

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2178557
Decision Date:	11/24/2021	Hearing Date:	11/22/2021
Hearing Officer:	Christine Therrien		

Appearance for Appellant:



Appearance for Nursing Facility:

Bob Baker, Director of Nursing; Sue Salley,
Assistant Director of Nursing; Samantha White,
Director of Social Services



*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

Appeal Decision:	Approved	Issue:	NF Discharge
Decision Date:	11/24/2021	Hearing Date:	11/22/2021
Nursing Facility's Rep.:	Bob Baker, Director of Nursing; Sue Salley, Assistant Director of Nursing; Samantha White, Director of Social Services	Appellant's Rep.:	
Hearing Location:	Quincy Harbor South		

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

The appellant received a Notice of Intent to Discharge Resident with Less than 30 Days' Notice (Expedited Appeal) dated 11/9/21. The notice stated that Oxford ("the skilled nursing facility" or "the facility") seeks to discharge the appellant to [REDACTED] on 11/23/21. The notice indicates the reason for the discharge is that "the safety of the individuals in the nursing facility is endangered due to your clinical or behavioral status" (Exhibit 1). The appellant filed this timely appeal on 11/10/21 (130 CMR 610.015(B); and Exhibit 2). Discharge of a Nursing Facility patient is valid grounds for appeal (130 CMR 610.029; 42 CFR Ch IV §483.200 et seq.).

Action Taken by MassHealth

The skilled nursing facility intends to discharge the appellant from the facility.

Issue

Is the planned discharge correct pursuant to 130 CMR 610.029?

Summary of Evidence

The director of nursing from the skilled nursing facility (NF) testified on behalf of the facility at the hearing. The appellant received a "Notice of Intent to Discharge Resident with Less than 30 Days' Notice" 11/9/21 (Exhibit 1). The director of nursing submitted the appellant's clinical record from the facility into evidence (Exhibit 4). The director of nursing testified that the appellant was admitted to the facility in [REDACTED]. The director of nursing testified that the appellant was admitted to the facility due to the need for Physical Therapy (PT) and medication management. The appellant was admitted with Type 2 Diabetes, Pneumonia, and Congestive Heart Failure. The director of nursing testified that the appellant has had multiple violation of the smoking policy which put himself and others at risk. The director of nursing testified that the appellant was caught on several occasions with multiple packs of cigarettes in his room and all smoking materials must be kept with the smoking cart. The director of nursing also testified that the appellant has been selling cigarettes to other residents. The appellant signed the smoking policy acknowledgement on 3/25/21 (Exhibit 4, p. 43). The director of nursing testified that the appellant can ambulate the distance of 150 ft with the help of a rolling walker or cane. The appellant has a provider's note in his file, dated 11/18/21, indicating he no longer needs NF care and can be safely discharged to a shelter (Exhibit 4, p. 10). The director of nursing testified that the appellant can be discharged to Mitch's Place, which is a homeless shelter, that allows nursing services to come in and assist with residents.¹

The clinical record shows that the appellant is not independent with all his activities of daily living (ADLs) and continues to require supervision or minimal assistance with bathing, and dressing and cueing for oral hygiene (Exhibit 4, pp. 30-34). Additionally, the clinical record indicates the appellant is increasingly incontinent of bowel (Exhibit 4, p. 33). The clinical record indicates the appellant has some cognitive decline (Exhibit 4). The clinical record does not include any notes regarding the appellant's ability to manage his multiple health conditions.

The appellant's sister testified on his behalf. The appellant's sister testified that the appellant cannot take care of himself in the community. The appellant's sister testified that she had no idea there was an issue with the appellant violating the smoking policy. The appellant's sister testified that had she known there was an issue with smoking she would have spoken to him about it. The appellant's sister testified that prior to being admitted to the facility the appellant would go to the hospital two times a week because he cannot manage his own diabetes and bipolar medication. The appellant's sister testified that the appellant spent down \$10,000 of his assets to qualify for MassHealth. The appellant's sister testified that the appellant was in soiled clothing on one occasion when she visited him. The appellant's sister testified that the day after she complained to the facility about the appellant's condition, she was notified that he was being discharged. The appellant's sister testified that prior to admission to the NF the appellant was in the hospital, and prior to that the appellant was living in a boarding home but he could not manage his conditions. The appellant testified that his room in the boarding home was on the third floor and he was unable to access it due to his inability to ambulate. The appellant testified that he has been to Mitch's Place before and there is no way to get nursing services because they kick you

¹ "Mitch's Place is a 30-bed, year-round emergency shelter for single men and women. Mitch's Place offers temporary overnight shelter to homeless individuals. Guests receive a bed, meals, housing search assistance, employment assistance, and case management support to secure permanent housing as well as needed health and social services." (<https://emmausinc.org/emergency-shelter/>)

out at 7am and will not allow you back until 5pm so there is no one to help with his medications.

Findings of Fact

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

1. The appellant received a “Notice of Intent to Discharge Resident with Less than 30 Days’ Notice” 11/9/21 (Exhibit 1).
2. The appellant’s clinical record from the facility was submitted into evidence (Exhibit 4).
3. The appellant was admitted to the facility in [REDACTED]
4. The appellant was admitted to the facility due to the need for PT and medication management.
5. The appellant was admitted with Type 2 Diabetes, Pneumonia, and Congestive Heart Failure.
6. The appellant has had multiple violations of the smoking policy.
7. The appellant has been found several times with multiple packs of cigarettes in his room.
8. The appellant signed the smoking policy acknowledgement on 3/25/21 (Exhibit 4, p. 43).
9. The appellant can ambulate the distance of 150 ft with the help of a rolling walker or cane.
10. A provider’s note in the appellant’s file, dated 11/18/21, indicates he no longer needs NF care and can be safely discharged to a shelter (Exhibit 4, p. 10).
11. Mitch's Place, the discharge location, is a homeless shelter that allows nursing services to come in and assist with residents.
12. The clinical record shows that the appellant is not independent with all his activities of daily living (ADLs) and continues to require supervision or minimal assistance with bathing, and dressing and cueing for oral hygiene (Exhibit 4, pp. 30-34)
13. The clinical record indicates the appellant is increasingly incontinent of bowel (Exhibit 4, p. 33).
14. The appellant has some cognitive decline (Exhibit 4).
15. The clinical record does not include any notes regarding the appellant’s ability to manage his multiple health conditions.
16. The prior to being admitted to the facility the appellant would go to the hospital because he cannot manage his own diabetes and bipolar medication.

17. Prior to admission to the NF the appellant was in the hospital, and prior to that the appellant was living in a boarding home but he could not manage his conditions.

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.

For the purposes of this decision, the definitions found in 130 CMR 456.402 apply:²

“Nursing facility” - an institution or a distinct part of an institution that meets the provider-eligibility and certification requirements of 130 CMR 456.404 or 456.405. For requirements related to the transfer and discharge of residents, the term nursing facility also includes a nursing facility participating in Medicare, whether or not it participates in MassHealth.

“Discharge” - 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.

“Transfer” — movement of a resident from:

- (1) a Medicaid- or Medicare-certified bed to a noncertified bed;*
- (2) a Medicaid-certified bed to a Medicare-certified bed;*
- (3) a Medicare-certified bed to a Medicaid-certified bed;*
- (4) one nursing facility to another nursing facility; or*
- (5) a nursing facility to a hospital, or any other institutional setting.*

A nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, resulting in the resident being moved to another institutional setting is also a transfer. Movement of a resident within the same facility from one certified bed to another bed with the same certification is not a transfer.

The appellant is challenging the nursing facility's attempt to discharge him to a homeless shelter in a community setting via its notice dated 11/9/21 (Exhibits 1 and 130 CMR 456.402).

The guidelines that apply in a determination of whether appellant can be so discharged are found in

² The regulatory language in the MassHealth Nursing Facility Manual has identical (or near-identical) regulatory counterparts within the Commonwealth's Fair Hearing Rules under 130 CMR 610.000 et seq., as well as federal regulations found under 42 CFR 483.000 et seq. As to this part of the regulatory law, the regulations in 130 CMR 610.028 and 42 CFR 483.12(a)(2) are identical to that found in 130 CMR 456.402. This appeal decision will hereafter make all further regulatory references only to the MassHealth Nursing Facility Manual regulations in 130 CMR 456.000, unless other regulatory references is noted and appropriate.

130 CMR 456.701 of the MassHealth Nursing Facility Manual. This section of the regulations strictly and specifically lists the only circumstances and conditions that allow for transfer or discharge of a resident from a nursing facility and the requirements of the relevant notice – if these requirements are not met, the facility must permit the resident to remain in the facility.

The relevant portions of the regulation at 130 CMR 456.701 read as follows:

456.701: 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 ...

(Emphasis added.)

The facility is seeking to issue a discharge notice based upon the grounds that the safety of the individuals in the nursing facility is endangered due to the appellant's clinical or behavioral status. The 11/9/21 "Notice of Intent to Discharge Resident with Less than 30 Days' Notice" found in Exhibit 1 asserts the circumstances identified at 130 CMR 456.701(C)(2) and complies with the notice requirements set forth in 130 CMR 456.701(C). Therefore, appellant received adequate and actual notice of the planned discharge.

The first issue is whether the appellant's discharge is appropriate because the safety of individuals in the nursing facility is endangered. The appellant's continued disregard for the smoking policy which he signed on 3/25/21 is concerning and could potentially harm himself and the other residents.

The second issue is whether the nursing facility has met the requirements of all other applicable federal and state regulatory requirements in addition to the MassHealth-related regulations discussed above, including MGL c.111, §70E, which went into effect in November of 2008. The key paragraph of that statute, which is directly relevant to this appeal, reads 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 notice of discharge lists the appellant's discharge location as Mitch's Place; a temporary homeless shelter. The OT notes indicates the appellant is not independent with all of his ADLs and is incontinent of bowel. While the appellant's provider issued a note in his chart that states he is eligible for discharge because he no longer needs NF care, the clinical record does not provide any notes about the appellant's ability to manage his multiple health conditions in order to avoid future hospitalization. Although, there is sufficient evidence provided that the safety of individuals in the nursing facility is endangered due to the appellant's disregard for the smoking policy, the clinical record fails to show that sufficient preparation and orientation of the appellant to ensure safe and orderly discharge has not occurred. The nursing facility has met not its burden to show compliance with MGL c.111, §70E.

Based on the record and the above analysis, the nursing facility does not have valid grounds to discharge the appellant per its notice dated 11/9/21. The appeal is therefore APPROVED.

Order for Nursing Facility

Rescind Notice of Intent to discharge.

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 this nursing facility fails to comply with the above order, you should report this in writing to the Director of the Board of Hearings, at the address on the first page of this decision.

Christine Therrien
Hearing Officer
Board of Hearings

cc:

