



FOR IMMEDIATE RELEASE

HUMAN RIGHTS AUTHORITY - PEORIA REGION
REPORT OF FINDINGS

Case # 12-090-9014
Sharon Healthcare Facilities

INTRODUCTION

The Human Rights Authority (HRA) opened an investigation after receiving complaints of possible rights violations at Sharon Healthcare Facilities in Peoria. The allegations were as follows:

- 1. Inadequate safety measures with regard to smoking policy and procedure.**
- 2. Inappropriate use of restrictions related to smoking policy.**
- 3. Inappropriate discharge related to smoking policy.**

If found substantiated, the allegations would violate the Centers for Medicare and Medicaid Services regulations (42 CFR 483) and The Life Safety Code 19.7.4.

The HRA spoke to the staff at the Sharon Healthcare Elms facility and discovered that all the Sharon facilities have different smoking policies. Facilities incorporated within Sharon Healthcare are the Sharon Elms, Sharon Woods, Sharon Pines, and Sharon Willows. Sharon Healthcare Elms is a skilled Medicare facility with more medical patients with medical needs than the other facilities. The facility has 98 beds and, at the time of the site visit, had 93 residents in the beds. The facility employs 100 staff members including registered nurses (RNs), licensed practical nurses (LPNs), and certified nursing assistants (CNAs) and serves individuals from the state of Illinois as well as some residents from other states.

COMPLAINT STATEMENT

The complaint alleges that the facility enacted inadequate safety measures when the facility made policy that those who do not follow safety procedures when smoking could be discharged or forfeit smoking privileges. The complaint also alleges that the facility practices the inappropriate use of restrictions when patients were told smoking privileges could be forfeited for not following safety procedures when smoking. Finally the complaint alleges an inappropriate discharge policy when patients are told they could be discharged for not following safety measures when smoking.

FINDINGS

Interview with staff (5/15/2012)

The HRA started the investigation by interviewing Sharon Healthcare facility staff, specifically staff working at the Sharon Healthcare Elms facility. The staff clarified that each Sharon Healthcare facility has its own smoking policy. The policy that was brought to the HRA's attention was one from the Elms facility. Staff said that policy for the Elms was reviewed and redesigned according to the new Centers for Medicare and Medicaid Services (CMS) regulations. The facility staff stated that it was their understanding that CMS surveyors were going to review smoking regulations very closely. When the facility staff heard this, they redesigned the smoking policy so that it met the interpretive guidelines for the regulations. The staff explained that all policies are up for evaluation and change as needed. The facility received a CMS memo regarding smoking and a copy of a policy to review and then they revised their policy with the help of consultants. The facility reviewed its policy and made the adjustments they thought were needed to be in compliance.

The staff explained that all the Sharon Healthcare facilities are a little different. The Sharon Elms facility is more of a skilled medical facility. The Sharon Woods facility deals more with mental health issues and has a younger population. The Sharon Pines facility has been changing to a traumatic brain injury facility. The Sharon Willows facility has geriatric patients and patients with mental health issues. Each Sharon facility examined their populations and tried to make their smoking policy comply with CMS requirements. All facilities felt that the number one issue involved in the policy was safety. The staff explained that the Sharon Elms facility bought a smoking assessment from a company named Medpass and the form is called the Safe Smoking evaluation. They stated that based on the assessment, they decide if the residents are independent smokers or need supervision while smoking. The staff adds the assessment results to the resident's care plan. The facility also uses information that comes with the resident from the hospital as part of their assessment. The patients usually have occupational therapy assessments that deal with cognitive issues and this adds to the smoking assessment. The staff stated that cognitive patterns, physical ability, and hearing are other aspects that are covered in the assessment. Observation and questions are also part of the smoking assessment.

Each facility has its own assessment tool that is used. The staff stated that if residents are independent or supervised smokers, they review the smoking rules with them to assure they understand. The staff said that if an independent smoker violates the rules, they discuss the violation with them. For the most part, the people who are independent smokers do not have issues. The staff stated that there is one smoking area outside the facility so an independent smoker could give a cigarette to someone who needs supervision and they may burn themselves or catch themselves on fire. Providing cigarettes to people who need supervision is the biggest issue that the facility faces regarding smoking. Residents will sell or give out cigarettes to individuals who need supervision. Stealing lighters, pipes, and tobacco are other issues at the facility. Sometimes a resident will attempt to smoke in the restroom. When an independent smoker breaks the rules, staff discuss the situation with him/her and then observe individual smoking practices. If residents break the rules again, the facility may supervise them for a certain time period, and if they follow the rules while under supervision, they can become independent again. They have had people that have gone from independent to supervised but they have never restricted someone from smoking.

The staff explained that supervised smoking means that a staff member goes outside with the resident, gives them the cigarette, lights the cigarette and then observes and assures that they are smoking safely. Independent smokers can smoke whenever, but those who need supervision can smoke outside every two hours starting at 7am. When the temperature is below 20, residents are not allowed to go outside to smoke.

Staff explained that if an independent smoker becomes supervised and continues to not follow the rules, he/she will become supervised smokers forever. When the policy was revised, they explained the policy to residents and residents signed a contract. The staff said that years ago there was a resident in the building who smoked while using oxygen. After the facility exhausted all efforts to end the unsafe behavior, they ended up discharging the resident. Staff said that when the resident returned home, he continued to smoke with the oxygen and there was an accident. Eventually the resident tried to return to the facility but he was not allowed. This resident was switched from independent to supervised smoking while at the facility. Staff said that in the smoking area, there is a fire extinguisher, fire apron, as well as other items needed in case of an emergency.

If there is a change in supervision levels, and residents are not allowed to handle their own cigarettes, the residents can obtain cigarettes from other means, like family members. If family or others provide the residents with cigarettes the facility does not know residents have them and it can be dangerous. Staff watch the residents being given cigarettes and sometimes other residents will watch for this also and alert staff. Staff stated that care plans are reviewed quarterly or if a need comes up. The goal for smoking is that residents follow the smoking rules and practice safe smoking habits. If someone is moved from independent to supervised smoking, they usually observe them for a couple of weeks before they make the decision to move them back to unsupervised smoking. Staff said that they have staff meetings daily and make decisions such as resident smoking supervision at the meetings.

The staff explained that the policy says residents will be educated and counseled about their inappropriate behavior, so staff feel as though the intent is to work with the resident, but if that does not work, the facility will consider other measures. The facility staff explained that they feel that they are responsible for the safety and well-being of the residents. Even though they exhibit the ability to smoke safely, they still have a responsibility to watch them and make sure they are smoking safely. They explained that those who access the community independently can smoke while walking up and down the street or go out on the patio alone and possibly not be seen. Even if that occurs, there are usually staff around. Regardless, there is a chance for people to smoke without being seen.

The staff explained that the policy was not approved by CMS. The policy was guided by the CMS letter that the facility received and the facility's own guidelines. The staff said the Illinois Department of Public Health (IDPH) and the facility attorney have seen the policy. The policy was reviewed by their attorney before it was initiated. Previously the facility had a smoking policy and resident assessments but not as formal as they are now. The staff also explained that they did not always have the fire extinguisher and some of the other safety measures in place. Staff explained that they updated parts of the policy to make it work for their

facility because in some cases they thought it would be too restrictive for some residents at the facility. The staff said that they took the population, problems in the past, guidance, and surveys into consideration when writing the policy. The staff said they do not have a Human Rights Committee that reviews policy.

The staff stated that they have never taken smoking privileges away from a resident and taking the privilege away has never been used as a punishment. The cigarettes are purchased with resident's own money. The staff said they realize it's a major part of resident's lives. They stated that, for the most part, if the residents are changed from unsupervised to supervised smoking, it usually takes care of any problems. Staff said that 15 people are supervised smokers and 7 are independent smokers. The staff also explained that the average age of residents at the Elms is 65.

The staff stated that the residents are not overwhelmed or upset about the policy update. Residents realize there are rules and there is a safety process and the residents understand that safety is the number one concern. The staff explained that the policy is simple, to the point, and direct. They stated that they are not making it sound indecisive because they want the residents to understand how serious the rules are and that there are consequences to breaking them. The residents do not complain about the smoking policy and they have not heard any complaints from guardians or family members. Staff also explained that it does not matter if the residents do not sign and return the policy, it is still in effect. The staff explained that the consumer's care plan involves anything safety related and the supervision is included in that plan, not in a separate safety plan.

The facility discharges usually involve a resident being a danger to him/herself or others, non-payment, or other criteria based on Public Health rules. If they felt a resident needed discharge the facility staff would talk to their attorney, fill out a notice of discharge, and present it to the patient. The staff would send notice to everyone needed, including an Ombudsman. The Ombudsman would then talk to the patient about the discharge. If the patient appeals, there is a hearing. The IDPH attends the hearing and they make a decision on the discharge. The staff stated that involuntary discharge does not occur often, and if there is a discharge, the main reason is non-payment. They have had patients with doctors orders not to smoke but they do not restrict smoking for behavioral reasons.

FINDINGS (Including record review, mandates, and conclusion)

The HRA reviewed policy and records pertinent to the complaints in this case. Because of the relation of the complaints, the HRA will first review the documents, and then provide the individual conclusions for all the complaints and any recommendations/suggestions in relation to the findings at the end of the document.

The HRA was provided records for four residents for whom they had consent. In reviewing all four of the patients' records, the HRA saw that all residents had completed smoking assessments. Three of the residents' assessments stated that they must be supervised while smoking and the fourth resident did not need supervision while smoking. All four resident care plans addressed smoking and matched the assessment in stating the level of supervision for the patients. All residents reviewed were residents at the Sharon Elms facility.

The HRA reviewed the smoking policies for all four facilities associated with Sharon Healthcare. The first smoking policy reviewed was for Sharon Elms, which was the policy that was initially cited in this complaint. The three page policy objective states that its purpose is "To provide a safe and healthy living environment with respect for the health and well-being needs of each resident, staff member and visitor. It is also the objective of this policy to communicate to each resident that they are responsible for following each rule and on-going compliance with this policy." In the guidelines, the policy states that smokers will be evaluated to determine if they require supervision, which we see from the documents above has occurred. The guidelines also state "Individuals who are non-compliant, potentially dangerous, exercise poor judgement and show a lack of concern for the welfare of others will be counseled accordingly. The facility maintains the right to limit and restrict access to smoking products, materials and lighters for persons deemed unsafe. **Smoking privileges will be revoked if there is a pattern of persistent, hazardous behavior.**" There are further guidelines described in the policy such as smoking is prohibited during meals, oxygen use is prohibited in smoking areas, and residents cannot barter, sell, share, trade or give away smoking materials. The policy proceeds to state that "All persons interested in retaining smoking privileges must follow the guidelines set forth in this policy." Another section of the policy states "**The following behaviors and/or conditions will jeopardize and cause revocation of the person's independent privileges**" such as smoking in non-designated areas, inconsiderate behaviors such as blowing smoke at others, and self-harm behaviors. Another section of the smoking policy titled "Consequences of non-compliance" reads "Residents will be instructed, educated and counseled about their inappropriate behavior. Safe, appropriate behavior will be stressed. Documentation will be entered in the record accordingly." The section proceeds to describe the action of residents losing independent privileges. The section also reads "Behavior determined to be potentially harmful may jeopardize the person's ability to remain in the health care facility. The facility may exercise the right to involuntarily discharge such individuals," and "The facility recognizes the potential harm that may result from careless, hazardous smoking and has implemented this policy to maintain a safe living environment. Violation of the policy will be taken seriously and appropriate action will be forthcoming."

In reviewing the facility Resident Behavior Contract, which is part of the smoking policy that the resident signs, the document reads "I understand that I must follow each and every rule governing smoking and should I violate even one rule, even one time, I am aware that the facility may initiate discharge proceedings and I will not be allowed to live in this building. **I ACKNOWLEDGE THAT SMOKING IS A PRIVILEGE AND NOT A RIGHT AND THE FACILITY MAY SUSPEND MY PRIVILEGE AT ANY TIME.**" The contract also reads "**I KNOW THAT CARELESS SMOKING WILL CAUSE MY PRIVILEGES TO BE SUSPENDED.**" Also, relating to restriction or discharge, the contract reads "I fully recognize that the consequences established for non-compliance with this contract will be at the discretion of the Administrator, Physician, and Interdisciplinary Team Members, and ARE VERY LIKELY TO RESULT IN THE FORFEITURE OF SMOKING PRIVILEGES AND/OR INVOLUNTARY DISCHARGE FROM THIS HEALTHCARE FACILITY." The policy does not differentiate between supervised or unsupervised smokers other than the statement that smokers will be evaluated and non-compliance may result in loss of independent privileges. The policy indicates that both supervised and independent smokers could be restricted or discharged

from the facility. The overall feel of the document seems to focus on restriction and discharge of the residents and residents taking responsibility for their own safety versus how the facility is going to assure resident safety.

Another section of the behavior contract reads "I agree to allow staff to check/search my room for contraband (i.e. such as hidden cigarettes, lighters, matches) at staff discretion."

In reviewing the facility's previous smoking policy the HRA saw that the policy did not focus on discharge or restriction of resident smoking and there was no statement indicating that either could occur. There is a section in the old policy that states new admissions must smoke outside of the facility and another passage that reads "Staff retains the right to change an individual's smoking arrangements if the individual does not follow the above stated rules whenever necessary to protect safety and welfare of all residents."

The HRA reviewed the memo (dated November 10th, 2011) that was discussed in the interview portion of this report that was sent from the CMS. The memo begins by making the statement that CMS is revisiting smoking safety in long term care facilities because of a recent resident death related to smoking. The incident was described as a resident was smoking outside of a facility without supervision and accidentally ignited her clothing. Staff attempted to reach the resident but could not and the resident died. The resident was not wearing a smoking apron and her wheelchair was blocking the fire extinguisher. The resident had been deemed appropriate to smoke with no supervision. The memo reads "Survey agencies must do all that they can to remind and encourage nursing homes with residents who smoke to take reasonable precautions to ensure the safety of residents to the maximum extent possible."

The memo proceeds to read that the situation caused CMS to review current regulations and surveyor guidance (42 CFR 483.25) and the guidance describes appropriate smoking precautions such as smoking in designated areas, and supervising residents whose assessment plans and care plans indicate they need supervision.

The memo reads "The facility's assessment of each smoking resident's capabilities and deficits determines whether or not supervision is required. A resident deemed incapable of independent smoking should have this information documented in the care plan or other designated location, so that staff know the correct procedure for each individual. This information must be kept current and updated as needed in accordance with any variance in the individual's capabilities and needs." The memo also explains that facility policies must describe methods by which residents are deemed safe to smoke without supervision, what these methods may include, that the frequency of reassessment and that it should be documented, and that surveyors may request to see the documentation of the assessment if it resulted in the resident being an unsupervised smoker. The memo states "Facilities should err on the side of caution and provide staff, family or volunteer supervision when unsure of whether or not the resident is safe to smoke unsupervised." The memo covers the prohibited use of oxygen in smoking areas, the obligation of the facility to ensure safety of designated smoking areas, and e-cigarettes. There is also a reminder that a change in a facility's policy to prohibit smoking does not affect current residents who smoke. Overall, the document does not reference restriction or discharge of

residents for not abiding by smoking rules but does emphasize a facility's obligation to provide for the resident's safety in smoking situations.

The HRA reviewed the smoking policy and procedure for Sharon Healthcare Woods. The policy reads "Those residents who follow all smoking rules will be allowed to keep and carry their own smoking materials. If one is found to be breaking any rule, the violations will be noted in the communication book. IDT members will then counsel the resident and stress appropriate alternatives. Corresponding documentation will be entered into the medical record." The policy proceeds to read "Should a second offense occur within a thirty (30) day period, the resident will be enrolled in the Smoking Safety class. However, such enrollment may be avoided if the violation is of a lesser nature, i.e. trading a candy bar for a cigarette on only one occasion within the aforementioned period ... Should rule violations continue, information received by the IDT via the communication book and/or morning report will result in the resident's placement within the facility's Smoking Program." In another document, smoking programs are titled "Pack-a-day" programs and "Managed Smoking" which are for residents who require smoking assistance. There is no mention of restriction or discharge within the policy but, in the Smoking Behavior Contract, a section reads "I will smoke carefully and make sure I do not burn my person, my clothing, or any other individual. I know that careless smoking will cause my privileges to be suspended" and "I acknowledge that smoking is a privilege and not a right and the facility may curtail or suspend my privilege at any time." The policy also reads "I agree to allow staff to check/search my room for contraband (i.e., hidden cigarettes, lighters, matches) at staff discretion." There is another document titled Smoking-Problematic behaviors which defines supervised smoking and one-to-one smoking at the facility. In the smoking restrictions section of that document, it reads that, after reviewing rule violations "A decision as to specific sanction" will be made by the resident's IDT. That discussion will appear in the treatment plan and record and specific restrictions decided upon will be communicated to the Receptionist. The restrictions are described within the plan and they deal with limiting cigarettes and attending Smoking Safety courses. The final paragraph of the document reads "If smoking violations persist despite imposition of the aforementioned restrictions, smoking privileges may be suspended. While recognizing that many issues may pose safety hazards, some clearly pose greater threat than others. If such serious threat is perceived, discharge proceedings may be initiated." The HRA feels as though the smoking behavior contract, which is to be signed by the resident, is in conflict with the rest of the smoking documentation in the fact that it states privileges could be suspended while other documents only mention this as a last resort.

In reviewing the tobacco use policy for the Sharon Healthcare Willows, the HRA saw no mention of discharge or revoking smoking privileges for violating smoking rules or regulations. The policy illustrates three smoking levels, one being full independent, one being managed independent, and the third level which is supervised. There is a "Six Cigarettes per Day" program for those who continue to violate smoking rules which states that if a resident continues to violate procedures despite being in the "Managed Smoking" program, the individual will be placed on six cigarettes per day for 30 days, but this could continue if violations persist. The restrictions section of the documentation also states that if a resident is on level one or two and has demonstrated unsafe smoking practices, they will be placed on level three for 14 days and then reassessed. The resident's community access pass may also be reviewed and changed if it

contributed to the smoking violation. The Sharon Healthcare Willows policy makes no mention of discharge or revoking smoking privileges.

The Sharon Healthcare Pines smoking policy illustrates the procedure for smoking which includes monitoring smoking during certain times, being dispensed cigarettes by the staff, and special permission to be permitted to smoke additional cigarettes at appointed times. In the facility smoking policy, there is a separate smoking policy for residents who carry their own cigarettes which reads "Understand that any violations of these agreements may result [in] loss of smoking privileges." Within the provided records there is a second procedure for residents who carry their own cigarettes, which is separate from the facility smoking policy, that reads "I understand violation of this agreement may mean I may no longer be able to carry my own cigarettes." The policy for residents who carry their own cigarettes seems to conflict between the smoking policy and the smoking policy for individuals who carry their own cigarettes. In the facilities smoking behavior contract it reads "As a responsible adult, I understand that failure to comply with the obligations of this contract will be dealt with accordingly. If I continue to disregard smoking safety regulations I am aware that the facility will remove my smoking materials and may place me on a money management/monetary control protocol to assist me in budgeting and regulating my smoking habit. I recognize that non-compliance will jeopardize my ability to remain at this health care residence."

Regarding discharge, the resident's rights document for the Sharon Healthcare Elms reads "You have a right to keep living in your facility unless your facility forces you to move because you are dangerous to yourself or others, for medical reasons, you have not paid or are late paying your bill or your facility closes."

The memo written by CMS mentions specific federal regulations regarding smoking and safety in facilities. The first mentioned citation is 42 CFR 483.25(h) which reads "(h) Accidents. The facility must ensure that-- (1) The resident environment remains as free of accident hazards as is possible; and (2) Each resident receives adequate supervision and assistance devices to prevent accidents." In the State Operations Manual, Guidance for Surveyors for Long Term Care Facilities, regarding this regulation it reads "Some facilities permit residents to smoke tobacco products. In these facilities, assessment of the resident's capabilities and deficits determines whether or not supervision is required. If the facility identifies that the resident needs supervision for smoking, the facility includes this information in the resident's plan of care, and reviews and revises the plan periodically as needed. The facility may designate certain areas for resident smoking. The facility must ensure precautions are taken for the resident's individual safety, as well as the safety of others in the facility. Such precautions may include smoking only in designated areas, supervising residents whose assessment and plans of care indicate a need for supervised smoking, and limiting the accessibility of matches and lighters by residents who need supervision when smoking. Smoking by residents when oxygen is in use is prohibited, and any smoking by others near flammable substances is also problematic. Additional measures may include informing all visitors of smoking policies and hazards." The manual also reads that guidance concerning resident smoking regulations can be found in the National Fire Protection Association 101, the Life Safety Code. In accordance with the CMS regulations (42 CFR 483.70) "(i) The facility must meet the applicable provisions of the 2000 edition of the Life Safety Code of the National Fire Protection Association." In accordance with the Life Safety

Code 19.7.4 "Smoking regulations shall be adopted and shall include not less than the following provisions ... (3) Smoking by patients classified as not responsible shall be prohibited. (4) The requirement of 19.7.4(3) shall not apply where the patient is under direct supervision." This passage was taken from the 2009 edition of the Code due to the HRA not being able to acquire a 2000 edition. In the Life Safety Code Handbook, 2009 edition, which consist of guidance regarding the Codes, it reads "The most rigid discipline with regard to prohibition of smoking might not be nearly as effective in reducing incipient fires from surreptitious smoking as the open recognition of smoking, with provision of suitable facilities for smoking. Proper education and training of the staff and attendants in the ordinary fire hazards and their abatement is unquestionably essential. The problem is a broad one, varying with different types and arrangements of buildings; the effectiveness of rules of procedure, which need to be flexible, depends in large part on the management."

The CMS guidance manual also refers to federal regulations (42 CFR 483.15(b) for information about a facility's desire to be smoke free. That passage reads "(b) Self-determination and participation. The resident has the right to--(1) Choose activities, schedules, and health care consistent with his or her interests, assessments, and plans of care; (2) Interact with members of the community both inside and outside the facility; and (3) Make choices about aspects of his or her life in the facility that are significant to the resident." The CMS guidance manual refers to this section as "The intent of this requirement is to specify that the facility must create an environment that is respectful of the right of each resident to exercise his or her autonomy regarding what the resident considers to be important facets of his or her life. This includes actively seeking information from the resident regarding significant interests and preferences in order to provide necessary assistance to help residents fulfill their choices over aspects of their lives in the facility."

The CMS regulations regarding discharge read "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" (42 CFR 483.12).

The CMS regulations also state "(e) Privacy and confidentiality. The resident has the right to personal privacy and confidentiality of his or her personal and clinical records. (1) Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident" (42 CFR 483.10).

Complaint Conclusions

In reviewing the evidence provided by the facility and regulations for long-term care facilities, the HRA feels strongly that the smoking policy for the facilities are overly restrictive (with the exception of the Sharon Healthcare Willows facility) and in violation of regulations. In reading the CMS memo that was provided to the facility, the emphasis was not to discharge or

restrict residents but rather to enforce supervision of residents that may be in need of supervision but have not been assessed as such. Another emphasis is to properly ensure that residents are safe. The memo puts the bulk of the responsibility of the safety on the facility rather than the residents, while the facility policies seem to put an emphasis on residents being responsible for their own safety.

The HRA feels the smoking policies are institutionalized policies rather than the individualized safety practices that they are intended to be. With that being said, the HRA feels that outside of the written policy, the Sharon Elms has given the residents individual attention and this is made evident by the individual smoking assessments and resident smoking plans for supervision being added to each individual's care plan.

Because of their findings, the HRA has the following conclusions regarding the complaints:

Complaint #1 - Inadequate safety measures with regard to smoking policy and procedure.

The facility has shown through its actions with care plans and assessments that the residents safety is being taken into consideration, but because the facility smoking polices, especially the Elms smoking policy, is not individualized and seems to contradict CMS regulations and the Life Safety Code, the HRA finds this complaint **substantiated**. This substantiation does not apply to the Sharon Healthcare Willows policy.

Complaint #2 - Inappropriate use of restrictions related to smoking policy.

The HRA feels as though the CMS memo is requesting the facility to review residents to assure that the proper supervision is in place and to make the proper restrictions. Much like complaint #1, the HRA feels as though the policies, especially the Elms smoking policy, contradict CMS regulations and the Life Safety Code and finds this complaint **substantiated**. The substantiation does not apply to the Sharon Healthcare Willows policy.

Complaint #3 - Inappropriate discharge related to smoking policy.

The CMS regulations regarding discharge (42 CFR 483.12) states that a resident can be discharged for safety reasons but the Elms policy states that even one violation may start discharge proceedings and non-compliance with the smoking contract would "Very likely" end in forfeiting smoking privileges and discharge. Because of the extreme nature of the policy wording that contradicts the regulations, the HRA finds this complaint **substantiated**.

Because of the substantiated findings, the HRA makes the following **recommendation**:

- The HRA recommends that the facility update their smoking policies to comply with the standards expressed by the CMS regulations (42 CFR 483.25(h)) and Life Safety Code 19.7 as well as the memo distributed by CMS all of which place much of the safety responsibility in the hands of the facility and supervision of the residents within the facility and places less emphasis on residents being restricted or discharged from the

facility. The HRA does not intend for the policy to state that the resident has no accountability or that there should be no consequences for behavior regarding smoking.

The HRA also offers the following **suggestions**:

- CMS regulations state that, in accordance with 42 CFR 483.10 "The resident has the right to personal privacy and confidentiality of his or her personal and clinical records. (1) Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups ..." In reviewing the smoking policy for Sharon Healthcare Elms and Sharon Healthcare Woods, the smoking policy allows for the staff to check the patient's room for contraband. The HRA suggests that the facility review the policy and assure privacy rights protections in accordance with the federal regulations.
 - In reviewing the Sharon Healthcare Pines smoking policy and procedure, there is a section in that policy for residents who carry their own cigarettes which reads "Understand that any violations of these agreements may result loss of smoking privileges" but in a separate document titled the Smoking Policy and Procedure for Residents Who Carry their Own Cigarettes, the policy states "I understand violation of this agreement may mean I may no longer be able to carry my own cigarettes." There seems to be a conflict between the two policies which address the same resident group. The HRA suggests that the facility make the policy consistent so that the residents are not confused by the policy consequences.
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RESPONSE

Notice: The following page(s) contain the provider response. Due to technical requirements, some provider responses appear verbatim in retyped format.

REGIONAL HUMAN RIGHTS AUTHORITY

HRA CASE NO. 12-090-9014

SERVICE PROVIDER: Sharon Healthcare Facilities

Pursuant to Section 23 of the Guardianship and Advocacy Act (20 ILCS 3955/1 *et seq.*), we have received the Human Rights Authority report of findings.

IMPORTANT NOTE

Human Rights Authority reports may be made a part of the public record. Reports voted public, along with any response you have provided and indicated you wish to be included in a public document will be posted on the Illinois Guardianship and Advocacy Commission Web Site. (Due to technical requirements, your response may be in a verbatim retyped format.) Reports are also provided to complainants and may be forwarded to regulatory agencies for their review.

We ask that the following action be taken:

We request that our response to any recommendation/s, plus any comments and/or objections be included as part of the public record.

We do not wish to include our response in the public record.

No response is included.


Sharon Health Care Facilities

NAME

Richard Duros, C.O.O.

TITLE

August 3, 2012

DATE

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August 3, 2012

Certified Mail
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Human Rights Authority
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401 Main Street
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Peoria, Illinois 61602

Re: Sharon Health Care Facilities
HRA Case No. 12-090-9014

Gentlemen and Ladies,

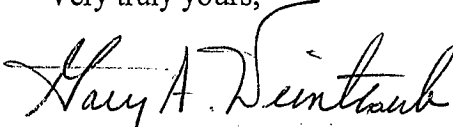
I represent the Sharon Health Care Facilities. On July 23, 2012, the Peoria Regional Office of the Human Rights Authority issued a "Report of Findings" in the above matter. In accordance with Section 23 of the Guardianship and Advocacy Act [20 ILCS 3955/, *et seq.*], the "Response and Objections" of the Facilities is herewith submitted.

In the event that the Authority decides to make the Report or any of the findings contained therein a part of the public record, the Facilities respectfully request that their Response and Objections also be made part of the public record.

Should anything further be required in connection with this matter, please so advise.

Thank you for your assistance.

Very truly yours,


Gary A. Weintraub

GAW/g
encl.

PEORIA REGIONAL HUMAN RIGHTS AUTHORITY

HRA CASE # 12-090-9014

RESPONSE AND OBJECTIONS OF
SHARON HEALTH CARE FACILITIES

The Sharon Health Care Facilities [the "Facilities"] respectfully submit that the HRA's conclusion that the Facilities' smoking policies somehow infringe on the "right" of residents to smoke (which is a privilege, and not a right, in the first place) is factually and legally incorrect. Accordingly, the Facilities disagree with and object to the Report of Findings issued in the above matter on or about July 23, 2012 ["Report"], and the conclusions reached therein.

As a threshold matter, it should be noted that:

1. the complaint does not allege or relate to any particular incident in which a resident was allegedly treated unfairly; and
2. there is no disagreement that individualized assessments of smoking safety/level of supervision required are prepared by the Facilities for all residents who smoke. Indeed, the Report confirms this. [Report, at 4 ("... all residents (in the sample whose records were reviewed) had completed smoking assessments"); Report, at 9-10 ("... Sharon Elms has given the residents individual attention and this is made evident by the individual smoking assessments and resident smoking plans for supervision being added to each individual's care plan").]

Rather, the complaint relates solely to the form of the Facilities'¹ smoking policies (which are modeled in large part on forms recommended by the federal government). The form(s) of the Facilities' policies are alleged to be improper in three regards [Report, at 1; introductory statement of allegations and "Complaint Statement"]:

1. "Inadequate safety measures with regard to smoking policy and procedure": "The complaint alleges that the facility enacted inadequate safety measures when the facility made policy that those who do not follow safety procedures when smoking could be discharged or forfeit smoking privileges."

¹ There are four facilities (Sharon Elms, Sharon Pines, Sharon Willows, and Sharon Woods) located in a complex in Peoria. The smoking policies are different based on the different resident populations and levels of care at the Facilities.

2. “Inappropriate use of restrictions related to smoking policy”: “The complaint also alleges that the facility practices the inappropriate use of restrictions when patients were told smoking privileges could be forfeited for not following safety procedures when smoking.”
3. “Inappropriate discharge relating to smoking policy”: “Finally the complaint alleges an inappropriate discharge policy when patients were told they could be discharged for not following safety measures when smoking.”

The Report concludes that the Facilities’ smoking policies (except that of Sharon Willows) are “overly restrictive” [Report, at 9] and “... seem[] to contradict CMS regulations and the Life Safety Code” [Report, at 10].

As to CMS regulations, on November 10, 2011, the Centers for Medicare & Medicaid Services [“CMS”], a division of the U.S. Department of Health & Human Services, issued a memorandum regarding smoking safety in long-term care facilities [“CMS Memo”]. The CMS Memo addresses federal regulation 42 C.F.R. §483.25(h) [designated as Federal Tag F323], which requires facilities to ensure that the resident environment remains as free from accident hazards as is possible and that each resident receive adequate supervision to prevent accidents. Attached to the CMS Memo were, *inter alia*, suggested forms/guides of a “Facility Smoking Safety Policy” [pp. 1-3], a “Smoking Behavior Contract” [p. 6], and a “Resident Behavior Contract” [p. 7].

The CMS Memo and the supporting documents furnished by CMS make it clear that the HRA’s conclusion that the Facilities’ policies in some unspecified way “contradict” CMS’s regulations is simply wrong. The Report completely misreads the CMS Memo and ignores the materials attached to it when it says “[o]verall, the document [*i.e.*, the CMS Memo] does not reference restriction or discharge of residents for not abiding by smoking rules ...” [Report, at 6]. In fact, the CMS Memo and model forms explicitly address restricting smoking privileges and discharge, as more particularly discussed below. The Facilities’ policies are consistent with and based on – not contrary to – CMS’s memorandum and model forms:

Complaint #1: That the facility policies that provide that residents who do not follow safety procedures when smoking may be subject to discharge or may forfeit smoking privileges contradict CMS regulations.

Response: CMS’s suggested “Facility Smoking Safety Policy” provides [¶4] that “[s]moking privileges will be *revoked* if there is a pattern of persistent, hazardous behavior” (emphasis added). CMS’s suggested “Resident Behavior Contract” provides [1st par.] that “... smoking is a privilege and not a right and the facility may *suspend* [that] *privilege* at any time” (emphasis added).

CMS's suggested "Resident Behavior Contract" also provides [last sentence] that "non-compliance [with smoking rules is] *very likely* to result in *forfeiture of smoking privileges* and/or *involuntary discharge* from this healthcare facility" (emphasis added).

Complaint #2: That the facility policies that provide that smoking privileges may be forfeited for not following safety procedures when smoking is an "inappropriate use of restrictions."

Response: CMS's suggested "Facility Smoking Safety Policy" provides [¶4] that "[s]moking privileges will be *revoked* if there is a pattern of persistent, hazardous behavior" (emphasis added). CMS's suggested "Resident Behavior Contract" provides [1st par.] that "... smoking is a privilege and not a right and the facility may *suspend* [that] *privilege* at any time" (emphasis added).

CMS's suggested "Resident Behavior Contract" also provides [last sentence] that "non-compliance [with smoking rules is] *very likely* to result in *forfeiture of smoking privileges* and/or *involuntary discharge* from this healthcare facility" (emphasis added).

Complaint #3: That the facility policies that provide that residents may be discharged for not following safety measures when smoking constitutes "an inappropriate discharge policy."

Response: (a) The language which the HRA criticizes ("... very likely to result in the forfeiture smoking privileges and/or involuntary discharge from this healthcare facility" [Report, at 5]) is verbatim from CMS's model form. CMS's suggested "Resident Behavior Contract" specifically provides [last sentence] that "non-compliance [with smoking rules is] very likely to result in forfeiture of smoking privileges and/or involuntary discharge from this healthcare facility."

The Report also references [at 5] "[a]nother section of behavior contract reads 'I agree to allow staff to check/search my room for contraband (i.e., such as hidden cigarettes, lighters, matches) at staff discretion.' " This language is also verbatim from CMS's model Resident Behavior Contract form (8th par.).

(b) In Illinois, the grounds for involuntary discharge of residents from long-term care facilities derive from State statute [210 ILCS 45/3-401] and regulation of the Illinois Department of Public Health ["IDPH"] [77 Ill.Admin.Code 300.3300(c)], not

from facility policies. The regulatory system established by statute and administrative regulation provides for the right to a due process hearing on any involuntary discharge. A resident who disagrees with a proposed involuntary discharge action may not be discharged unless an administrative law judge recommends that such discharge be upheld and the Director of IDPH approves such recommendation. The ultimate decision as to whether a resident whose smoking behavior may constitute a danger to himself or to other residents should be discharged is not the Facility's, but rather that of the Director of IDPH, after review of the determinations and recommendation of an impartial administrative law judge.

(c) Nor do the Facilities agree with the HRA's implicit conclusion that discharge proceedings based on only a single violation can never be warranted. [Report, at 10 ("... even one violation may start discharge proceedings...").] An example where such proceedings would be warranted is a resident smoking in his room while on oxygen.

As to the Life Safety Code, it should first be noted that the HRA Report is internally inconsistent and illogical – if the policies are “overly restrictive,” making them less “restrictive” cannot advance Life Safety Code [fire safety] compliance. Furthermore, the Life Safety Code requires facilities to adopt a threshold level of regulation: “Smoking regulations shall be adopted and shall include *not less than* the following ...” [LSC 19.7.4 (emphasis added)]. It does not prevent or prohibit a facility from adopting more restrictive rules. In fact, it recognizes that “[t]he problem is a broad one, varying with different types and arrangements of buildings; the effectiveness of rules of procedure, which need to be flexible, depends in large part on the management” [L.S.C. 19.7.4; *see*, Report, at 9]. LSC 19.7.4 sets forth guidance concerning requirements for signage in areas in which oxygen is in use, prohibiting smoking by residents classified as not responsible, and the requirement for ashtrays of noncombustible material in all areas where smoking is permitted. It does not in any way address the consequences of unsafe smoking or suggest that smoking privileges may not be restricted or that other consequences (including involuntary discharge) may result from conduct which creates a danger to self or others.

The Report's conclusion that the Facilities' smoking policies somehow violated the rights of residents misapprehends the applicable regulatory framework and is simply incorrect. As CMS's suggested “Resident Behavior Contract” makes clear [1st par.] “... smoking is a privilege and not a right and the facility may suspend [that] privilege at any time.” There is no underlying right to smoke which is subject to being violated in the first place.

The subject of fires in nursing homes is of such significance that IDPH reports on it annually to the Illinois General Assembly. In the Department's August 2010 Report to

the General Assembly, it noted that there were 40 reported fire incidents in Illinois nursing homes during 2009 [Long-Term Care Annual Report to the Illinois General Assembly (Aug. 2010), at 23], of which 5 (or 12.5%) were smoking-related:

There were five reports of careless use of smoking materials. Enforcement of facility smoking policies, identification of potential problem smokers, enforcement of oxygen administration regulations and maintenance of fire detection and extinguishment systems are important.

Long-Term Care Annual Report to the Illinois General Assembly (Aug. 2010), at 24

The Facilities respectfully disagree with the characterization of their smoking policies as "overly restrictive" [Report, at 9] and decline the suggestion in the Report that their smoking policies should be made less restrictive. Making the policies less restrictive or lessening the potential consequences for unsafe smoking is not in the interests of resident safety (either the resident him/herself or other residents).

Accordingly, the Facilities object to the proposed findings. In the event that such findings are included in any publicly released report, the Facilities respectfully request that these comments and objections also be included in such public report.

Thank you for your consideration.

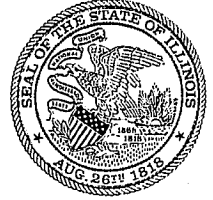
Sharon Health Care Facilities

GUARDIANSHIP & ADVOCACY COMMISSION

STATE OF ILLINOIS
Pat Quinn
Governor

Dr. Mary L. Milano, Director

HUMAN RIGHTS AUTHORITY
LEGAL ADVOCACY SERVICE
OFFICE OF STATE GUARDIAN



December 4th, 2012

Gary A. Weintraub, P.C.
465 Central Ave., Suite 100
Northfield, Illinois 60093

Re: Human Rights Authority Case #12-090-9014

Dear Gary A. Weintraub:

At its November 28th, 2012 meeting, the HRA reviewed copies of the "Facility Smoking Safety Policy" and "Resident Behavior Contract" that were provided. The HRA still feels that the smoking policy is not compliant with the direct CMS memo as well as CMS regulations and guidance as referenced in the HRA report (42 CFR 483.25(h) & Life Safety Code 19.7). The HRA requests that the facility take action on the following report recommendation:

- The HRA recommends that the facility update their smoking policies to comply with the standards expressed by the CMS regulations (42 CFR 483.25(h)) and Life Safety Code 19.7 as well as the memo distributed by CMS all of which place much of the safety responsibility in the hands of the facility and supervision of the residents within the facility and places less emphasis on residents being restricted or discharged from the facility. The HRA does not intend for the policy to state that the resident has no accountability or that there should be no consequences for behavior regarding smoking.

Please forward copies of the suggest policy and contract to the following address, attention of Gene Seaman, by **January 7th, 2012**:

Illinois Guardianship and Advocacy Commission
401 Main Street, Suite 620
Peoria, IL 61602

If you have questions in the meantime, you may contact Human Rights Authority Coordinator, Gene Seaman, at (309) 671-3044.

PEORIA REGIONAL OFFICE

◆ 401 Main Street, Suite 620 ◆ Peoria, IL 61602
◆ Telephone (309) 671-3030 ◆ Fax (309) 671-3060
◆ Statewide Toll Free Intake (866) 274-8023 ◆ Statewide TTY (866)
333-3362



Yours truly,

Meri Tucker (gs)

Meri Tucker, Chairperson
Regional Human Rights Authority

MT:gs

CC: Sherry Ford

LAW OFFICES OF
GARY A. WEINTRAUB, P. C.
465 CENTRAL AVE.
SUITE 100
NORTHFIELD, ILLINOIS 60093
(847) 441-8535
FAX (847) 441-0800

December 5, 2012

Certified Mail
#7010 3230 0001 8186 4751

Illinois Guardianship and Advocacy Commission
401 Main Street
Suite 620
Peoria, Illinois 61602

Re: Sharon Health Care Facilities
HRA Case No. 12-090-9014

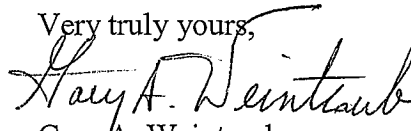
Gentlemen and Ladies,

I represent the Sharon Health Care Facilities. On December 4, 2012, the Peoria Regional Office of the Human Rights Authority sent a letter regarding the above matter. Enclosed is a "Supplemental Response and Objections of Sharon Health Care Facilities" to such letter and the recommendation contained therein.

In the event that the HRA decides to make such letter or any of the findings or recommendation contained therein a part of the public record, the Facilities respectfully request that their Supplemental Response and Objections also be made part of the public record.

Should anything further be required in connection with this matter, please so advise.

Thank you for your assistance.

Very truly yours,

Gary A. Weintraub

GAW/g
encl.

PEORIA REGIONAL HUMAN RIGHTS AUTHORITY

HRA CASE # 12-090-9014

SUPPLEMENTAL RESPONSE AND OBJECTIONS OF
SHARON HEALTH CARE FACILITIES

The Sharon Health Care Facilities [the “Facilities”] respectfully submit this Supplemental Response in response and objection to the recommendation communicated by letter dated December 4, 2012 (apparently following further consideration by the HRA at its meeting of November 28, 2012):

1. In its initial Report of Findings issued on or about July 23, 2012 [“Report”], , the HRA concluded – incorrectly – that:
 - a. the facilities’ smoking policies constitute “inadequate safety measures” because they “contradict” – in some unspecified way – CMS regulations [Report, at 10];
 - b. The facilities’ smoking policies constitute “inappropriate use of restrictions” because they “contradict” – again, in some unspecified way – CMS regulations [Report, at 10]; and
 - c. The facilities’ smoking policies [particularly, Elms’ policy] allow for the possibility of an “inappropriate discharge” because they provide for loss of smoking privileges and the bringing of discharge proceedings in the event of violation of the facilities’ safe smoking rules. [Report, at 10.]

2. In response, the Facilities pointed out that:
 - a. As a threshold matter, smoking is a privilege, and not a right.
 - b. The Facilities’ smoking policies are consistent with CMS regulations, as discussed and clarified in CMS’ November 10, 2011, memorandum regarding smoking safety in long-term care facilities [“CMS Memo”] and the model forms/guides provided by CMS with the CMS Memo (“Facility Smoking Safety Policy” [pp. 1-3]; “Smoking Behavior Contract” [p. 6]; and “Resident Behavior Contract” [p. 7]).
 - c. In particular, the Report was flatly wrong when it said that “[o]verall, the document [*i.e.*, the CMS Memo] does not reference restriction or discharge of residents for not abiding by smoking rules ...” [Report, at 6]. In fact,

- i. CMS's suggested "Facility Smoking Safety Policy" provides [¶4] that "[s]moking privileges will be *revoked* if there is a pattern of persistent, hazardous behavior" (emphasis added). CMS's suggested "Resident Behavior Contract" provides [1st par.] that "... smoking is a privilege and not a right and the facility may *suspend* [that] *privilege* at any time" (emphasis added).
 - ii. CMS's suggested "Resident Behavior Contract" also provides [last sentence] that "non-compliance [with smoking rules is] *very likely* to result in *forfeiture of smoking privileges* and/or *involuntary discharge* from this healthcare facility" (emphasis added).
3. HRA now recommends that the Facilities change their smoking policies "... to comply with the standards expressed by the CMS regulations ... as well as the [CMS] [M]emo ... and [to] place[] less emphasis on residents being restricted or discharged from the facility" [Dec. 4, 2012, HRA letter].
4. In response, the Facilities are constrained to note that:
 - a. HRA fails to identify or point out any specific manner in which the Facilities' smoking policies fail to comply with CMS regulations. Indeed, CMS's regulations allow for restrictions or discharge in the event of noncompliance with safe smoking policies.
 - b. HRA does not specify how "... plac[ing] less emphasis on residents being restricted or discharged ..." will promote safety. Respectfully, it is the Facilities' position that making the policies less restrictive or lessening the potential consequences for unsafe smoking is not in the interests of resident safety (either the resident him/herself or other residents).

Accordingly, the Facilities object to the proposed recommendation. In the event that either the prior Report or the current recommendation are included in any publicly released report, the Facilities respectfully request that these comments and objections also be included in such public report.

Thank you for your consideration.

Sharon Health Care Facilities