

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Approved	Appeal Number:	2179357
Decision Date:	12/28/2021	Hearing Date:	12/21/2021
Hearing Officer:	Paul C. Moore		

Appellant Representative:

Pro se, by telephone

Nursing Facility Representatives:

Alan Blier, administrator; Naomi Cairns, L.I.C.S.W., director of social services; Kelly Corrao-Fisher, substance counselor; Aneta Czartoryski, R.N., director of nursing; Annmarie Ester, after-care coordinator; Mark Cronin, social work intern (all from Highview of Northampton, and all 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

Appeal Decision:	Approved	Issue:	Expedited Nursing Facility Discharge
Decision Date:	12/28/2021	Hearing Date:	12/21/2021
Nursing Facility Reps.:	Administrator et al.	Appellant Rep.:	Pro se
Hearing Location:	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 Notice of Intent to Discharge Resident with Less than 30 Days’ Notice dated October 26, 2021 (“discharge notice”), Highview of Northampton nursing facility (“Highview” or “the facility”) notified the appellant that it sought to discharge him effective November 9, 2021 to the Grove Street Inn, 91 Grove Street, Northampton, MA because “the safety of the individuals in the nursing facility is endangered due to the clinical or behavioral status of the [appellant]” and “the health of the individual (*sic*) in the facility would be otherwise endangered” (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on October 27, 2021 (130 CMR 610.015(B); 130 CMR 456.703; Exhibit 2). Challenging an expedited notice of transfer or 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 on an expedited basis because the safety of the individuals in the nursing facility is endangered.

Issues

The appeal issues are whether: (1) the facility has valid grounds to discharge the appellant; (2) the discharge notice and patient record meet the regulatory requirements set forth in the Fair Hearing Rules at 130 CMR 610.028 and 610.029; 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. Testimony and Documentary Evidence

Prior to hearing, the facility submitted some of the appellant's clinical records, including but not limited to his admission record, plan of care, nursing progress notes, social service progress notes, and some physician progress notes (Exh. 4). The facility's social worker, Ms. Cairns, testified by telephone that the facility issued an expedited notice of discharge to the appellant on October 26, 2021 due to concerns about the appellant smoking in his room, and having smoking paraphernalia on his person.¹ She testified that a copy of the facility's smoking policy was provided to the appellant upon his admission to the facility on [REDACTED], and that he stated that he understood them. According to Ms. Cairns, the facility has three designated smoking times per day, and all smoking materials, such as lighters, cigarettes, and electronic cigarettes, are held in a locked smoking cart which is kept in the activities room. All smoking is to occur in outdoor spaces on facility grounds and is to be supervised by staff members. By smoking in his room or in other non-designated areas, the appellant is endangering the safety of other residents at the facility, she asserted (Testimony).

According to Ms. Cairns, the first smoking incident occurred on October 26, 2021, when the appellant was caught smoking marijuana out of a vaping pen with another resident (Exh. 4, p. 74). The second incident occurred on December 13, 2021, when a strong odor of marijuana was detected coming from his room (Exh. 4, p. 58, p. 74).² A third incident occurred just the night before the day of hearing, at 3:45 am, when a nurse found the appellant smoking tobacco in a shower room at the facility (Testimony).

The appellant, who is under age 65, was admitted to the facility for short-term rehabilitation following an above-knee amputation of his right leg at Baystate Medical Center. According to his admission record, his other diagnoses include type 2 diabetes with neuropathy, acquired absence of his left leg above his knee, major depressive disorder, hyperlipidemia, atrial fibrillation, peripheral

¹ Ms. Cairns testified that she faxed the appellant's request for a fair hearing on the October 26, 2021 expedited discharge notice to the Board of Hearings on October 27, 2021 but heard nothing in response. She faxed another copy of the appellant's request for a fair hearing to the Board of Hearings on December 13, 2021, which eventuated in the instant appeal hearing being held on December 21, 2021.

² As a result of these incidents, the appellant was required to sign a "no-harm agreement," and his leave-of-absences privileges at the facility were revoked.

vascular disease, a history of cannabis use, and muscle weakness (Testimony, Exh. 4, pp. 1-2). He ambulates via an electric wheelchair (*Id.*).

The appellant acknowledged smoking marijuana from another resident's vaping pen in October, 2021. Regarding the December 13, 2021 incident, the appellant denied smoking marijuana in his room, but acknowledged that he had both a vaping pen containing marijuana, as well as a pack of cigarettes, on his person on that occasion. He relinquished those to facility staff. He stated that his son gave him the marijuana during an off-site visit with him earlier that day. For the most recent incident, occurring on December 21, 2021, he denied smoking tobacco or marijuana in a facility shower room. He stated that he awakened at 3:45 am, went to the nurse's station to request pain medication, and went into the shower room with a coffee cup to use the bathroom. He stated that a facility security officer accused him of smoking at that time, but the security officer did not attempt to search his room or his person (Testimony).

Ms. Ester, the facility's director of after-care, stated that when the appellant was admitted to the facility, he believed he was going to be approved for bilateral lower-extremity prosthetics. However, his insurer, Commonwealth Care Alliance, did not approve them. She added that the appellant is independent with his activities of daily living (ADLs), such as bathing, dressing, transferring, grooming, toileting and eating. Ms. Ester added that if the appellant is ultimately approved for prosthetics, he may receive rehabilitation services, such as physical therapy and occupational therapy, in an outpatient setting (Testimony).

The discharge location the facility selected for the appellant is a homeless shelter in Northampton (Exh. 1, Testimony).

The appellant testified that he was staying with his ex-wife in Chicopee prior to being hospitalized at Baystate Medical Center. He stated that his "place" burned down. He testified that he does not want to go to a homeless shelter, as it is unsafe. He has stayed at shelters before. Ms. Ester stated that the appellant submitted a CHAMP application for subsidized housing and is on various housing waitlists.³ The appellant has a son who lives in distant upstate New York, and his mother lives in a "home community." He cannot reside with either of them (Testimony).

Ms. Corrao-Fisher, the facility's substance abuse counselor, stated that the appellant has attended some therapy groups that she runs at the facility for persons in recovery from substance abuse. Many of the residents at Highview are in recent recovery from substance abuse (Testimony).

The appellant testified that he can identify and take his own medications. He is prescribed insulin for his Type 2 diabetes, and he receives injections twice a day. He stated that he will discontinue his insulin when he leaves the facility (Testimony).

The appellant fell out of his wheelchair on November 15, 2021 at the facility, when he was "high-fiving" another resident. As a result of the fall, he sustained a hematoma on his left stump (Exh. 4,

³ CHAMP is an acronym for "Common Housing Application for Massachusetts Programs."

p. 43). The wound is now scabbed over, and he is not receiving wound care. Ms. Czartoryski, the facility's director of nursing, testified that the site is cleaned daily, but is no longer an open wound. She noted that he did not receive antibiotics for the abrasion (Testimony).

B. Content of the discharge notice/patient 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 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 5 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 office, and the mailing address of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exhs. 1 & 2).

The appellant's medical record from the facility, or the portion of same submitted to the hearing officer, does not contain a progress note by a physician explaining the reasons for the appellant's intended discharge (Exh. 4).

Findings of Fact

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

1. The appellant is under age 65, and has resided at Highview since [REDACTED] (Testimony).
2. The appellant's medical diagnoses include type 2 diabetes with neuropathy, acquired absence of his left leg above his knee, major depressive disorder, hyperlipidemia, atrial fibrillation, peripheral vascular disease, a history of cannabis use, and muscle weakness (Testimony, Exh. 4, pp. 1-2).
3. The appellant was admitted to Highview for short-term rehabilitation following an above-knee amputation of his right leg at Baystate Medical Center (Testimony).
4. The appellant's insurer, Commonwealth Care Alliance, has not yet approved bilateral lower-extremity prosthetics for the appellant (Testimony).
5. The appellant has not been engaged in physical therapy or occupational therapy at Highview (Testimony, Exh. 4).
6. Through an expedited discharge notice dated October 26, 2021, Highview of Northampton

notified the appellant that it sought to discharge him effective November 9, 2021 to the Grove Street Inn, 91 Grove Street, Northampton, MA because “the safety of the individuals in the nursing facility is endangered due to the clinical or behavioral status of the [appellant]” and “the health of the individual (*sic*) in the facility would be otherwise endangered” (Exh. 1).

7. The appellant filed a timely request for a fair hearing with the BOH on October 27, 2021 (Exh. 2).
8. A copy of the facility’s smoking policy was provided to the appellant upon his admission to the facility, and that he stated that he understood them (Testimony).
9. The facility has three designated smoking times per day, and all smoking materials, such as lighters, cigarettes, and electronic cigarettes, are held in a locked smoking cart which is kept in the activities room (Testimony).
10. All resident smoking is supervised and takes place outdoors on the grounds of the facility (Testimony).
11. On October 26, 2021, the appellant was caught smoking marijuana out of a vaping pen with another resident (Exh. 4, p. 74).
12. A second smoking incident occurred on December 13, 2021, when a strong odor of marijuana was detected coming from the appellant’s room (Exh. 4, p. 58, p. 74).
13. As a result of these incidents, the appellant was required to sign a “no-harm agreement,” and his leave-of-absences privileges at the facility were revoked (Testimony, Exh. 4).
14. On December 13, 2021, the appellant relinquished a pack of cigarettes, as well as a vaping pen containing marijuana, to the facility representatives (Testimony).
15. The appellant was also reported by a nurse for smoking tobacco in a shower room at the facility on December 21, 2021 at 3:45 am (Testimony).
16. The appellant acknowledges smoking with another resident on October 26, 2021 but denies smoking inside the facility on both December 13, 2021 and December 21, 2021 (Testimony).
17. The appellant ambulates via an electric wheelchair and is independent with his ADLs (Testimony).
18. If the appellant is ultimately approved for prosthetics, he may receive rehabilitation services, such as physical therapy and occupational therapy, in an outpatient setting (Testimony).

19. The appellant's discharge location designated in the expedited discharge notice is a homeless shelter (Exh. 1).
20. The appellant does not wish to be discharged to a homeless shelter but has no permanent place to live (Testimony).
21. 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 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 5 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 office, and the mailing address of the agencies responsible for the protection and advocacy of mentally ill individuals, and the protection and advocacy for developmentally disabled individuals, respectively (Exhs. 1 & 2).
22. The appellant's medical record from the facility, or the portion of same submitted to the hearing officer, does not contain a progress note by a physician explaining the reasons for the appellant's intended discharge (Exh. 4).

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 456.002 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)

Further, the Nursing Facility Manual regulations at 130 CMR 456.702 set forth the requirements that must be met by a nursing facility when it issues an expedited notice of discharge, as follows:

(B) Instead of the 30-day-notice requirement set forth in 130 CMR 456.702(A), the notice of discharge or transfer required under 130 CMR 456.701 must be made as soon as practicable before the discharge or transfer in any of the following circumstances, which are emergency discharges or emergency transfers.

(1) The health or safety of individuals in the nursing facility would be endangered and this is documented in the resident's record by a physician.

(2) The resident's health improves sufficiently to allow a more immediate transfer or discharge and the resident's attending physician documents this in the resident's record.

(3) An immediate transfer or discharge is required by the resident's urgent medical needs and this is documented in the medical record by the resident's attending physician.

(4) The resident has not resided in the nursing facility for 30 days immediately prior to receipt of the notice.

(C) When the transfer or discharge is the result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the notice of transfer or discharge, including that which is required under 130 CMR 456.429, must comply with the requirements set forth in 130 CMR 456.701 and must be provided to the resident and an immediate family member or legal representative at the time the nursing facility determines that it will not readmit the resident.

(Emphasis added)

Based on the evidence in the record, I agree that the facility has sufficient grounds to discharge the appellant, as his unsupervised smoking of both tobacco and marijuana presents a danger to other residents at the facility. If the appellant inadvertently caused a fire at the facility (by, for example, dropping a cigarette ash), this would endanger others (residents and staff), as well as himself. Despite being counseled after each smoking incident, and given "no harm agreements"

to sign, the appellant has repeated his conduct. Thus, the facility has a legal basis to discharge him.

I also find that the discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C).

However, the appellant's clinical record in evidence does *not* contain documentation by a physician containing the reasons for his intended discharge. There is no narrative in the record by a physician explaining how the appellant's actions constitute a danger to the safety and health of others in the facility. Such documentation is *required* by 130 CMR 456.701(B)(2) and 130 CMR 456.702(B)(1), above.

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)

Because I have found that the facility did not meet the requirements in the Nursing Facility Manual regulations regarding physician documentation, I need not decide at this time whether the facility has provided sufficient preparation and orientation to the appellant to ensure his safe and orderly transfer or discharge from the facility to another safe and appropriate place.

Based on the record and the above analysis, this appeal is APPROVED.

Order for Nursing Facility

Rescind notice of October 26, 2021. Do not discharge the appellant under this particular notice.

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 at the address on the first page 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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Alan Blier, Administrator, Highview at Northampton, 222 River Road, Leeds, MA 01053