

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2155398
<b>Decision Date:</b>	9/20/2021	<b>Hearing Date:</b>	09/09/2021
<b>Hearing Officer:</b>	Paul C. Moore	<b>Record Closed:</b>	09/16/2021

**Appellant Representative:**  
Pro se (by telephone)

**Nursing Facility Representatives:**  
Thomas Lynch, Administrator, and Elizabeth Bohan, Director of Social Services, Medford Rehabilitation and Nursing Center (both by telephone)



*The Commonwealth of Massachusetts  
Executive Office of Health and Human Services  
Office of Medicaid  
Board of Hearings  
100 Hancock Street, Quincy, Massachusetts 02171*

# APPEAL DECISION

<b>Appeal Decision:</b>	Denied	<b>Issue:</b>	Nursing Facility Discharge
<b>Decision Date:</b>	9/20/2021	<b>Hearing Date:</b>	09/09/2021
<b>Nursing Facility Reps.:</b>	Administrator et al.	<b>Appellant Rep.:</b>	Pro se
<b>Hearing Location:</b>	Board of Hearings (remote)		

## Authority

This hearing was conducted pursuant to Massachusetts General Laws (“M.G.L.”) Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

## Jurisdiction

Through a 30-Day Notice of Intent to Discharge Resident dated June 24, 2021 (“discharge notice”), [REDACTED] Rehabilitation and Nursing Center, a skilled nursing facility (“the facility” or [REDACTED]), notified the appellant that it sought to discharge him effective [REDACTED] to [REDACTED] [REDACTED] because “[his] health has improved sufficiently so that [he] no longer needs the services provided by the facility” (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on July 16, 2021 (130 CMR 610.015(B); 130 CMR 456.703; Exhibit 2). Challenging a notice of discharge initiated by a nursing facility is a valid ground for appeal to BOH (130 CMR 610.032(C)).

## Action Taken by Nursing Facility

The nursing facility notified the appellant that it sought to discharge him because his health has improved sufficiently that he no longer needs the services provided by the facility.

## Issues

The appeal issues are whether: (1) the facility has valid grounds to discharge the appellant to the community; (2) the discharge notice meets the regulatory requirements set forth in the Fair Hearing Rules at 130 CMR 610.028; and (3) the facility has provided sufficient preparation and orientation

to the appellant to ensure safe and orderly discharge from the facility to another safe and appropriate place.

## Summary of Evidence

### A. Documentary and Testimonial Evidence

Prior to hearing, the facility submitted a copy of some of the appellant's clinical records, including a progress note from the medical director of the facility, a completed Medicaid Management Minutes Questionnaire, and a certified nursing assistant ("CNA") flowsheet (Ex. 4). Mr. Lynch, the facility administrator, testified by telephone that the appellant, who is under age 65, was admitted to the facility for short-term rehabilitation on [REDACTED]. He testified that a letter from the facility's medical director, Dr. Aweh, reflects that the appellant completes his activities of daily living (ADLs) safely on his own, manages his own medications, and does not have any current treatments ordered (Testimony, *citing to* Exhibit 4, p. 2). Further, Mr. Lynch noted that a registered nurse completed a Medicaid Management Minutes Questionnaire (MMQ) for the appellant, again reflecting that he is independent with his ADLs, and that he walks with an assist (*Id.*, *citing to* Ex. 4, p. 3). Mr. Lynch added that a CNA flowsheet also reflects that the appellant is independent with his ADLs, except that he uses a rollator to ambulate (Testimony, *citing to* Ex. 4, p. 4).

Mr. Lynch noted that following the issuance of the discharge notice in June, the appellant has engaged in behaviors and actions that have endangered other residents and staff at the facility. Mr. Lynch noted that the appellant was found with cigarette packets, and cartons of cigarettes, in his room. He added that the facility has a supervised smoking program, and the appellant has not complied with this program. Within Exhibit 4, the facility included photos of cigarette packets and cartons it asserted were found in the bureau drawers of the appellant's room. Mr. Lynch added that the appellant has been selling and/or giving cigarettes to other residents, including to one resident who is prescribed oxygen. He added that the appellant "hangs around" the nursing medication cart when the nurse is passing medications, and on one occasion, took a medication card from the cart, which the nurse was able to recover. He noted that the [REDACTED] Fire Department reported to Mr. Lynch that the appellant was seen smoking in his room (Testimony).

Mr. Lynch stated that the appellant is a danger to the residents and staff at the facility, and expressed frustration at the length of time between the issuance of the discharge notice and the scheduling of the instant appeal hearing. In response, the hearing officer noted that the discharge notice at issue does not contain an assertion that the appellant should be discharged because he presents a danger to other residents at the facility. The hearing officer advised Mr. Lynch that another discharge notice containing a different grounds for discharge would need to be issued to the appellant, if the facility believes that is appropriate.

Ms. Bohan, the facility's director of social services, testified that the appellant was admitted to the facility for short-term rehabilitation from South Shore Hospital. The appellant testified that he has epilepsy, and that he had a grand-mal seizure, leading to his hospital admission. Ms. Bohan testified that the appellant's other diagnoses include depression, bradycardia, gastroesophageal reflux

disease (GERD), chronic back pain, polysubstance abuse, falls, panic attacks, bipolar disorder, post-traumatic stress disorder (PTSD), and history of surgeries on his neck, back, shoulders and knees (Testimony).

Mr. Lynch noted that the appellant successfully completed physical and occupational therapy at the facility. The appellant testified that a physical therapist at the facility suggested that he needs additional physical therapy for his neck, back and knees. The appellant asserted that he had a fall at the facility the day before the hearing; the administrator testified that he was not aware of this. The appellant added that he showers using a shower chair, and is able to dress independently while lying on the floor. He is able to eat and toilet independently, and can identify and take most of his medications on his own (Testimony).

Mr. Lynch stated that he received an e-mail communication from the [REDACTED] director of physical therapy services during the appeal hearing, corroborating that the appellant no longer needs any physical therapy (Testimony).

Ms. Bohan testified that the appellant has applied to a number of housing locations, and that the [REDACTED] House, a medical shelter, was chosen as his discharge location. She stated that this was the appellant's preference, and that he did not wish to go to a non-medical homeless shelter (Testimony).

The appellant testified he does not wish to be discharged to a homeless shelter, because there is a lot of gang violence and drug use at those locations. He was homeless and stayed at the [REDACTED] Inn in [REDACTED] in the past (Testimony).

The appellant stated that he does not wish to leave the nursing facility, because he still has medical issues. He stated that he had surgery on both knees about three months ago, but the surgery on his right knee "did not take." He asserted that he may need a right knee replacement. He requested an opportunity to submit a letter from Lars Richardson, M.D., his orthopedic surgeon at Massachusetts General Hospital ("MGH"), documenting ongoing problems with his right knee.

Mr. Lynch asserted that a recent evaluation by the facility's physical therapy director reflects that the appellant can walk over 800 feet without an assistive device, on both even and uneven surfaces (Testimony).

The appellant denied ever stealing medication cards from any medication carts at the facility, and that he ever sold or gave cigarettes to other residents. He acknowledged smoking in his room in the past, and apologized (Testimony).

Mr. Lynch stated that MassHealth has been paying for the appellant's nursing facility stay. Upon a request by the hearing officer, Mr. Lynch agreed to forward a copy of the MassHealth approval of clinical eligibility for nursing-facility services for inclusion in the record.

The appellant stated that his depression has worsened over the past several months, because both of

his parents and fiancée recently died. He added that he was suicidal, and now sees a therapist every week (Testimony).

At the close of the hearing, the hearing officer agreed to keep the record of the appeal open until September 23, 2021 for the appellant to submit a letter from Dr. Richardson attesting to his orthopedic problems and any functional limitations he may have (Ex. 5). The hearing officer also left the record open for the facility to submit a recent physical therapy evaluation of the appellant, as well as the dates of the appellant's MassHealth approval for his short-term stay (Ex. 5). Finally, the hearing officer agreed to keep the record of the appeal open for an additional week, or until September 30, 2021, for the facility to submit comments on the letter from Dr. Richardson, if it wishes (*Id.*).

Shortly after the hearing concluded, the hearing officer received via fax from the facility a copy of an additional letter from Dr. Aweh, the facility's medical director, stating in pertinent part: "[The appellant] is medically stable. If he were to need any type of surgery in the future it is considered elective surgery, which he can do if he is out in the community" (Ex. 6A).<sup>1</sup>

In addition, the hearing officer received a document via fax from the facility entitled, "MassHealth Payment of Nursing-Facility Services," reflecting that the appellant was approved by MassHealth for clinical eligibility for payment of nursing-facility services for the period August 1, 2021 through December 31, 2021 (Ex. 6B).

Finally, immediately following the hearing, the hearing officer received via fax a copy of a facility physical therapy treatment encounter note, dated May 26, 2021, stating in relevant part:

Gait training: gait training to normalize gait pattern, gait training on uneven surfaces and gait training with emphasis on increasing safety and performance within the facility. [The appellant] able to ambulate 800'+ with no AD and S. [The appellant] able to negotiate safely over curb and on uneven grassy surface.

(Ex. 6C)

On or about September 14, 2021, the hearing officer received via fax a letter from a Dr. Mendes about the appellant. However, the hearing officer notified the parties by e-mail on the same date that this letter was not requested at the hearing, and that the letter would not be accepted for inclusion in the record absent an explanation of who Dr. Mendes is, and for what reason he is treating the appellant (Ex. 7).<sup>2</sup>

On or about September 16, 2021, the hearing officer received correspondence dated September 16, 2021 signed by Lars Richardson, M.D., at MGH, which is entitled, "Physical Therapy Prescription" (Ex. 8). The letter states that the appellant's diagnoses are "right knee, medial meniscus tear, left

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<sup>1</sup> This letter was not requested by the hearing officer.

<sup>2</sup> No such explanation was provided.

knee medial meniscus tear,” that the appellant had bilateral knee arthroscopies and meniscectomies on April 8, 2021, and that Dr. Richardson was referring the appellant for physical therapy one to three times per week for a period of five to eight weeks (*Id.*).

On the same date, the hearing officer received e-mail correspondence from the facility’s administrator commenting on Dr. Richardson’s letter, which states as follows:

Surgery was 4/8/2021 (April)  
Frequency & Duration = 5-8 weeks

It’s now September 16, 2021  
5 Months have past (*sic*)

(Ex. 9)

B. Content of the discharge notice/clinical record

The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the BOH, the time frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 30 days after the hearing officer’s decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exs. 1A & 2).

Within Exhibit 4, the appellant’s medical record from the facility, Dr. Awch, the medical director, documented in a progress note dated September 8, 2021 the reasons for the appellant’s intended discharge (Ex. 4, p. 3).

## **Findings of Fact**

Based on a preponderance of the evidence, I find the following:

1. The appellant is under age 65, and was admitted to the facility on [REDACTED] for short-term rehabilitation (Testimony, Ex. 4).
2. The appellant’s diagnoses include epilepsy, depression, bradycardia, GERD, chronic back pain, polysubstance abuse, falls, panic attacks, bipolar disorder, PTSD, right knee medial

meniscus tear, left knee medial meniscus tear, and history of surgeries on his neck, back, shoulders and knees (Testimony, Ex. 8).

3. Through a 30-day discharge notice dated June 24, 2021, the facility notified the appellant that it sought to discharge him effective [REDACTED] to [REDACTED] because “[his] health has improved sufficiently so that [he] no longer needs the services provided by the facility” (Ex. 1).
4. The appellant filed a timely appeal of the discharge notice with the BOH (Ex. 2).
5. The appellant successfully completed physical and occupational therapy at the facility (Testimony).
6. A facility physical therapy treatment encounter note, dated May 26, 2021, states in relevant part: “Gait training: gait training to normalize gait pattern, gait training on uneven surfaces and gait training with emphasis on increasing safety and performance within the facility. [The appellant] able to ambulate 800’+ with no AD and S. [The appellant] able to negotiate safely over curb and on uneven grassy surface” (Ex. 6C).
7. The appellant is able to complete his ADLs independently, and uses a rollator for ambulation (Testimony, Ex. 4).
8. The appellant had bilateral knee arthroscopies and meniscectomies on April 8, 2021 (Ex. 8).
9. The appellant’s orthopedic surgeon, Lars Richardson, M.D., recommended on September 16, 2021 that the appellant complete another five to eight weeks of physical therapy for his knees, one to three days per week (Ex. 8).
10. The discharge location designated in the discharge notice issued to the appellant is [REDACTED], a medical shelter in [REDACTED] which the facility social worker discussed with the appellant (Testimony, Ex. 1).
11. The appellant was formerly homeless and was a client of the [REDACTED] (Testimony).
12. The appellant has applied for other housing options (Testimony).
13. The appellant does not wish to live at a homeless shelter due to his concerns about violence and drug use (Testimony).
14. The discharge notice at issue in this matter contains: a specific statement of the reasons for the intended discharge, the location to which the appellant is to be discharged, the effective date of the intended discharge, the right of the appellant to request a fair hearing on the intended discharge, the address, telephone number and fax number of the BOH, the time

frame for requesting a hearing, the effect of requesting a hearing as provided for under 130 CMR 610.030 (*to wit*, that the facility cannot discharge the appellant until 30 days after the hearing officer's decision is received), the name of the person at the facility who can answer any questions about the discharge notice and about the right to file an appeal, the name and address of the local legal-services office, the name and address of the local long-term care ombudsman program, and the mailing addresses and telephone numbers of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exs. 1A & 2).

15. Within Exhibit 4, the appellant's medical record from the facility, Dr. Aweh, the medical director, documented in a progress note dated September 8, 2021 the reasons for the appellant's intended discharge (Ex. 4, p. 3).

## Analysis and Conclusions of Law

The federal Nursing Home Reform Act (NHRA) of 1987 guarantees all residents the right to advance notice of, and the right to appeal, any transfer or discharge initiated by a nursing facility. MassHealth has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in both (1) the Nursing Facility Manual regulations at 130 CMR 456.000 et seq., and (2) the Fair Hearing Rules at 130 CMR 610.000 et seq.

The regulations at 130 CMR 456.402 define a "discharge" as "the removal from a nursing facility to a noninstitutional setting of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual; this includes a nursing facility's failure to readmit following hospitalization or other medical leave of absence." Similarly, 130 CMR 610.004 defines a discharge as "the removal from a nursing facility of an individual who is a resident where the discharging nursing facility ceases to be legally responsible for the care of that individual."

The Nursing Facility Manual regulations at 130 CMR 456.701 provide in relevant part:

Notice Requirements for Transfers and Discharges Initiated by a Nursing Facility

**(A) A resident may be transferred or discharged from a nursing facility only when:**

- (1) the transfer or discharge is necessary for the resident's welfare and the resident's needs cannot be met in the nursing facility;
- (2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so that the resident no longer needs the services provided by the nursing facility;**
- (3) the safety of individuals in the nursing facility is endangered;
- (4) the health of individuals in the nursing facility would otherwise be

endangered;

(5) the resident has failed, after reasonable and appropriate notice, to pay for (or failed to have the Division or Medicare pay for) a stay at the nursing facility; or

(6) the nursing facility ceases to operate.

**(B) When the facility transfers or discharges a resident under any of the circumstances specified in 130 CMR 456.701(A)(1) through (5), the resident's clinical record must contain documentation to explain the transfer or discharge. The documentation must be made by:**

**(1) the resident's physician when a transfer or discharge is necessary under 130 CMR 456.701(A)(1) or (2); and**

**(2) a physician when the transfer or discharge is necessary under 130 CMR. 456.701(A)(3) or(4).**

(C) Before a nursing facility discharges or transfers any resident, the nursing facility must hand deliver to the resident and mail to a designated family member or legal representative a notice written in 12-point or larger type that contains, in a language the member understands, the following:

(1) the action to be taken by the nursing facility;

(2) the specific reason or reasons for the discharge or transfer;

(3) the effective date of the discharge or transfer;

(4) the location to which the resident is to be discharged or transferred;

(5) a statement informing the resident of his or her right to request a hearing before the Division's Board of Hearings including:

(a) the address to send a request for a hearing;

(b) the time frame for requesting a hearing as provided for under 130 CMR 456.702; and

(c) the effect of requesting a hearing as provided for under 130 CMR 456.704;

(6) the name, address, and telephone number of the local long-term-care ombudsman office;

(7) for nursing-facility residents with developmental disabilities, the address and telephone number of the agency responsible for the protection and advocacy of developmentally disabled individuals established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. § 6041 et seq.);

(8) for nursing-facility residents who are mentally ill, the mailing address and telephone number of the agency responsible for the protection and advocacy of mentally ill individuals established under the Protection and Advocacy for Mentally Ill Individuals Act (42 U.S.C. § 10801 et seq.);

(9) a statement that all residents may seek legal assistance and that free legal assistance may be available through their local legal-services office. The notice should contain the address of the nearest legal-services office; and

(10) the name of a person at the nursing facility who can answer any questions the resident has about the notice and who will be available to assist the resident in filing an appeal.

(Emphasis added)

The evidence shows that the appellant's health has improved significantly since his admission to the facility. He is able to perform his ADLs independently and can (if he wishes) walk more than 800 feet on surfaces without an assistive device. However, the appellant continues to use a rollator at the facility.

The appellant contended that he may need right knee replacement surgery; however, this testimony is not corroborated by correspondence from his orthopedic surgeon. The surgeon did not raise the possibility of additional surgery for the appellant, but instead recommended additional physical therapy for the appellant. Physical therapy may be conducted on an outpatient basis.

With regard to the issues of the appellant's alleged failure to comply with the facility's smoking policy, attempting to steal medications, and allegations that he dispensed cigarettes to other residents, these issues were not the subject of the discharge notice issued to the appellant in this case. Therefore, testimony on these issues is not material to the outcome of this appeal.

The discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C), above. Further, the facility's medical director has documented the reasons for the appellant's intended discharge from the facility in his clinical record, as required at 130 CMR 456.701(B).

Also relevant to this appeal, an amendment to M.G.L. c. 111, §70E, which went into effect in November of 2008, states as follows:

A resident, who requests a hearing pursuant to section 48 of chapter 118E, shall not be discharged or transferred from a nursing facility licensed under section 71 of this chapter, unless a referee determines that the nursing facility has provided **sufficient preparation and orientation to the resident to ensure safe and orderly transfer or discharge from the facility to another safe and appropriate place.**

(Emphasis added)

The facility's social services director testified that she discussed possible discharge locations with the appellant, and that he preferred a medical shelter over a homeless shelter. In addition, the social worker indicated that the appellant has applied for other housing options as well.

The intended discharge location, a medical shelter, is a safe and appropriate place for the appellant's discharge, while he continues to undergo physical therapy outpatient sessions. The facility has provided preparation and orientation to the appellant for this eventual discharge.

For these reasons, the appeal is DENIED.

## **Order for Nursing Facility**

Proceed with the intended discharge, but not earlier than thirty (30) days from the date of this decision.

## **Notification of Your Right to Appeal to Court**

If you disagree with this decision, you have the right to appeal to court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

## **Implementation of this Decision**

If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings, Office of Medicaid, at the address on the first page of this decision.

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Paul C. Moore  
Hearing Officer  
Board of Hearings

cc: Thomas Lynch, Administrator, Medford Rehabilitation and Nursing Center, 800 Winthrop Street, Medford, MA 02155