

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision:	Denied	Appeal Number:	2202047
Decision Date:	4/04/2022	Hearing Date:	03/30/2022
Hearing Officer:	Paul Moore		

Appellant Representative:

Pro se, by telephone

Nursing Facility Representatives:

Mark Nugent, administrator; Samantha White, director of social services; Susanne Braid, R.N., director of nursing (all from the Oxford Rehabilitation and Nursing Care Center, 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:	Denied	Issue:	Expedited Nursing Facility Discharge
Decision Date:	4/04/2022	Hearing Date:	03/30/2022
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 March 17, 2022 (“expedited discharge notice”), The Oxford Rehabilitation and Nursing Care Center (“the Oxford” or “the facility”) notified the appellant that it sought to discharge him effective [REDACTED], [REDACTED] to [REDACTED] because “the safety of the individuals in the nursing facility is endangered due to [the appellant’s] clinical or behavioral status” (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1). The appellant filed a timely appeal with the Board of Hearings (BOH) on March 17, 2022 (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 a copy of some of the appellant's clinical records, including his admission record, plan of care, social service progress notes, and order summary report, which the hearing officer marked as Exhibit 4. The facility's director of nursing, Ms. Braid, testified by telephone that the facility issued an expedited notice of discharge to the appellant on March 17, 2022 due to concerns about the appellant smoking at unauthorized times and places within the facility. Ms. Braid stated that the facility has designated, supervised smoking times outdoors on the grounds of the facility, at 7 am, 11 am, 2 pm, and 6 pm each day. Smoking materials (such as cigarettes and lighters) are kept in a locked metal cabinet at the facility's reception desk. The appellant was caught smoking, mostly in the shower room on the first floor of the facility during overnight hours, on the following occasions: March 17, 2022; March 16, 2022; February 17, 2022; January 5, 2022; November 30, 2021; July 21, 2021; and January 29, 2021 (Testimony).¹

The facility's administrator, Mr. Nugent, also noted that there was an incident in which the appellant "pocketed" an oxycodone tablet, for unknown reasons, presenting a danger to himself and potentially to other residents (Testimony).

Ms. Braid testified that the appellant resides on a subacute floor, with a number of residents who are on supplemental oxygen. This makes his unauthorized smoking even more dangerous since oxygen is flammable, according to Ms. Braid.

The appellant, who is [REDACTED], was initially admitted to the facility on [REDACTED], and after a subsequent hospital stay, was readmitted on [REDACTED]. His medical diagnoses upon admission included malignant neoplasm of the tonsil, acute respiratory failure with hypoxia, anemia, polyarthrititis, major depressive disorder, generalized anxiety disorder, muscle weakness, chronic obstructive pulmonary disease (COPD), dysphagia, a history of alcohol abuse, gastrostomy and pneumonia (Testimony, Exh. 4, p. 8). The appellant noted that for his cancer diagnosis, he underwent chemotherapy and radiation, and had several oral and neck surgeries. He stated that he

¹ Additional instances of the appellant's unauthorized smoking are documented in the social service progress notes on other dates in July, August and September of 2021, and in December, 2020 (Exh. 4).

has one additional surgery scheduled (Testimony).

The discharge location designated by the facility on the expedited discharge notice is a homeless shelter in [REDACTED] Ms. Braid testified that the visiting nursing association (VNA) will be able to visit the shelter to administer the appellant's medications to him daily. The appellant testified that he cannot distinguish all his medications (Testimony).²

The appellant acknowledged smoking in the facility shower room "a couple of times."³ He also acknowledged holding onto some smoking materials, although he is required to relinquish his smoking materials to the front desk for safekeeping. When asked whether his oncologist has told him to stop smoking, the appellant stated, "not specifically" (Testimony).

The facility administrator, Mr. Nugent, testified that when the appellant was admitted to the facility, the smoking policy was explained to him, and he signed an acknowledgment that he understood, and agreed to abide by, the policy (Testimony).

Ms. Braid stated that the appellant is independent with activities of daily living (ADLs), such as walking, bathing, dressing, and grooming. The appellant agreed. The appellant stated that he did not receive physical therapy or occupational therapy at the facility (Testimony).

Following each incident of unauthorized smoking, the nursing staff, as well as the social services staff, advised the appellant that he cannot smoke inside the building due to the presence of combustible oxygen, and also due to the appellant's cancer diagnosis (Testimony).

In December, 2020, the facility documented an incident in which the appellant "attempted to divert Oxycontin by placing pill in pocket" (Exh. 4, p. 35). Mr. Nugent explained that the appellant was prescribed Oxycontin at that time, and was observed not taking his prescribed medication. Mr. Nugent stated that the appellant's intentions were not clear, and that the potential existed that the appellant might sell the tablet, or give another resident the tablet. Since there are residents in recovery from substance abuse on the subacute unit, this diversion incident presented a danger to other residents, according to Mr. Nugent (Testimony).

The appellant did not specifically recall this incident, and stated that if it happened, he did not sell or give the Oxycontin to another resident.

² Per the medical record, the appellant's current prescribed medications include Ambien, acetaminophen, Benadryl, Benzocaine liquid, chlorhexidine liquid, Fleet enema, Gabapentin, Lorazepam, Mirtazapine, Seroquel, and morphine sulfate (Exh. 4, pp. 30-33).

³ A social service progress note, dated November 30, 2021, states in pertinent part: "This writer met with [the appellant] on this day to issue a final warning concerning smoking within the facility. [The appellant] informed this writer he is struggling with pain and does not sleep through the night. [The appellant] reports being prescribed many sleep aides (*sic*), all to no avail. [The appellant] reports sleeping in hour or two increments during the day. [The appellant] reports strong desire to use tobacco during overnight/early morning hours. [The appellant] was offered smoking replacements and agreed to attempt lozenges if approved by nursing/speech [The appellant] reports inability to chew nicotine gum and also reports utilizing nicotine patch without successes in the past" (Exh. 4, p. 14).

Ms. Braid testified that on or about December 24, 2021, the appellant was clinically approved for MassHealth payment of nursing-facility services on a long-term basis, due to his cancer diagnosis. Mr. Nugent stated that although the appellant was on hospice at one time, he is doing much better now. Ms. White, the facility's social worker, stated that the facility has done very little discharge planning with or on behalf of the appellant, since they had planned to keep him on until he began violating the smoking rules (Testimony).

The appellant does not wish to discharge to a homeless shelter; he would like to remain at the facility until after his next oral surgery. He once resided at a homeless shelter in [REDACTED]. In response to questioning by the hearing officer, the appellant stated he previously lived with a friend in [REDACTED], that he has not spoken to her since his admission to the Oxford, and that he has no family in the area he could move in with (Testimony).

The facility's medical director, Dr. Elmi, submitted a letter dated March 25, 2022, which is included in Exhibit 4. The letter states in relevant part:

[The appellant] has been under my care since August 11, 2020. [The appellant] got admitted to [the facility] due to malignant neoplasm of tonsil, respiratory failure and COPD. [The appellant] can perform [ADLs] independently with no assistance needed. [The appellant] ambulates around the facility using his wheelchair which he is able to navigate independently.

Since [the appellant's] admission, he has had over ten events regarding smoking in the building and smoking outside during nonsmoking times. [The appellant] has been spoken to about this behavior numerous times and his behavior has not changed. [The appellant] is at risk to himself and others as he is smoking in the building while himself and other residents are on oxygen.

It is my professional opinion that there is not a medical need for [the appellant] to remain a resident at the Oxford. [The appellant] is capable and safe to discharge to the community.

(Exh. 4, p. 9)

B. Content of the expedited discharge notice/patient record

The expedited 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 rendered), 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 patient record submitted into evidence (Exhibit 4) contains a statement of the reasons for the appellant's intended discharge, written by Dr. Elmi, the facility's medical director (Exh. 4, p. 9).

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 the Oxford since August 11, 2020 (Testimony, Exh. 4).
2. The appellant's medical diagnoses upon admission included malignant neoplasm of the tonsil, acute respiratory failure with hypoxia, anemia, polyarthritis, major depressive disorder, generalized anxiety disorder, muscle weakness, COPD, dysphagia, a history of alcohol abuse, gastrostomy and pneumonia (Testimony, Exh. 4, p. 8).
3. The facility has designated, supervised smoking times for residents outdoors on the grounds of the facility, at 7 am, 11 am, 2 pm, and 6 pm each day. Smoking materials (such as cigarettes and lighters) are kept in a locked metal cabinet at the facility's reception desk (Testimony).
4. The appellant was caught smoking, mostly in the shower room on the first floor of the facility during overnight hours, on at least the following occasions: March 17, 2022; March 16, 2022; February 17, 2022; January 5, 2022; November 30, 2021; July 21, 2021; and January 29, 2021 (Testimony, Exh. 4).
5. When the appellant was admitted to the facility in [REDACTED], he was provided a copy of the facility smoking policy, and signed an acknowledgment that he understood, and agreed to abide by, the policy (Testimony).
6. The facility asserts that the appellant's unauthorized, unwitnessed smoking presents a danger to the safety of individuals in the facility, since combustible oxygen is present in the facility (Testimony).
7. In December, 2020, the facility documented an incident in which the appellant "attempted to divert Oxycontin by placing pill in pocket" (Exh. 4, p. 35).
8. Through an expedited discharge notice dated March 17, 2022, the Oxford notified the appellant that it sought to discharge him effective [REDACTED] to [REDACTED], [REDACTED] because "the safety of the individuals in the nursing facility is endangered due to [the appellant's] clinical or behavioral status" (Exh. 1).

9. The appellant filed a timely appeal of the expedited discharge notice with the BOH on March 17, 2022 (Exh. 2).
10. For his tonsillar cancer diagnosis, the appellant underwent chemotherapy and radiation, and had several oral and neck surgeries (Testimony).
11. The appellant was on hospice at one time while residing at the facility, but was discharged from hospice (Testimony).
12. The appellant ambulates via wheelchair and is independent with his ADLs (Testimony, Exh. 4).
13. The appellant cannot distinguish all his prescribed medications (Testimony).
14. The discharge location designated on the expedited discharge notice is a homeless shelter in [REDACTED] which the VNA will be able to visit in order to administer the appellant's medications to him daily (testimony).
15. The appellant used to reside in a homeless shelter in [REDACTED] (Testimony).
16. The appellant acknowledged smoking in the facility's shower room on the overnight shift "a couple of times," and acknowledged retaining some smoking materials on his person (Testimony).
17. Following each incident of unauthorized smoking, the nursing staff, as well as the social services staff, advised the appellant that he cannot smoke inside the building due to the presence of combustible oxygen, and also due to the appellant's cancer diagnosis (Testimony, Exh. 4).
18. The appellant does not sleep well at night and reports strong desire to use tobacco during overnight/early morning hours (Exh. 4, p. 14).
19. The appellant's past attempts to quit smoking have been unsuccessful (*Id.*).
20. The appellant did not specifically recall diverting Oxycontin, and denied ever selling or giving this drug to other residents of the facility (Testimony).
21. The facility was prepared to keep on the appellant as a resident there long-term, until he began violating the smoking policy (Testimony).
22. The expedited 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 rendered), 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).

23. The facility's medical director, Dr. Elmi, documented in the appellant's medical record the reasons for his intended expedited discharge (Exh. 4, p. 9).

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, the Fair Hearing Rules, at 130 CMR 610.004, define 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 behavior presents a danger to the safety of other residents, as well as staff. His actions in repeatedly smoking at unauthorized times and in unauthorized places at the facility, as well as his habit of retaining smoking materials on his person, violates the facility rules. Re-education attempts by the facility following each incident have clearly been unsuccessful. In the presence of combustible oxygen, unsupervised smoking is especially dangerous.

I also find that the discharge notice issued by the facility to the appellant, as well as the appellant's patient record, are documented appropriately, and meet the regulatory requirements set forth at 130 CMR 456.701(B) and (C), and at 130 CMR 456.702.

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)

Although the facility had planned to keep the appellant on as a long-term resident, the appellant's continued behavior in smoking at unauthorized times and in unauthorized places derailed that plan. The appellant has been apprised that he will be discharged to a homeless shelter in [REDACTED] and that a visiting nurse will be able to see him there daily to administer his medications. He does not dispute that he is independent with his ADLs. Moreover, the appellant acknowledged that he lived at a homeless shelter in the past.

I conclude that the facility has therefore complied with the legal requirement, above, to provide the appellant sufficient preparation and orientation to ensure his safe and orderly discharge from the facility to another safe and appropriate place.

For these reasons, this appeal is DENIED.

Order for Nursing Facility

None, except to proceed with the planned discharge, but not earlier than five days from the date 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 Acting 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: Mark Nugent, Administrator, The Oxford Rehabilitation and Nursing Care Center, 689 Main Street, Haverhill, MA 01830