicaid Code fails.

## **B**

### **Sufficient Evidence was Introduced into the Administrative Hearing Record to Support the EOHHS' Decision to Uphold Ms. Trinko's Discharge for Violating the Smoking Policy**

Ms. Trinko next argues that even if the Court determines that her discharge was not clearly erroneous or in violation of statutory law despite the lack of notation by her physician in her clinical record, it was nevertheless improper due to the vagueness of the smoking policy and its arbitrary enforcement. Ms. Trinko contends that she was discharged in part for buying and selling cigarettes to other residents, which is not prohibited by the smoking policy. Additionally, Ms. Trinko argues that no instances of her smoking in specific prohibited areas were referenced at the Administrative Hearing, and further, that she was not prohibited from possessing cigarettes and lighters until a smoking assessment was performed on her by Woonsocket Health *after* she received her Notice of Discharge. Thus, Ms. Trinko contends that she should not be punished for such behavior, and that the Decision of the EOHHS should be overturned due to the lack of

evidence showing that she continuously violated the smoking policy or constituted a clear danger to other residents and staff.

Once again, Ms. Trinko's argument is misplaced. A review of the smoking policy indicates that Ms. Trinko is correct in her assertion that possessing, buying, and/or selling cigarettes is not necessarily a violation. See Smoking Policy, Appellant's Ex. E. However, the smoking policy does clearly state that residents are prohibited from smoking in the building and may, in fact, only smoke in designated areas. Id. at ¶¶ 2-3. As discussed supra, Ms. Trinko's clinical record—which was introduced into the Administrative Hearing Record—provides clear examples of several instances where Ms. Trinko violated the smoking policy by smoking in prohibited areas. See Clinical Notes, Admin. R. Ex. 9 at 5-6, 10, 13-15, 17, 21 (examples include smoking indoors near the entrance of the facility, smoking inside the facility's library, and smoking near open doors leading outside the facility; all prohibited areas). As such, it cannot be said that the Decision of the EOHHS was clearly erroneous or in violation of statutory provisions, as competent evidence exists on the Administrative Hearing Record to support its Decision to uphold Woonsocket Health's decision to discharge Ms. Trinko for her repeated violations of the smoking policy. Mine Safety Appliances Co., 620 A.2d at 1259.

## C

### **No Competent Evidence in the Administrative Hearing Record Exists Suggesting that Ms. Trinko was Discharged for Reasons Unrelated to her Violations of the Smoking Policy**

In her final argument, Ms. Trinko contends that the Decision of the EOHHS to uphold her discharge is clearly erroneous based on evidence indicating that Woonsocket Health was actually attempting to discharge her for reasons that have nothing to do with

her violating the smoking policy, or the resulting safety risk such violations created. Specifically, Ms. Trinko contends that a Behavior Contract developed in June of 2013—which lists only one prohibited behavior that relates to smoking out of eight discussed—demonstrates the actual behaviors she was being discharged for; none of which have anything to do with safety. See Behavior Contract, Appellant’s Ex. F. Additionally, Ms. Trinko argues that the only evidence introduced at the Administrative Hearing indicating that she was a safety risk was a psychiatric evaluation conducted on the same day the Behavior Contract was developed, though such risks or concerns resulting from the evaluation were not incorporated into the Behavior Contract. Considering this, and considering her testimony at the Administrative Hearing—where she stated that she had called the police on three separate occasions because her property was stolen, and that she believed these actions were what actually caused her to be discharged—Ms. Trinko asserts that the Decision of the EOHHS was clearly erroneous, as the evidence provided does not support the contention that she was being discharged because she posed a safety resulting from her continuous violations of the smoking policy.

This Court disagrees. A review of the Decision shows that the EOHHS considered Ms. Trinko’s concerns, but rejected her allegations based on the lack of evidence provided to support them. Rather, the EOHHS considered all of the evidence presented and found that Woonsocket Health had demonstrated that Ms. Trinko was continuously in violation of its smoking regulations—which posed a safety risk to other residents and staff—and denied her appeal on that basis. See Decision at 5-6. Thus, Ms. Trinko’s argument that she was discharged for other behavior issues unrelated to violating the smoking policy and posing a safety risk is not persuasive. As discussed

supra, there is ample evidence in the Administrative Hearing Record to show that Ms. Trinko indeed repeatedly violated the policy, and thus posed a safety risk to other residents and staff. When competent evidence exists in the record to support an agency's decision, as it does here, this Court will not disturb that decision. See Johnston Ambulatory Surgical Assocs., Ltd., 755 A.2d at 805; Mine Safety Appliances Co., 620 A.2d at 1259. Accordingly, Ms. Trinko's appeal must fail, and the Decision of the EOHHS upholding her discharge must be affirmed.

#### IV

#### Conclusion

Upon review of the record before it, this Court finds that the Decision of the EOHHS was supported by competent evidence in the Administrative Hearing Record. Woonsocket Health provided sufficient evidence to demonstrate that Ms. Trinko's repeated violations of the facility's smoking policy posed a safety risk to other residents and staff at the facility, and she was issued a proper Notice of Discharge stating as such. Thus, the Decision was not clearly erroneous or in violation of statutory provisions as Ms. Trinko has argued. Accordingly, the Decision of the EOHHS is affirmed. Counsel for the Appellees shall prepare the appropriate order.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** **Trinko v. Executive Office of Health and Human Services, et al.**

**CASE NO:** **PC 15-2838**

**COURT:** **Providence County Superior Court**

**DATE DECISION FILED:** **April 20, 2016**

**JUSTICE/MAGISTRATE:** **Van Couyghen, J.**

**ATTORNEYS:**

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