

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: Denied

Appeal Number: 2204952

Decision Date: 8/4/2022

Hearing Date: 7/19/2022

Hearing Officer: Cynthia Kopka

Appearance for Appellant:

Pro se

Appearance for Respondent:

Emily Getchell, Director of Nursing
Stephen Williams, Director of Social Services
Michael Takesian, Administrator



*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:	Nursing facility discharge
Decision Date:	8/4/2022	Hearing Date:	7/19/2022
Respondent's Rep.:	Director of Nursing, Director of Social Services, Administrator	Appellant's Rep.:	Pro se
Hearing Location:	Quincy (remote)	Aid Pending:	No

Authority

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

Jurisdiction

By notice dated June 9, 2022, Fairhaven Healthcare Center ("Respondent" or "the facility") informed Appellant of its intent to discharge Appellant from the facility on July 11, 2022. Exhibit 1. Appellant filed a timely appeal on July 5, 2022. Exhibit 2. 130 CMR 610.615. Challenging the discharge or transfer from a nursing facility is a valid basis for appeal. 130 CMR 610.032.

Action Taken by Respondent

Respondent informed Appellant of its intent to discharge Appellant from the facility.

Issue

The appeal issue is whether Respondent satisfied its statutory and regulatory requirements when it issued Appellant the notice of intent to discharge.

Summary of Evidence

Respondent, a skilled nursing facility licensed in Massachusetts, was represented by telephone by its

administrator, director of nursing, and director of social services. Respondent's representatives submitted documents in support of its position, Exhibit 4. Appellant appeared by telephone. A summary of testimony and supporting records follow.

By hand-delivered letter dated June 9, 2022, Respondent informed Appellant of its intent to discharge Appellant from the facility to a homeless shelter. Exhibit 1. A copy of the notice was not provided to a representative on Appellant's behalf. The notice stated that Respondent sought to discharge Appellant on July 9, 2022 because "the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident i.e.: using a lighter/matches to smoke marijuana within the facility, in your room." *Id.* The notice identified a social worker as the person responsible for supervising the discharge and explained Appellant's appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons' protection commission) and a local legal service office. *Id.*

Appellant is in her seventies with diagnoses including dyslipidemia, hypertension, neuropathy, coronary artery disease, hypothyroidism, deep vein thrombosis, delusion disorder, bipolar disorder, carotid stenosis, PVD, anxiety and depression. Exhibit 4 at 16. She was admitted to the facility after transferring from a different facility that closed. *Id.* Respondent's representatives testified that it issued the notice to Appellant on June 9, 2022 after an incident occurring on June 7, 2022. The director of nursing testified that she smelled marijuana coming from Appellant's room and found a marijuana blunt as well as a lighter and matches. *Id.* at 6. Appellant was transferred to the hospital for altered mental status and slurred speech and was diagnosed with marijuana intoxication. *Id.* at 5. Respondent's representatives testified that this has happened on more than one occasion. *Id.* at 11, 12-13, 70. Appellant's doctor references the June 7, 2022 incident and discharge in her notes from medical visits. *Id.* at 21, 26. Appellant's notes from her behavioral health clinician also references the incident and discharge. *Id.* at 91. Respondent's representatives testified that the smoking policy is codified, but did not provide a copy of it for the hearing record. Respondent's representatives testified that marijuana is prohibited, as the facility receives federal funding.

Regarding discharge planning, the homeless shelter listed on the discharge notice is accessible and a bed would be secured prior to Appellant's discharge. Respondent's representatives testified that Appellant has been in her discharge plan and securing housing since prior to the notice of discharge. This is supported in the record. *Id.* at 4, 11, 64. Appellant is approved for a MassHealth waiver and has recently toured three facilities for residential placement. Respondent's representatives testified that a caseworker is due for a follow up visit with Appellant in the next day or two. Respondent anticipates that Appellant will have a residential placement soon.

Appellant testified that she is very sorry for the incident. To Appellant, marijuana is a life saver. Appellant uses marijuana medically and not to get high. Appellant finds it unfair that people are allowed to smoke cigarettes recreationally, but Appellant is not allowed to smoke the marijuana that helps her clinically. Appellant testified vehemently that she does not want to go to a shelter. Appellant said that the three houses she toured were very nice. Appellant denies having smoked in her room on "numerous" occasions but admitted to doing it "two and a half" times. Appellant testified that she knows that smoking is not allowed in the room and was told this by the facility's

representatives at the beginning.

Findings of Fact

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

1. Appellant is in her seventies with diagnoses including dyslipidemia, hypertension, neuropathy, coronary artery disease, hypothyroidism, deep vein thrombosis, delusion disorder, bipolar disorder, carotid stenosis, PVD, anxiety and depression. She was admitted to the facility after transferring from a different facility that closed. Exhibit 4 at 16.
2. By hand-delivered letter dated June 9, 2022, Respondent informed Appellant of its intent to discharge Appellant from the facility to a homeless shelter. Exhibit 1.
3. The notice stated that Respondent sought to discharge Appellant on July 9, 2022 because “the safety of the individuals in the facility is endangered due to the clinical or behavioral status of the resident i.e.: using a lighter/matches to smoke marijuana within the facility, in your room.” *Id.*
4. The notice identified a social worker as the person responsible for supervising the discharge and explained Appellant’s appeal rights. The notice included contact information for a local long term care ombudsman, the disability law center, centers for public representation (including a disabled persons’ protection commission) and a local legal service office. *Id.*
5. Appellant filed a timely appeal on July 5, 2022. Exhibit 2.
6. On June 7, 2022, Appellant was found to be smoking marijuana in her room. Exhibit 4 at 5-6.
7. Appellant had prior incidents of smoking marijuana in her room. *Id.* at 11, 12-13, 70.
8. Appellant’s physician and clinicians reference the June 7, 2022 incident and discharge notice in medical records. *Id.* at 21, 26, 91.
9. The homeless shelter listed on the discharge notice is accessible and a bed would be secured prior to Appellant’s discharge.
10. Appellant has been active in her discharge plan and securing housing since prior to the notice of discharge. *Id.* at 4, 11, 64.
11. Appellant is approved for a MassHealth waiver and has recently toured three facilities for residential placement.

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 action initiated by a nursing facility. Massachusetts has enacted regulations that follow and implement the federal requirements concerning a resident's right to appeal a transfer or discharge, and some of the relevant regulations may be found in both (1) the MassHealth Nursing Facility Manual regulations at 130 CMR 456.000 *et seq.*, and (2) the Fair Hearing Rules at 130 CMR 610.000 *et seq.*

Per 130 CMR 456.701(A) and 130 CMR 610.028(A), a nursing facility resident may be transferred or discharged 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 MassHealth Agency or Medicare) a stay at the nursing facility; or
- (6) the nursing facility ceases to operate.

Additionally, if the facility discharges a resident under 130 CMR 610.028(A)(3) and (4), the resident's clinical record must be documented by a physician. 130 CMR 456.701(B); 130 CMR 610.028(B).

Prior to discharge or transfer, the nursing facility must hand deliver to the resident and mail to a designated family member or legal representative (if the resident has made such a person known to the facility), 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 MassHealth agency 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 610.029; and
 - (c) the effect of requesting a hearing as provided for under 130 CMR 610.030;
- (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.

130 CMR 610.028(C).

Pursuant to 130 CMR 610.029(A), the notice of discharge or transfer required under 130 CMR 610.028 must be made by the nursing facility at least 30 days before the date the resident is to be discharged or transferred, except as provided for under 130 CMR 610.029(B) and (C) when the discharge is being made on an emergency basis. *See also* 130 CMR 456.702(A).

Further, Mass. Gen. Laws ch. 111, §70E provides that “[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.” Finally, federal regulations require that a nursing facility provide sufficient preparation for a safe and orderly discharge. *See* 42 CFR 483.12(a)(7).

Respondent has presented sufficient evidence it has complied with the regulations when issuing the notice of discharge. Appellant admitted to violating the smoking policy, albeit for understandable and sympathetic reasons. Regardless of the reason, smoking inside is inherently a safety concern for residents and staff. There is no evidence that the shelter listed on the discharge notice is a not a safe or appropriate place for discharge. Respondent has engaged with sufficient discharge planning with Appellant. Accordingly, this appeal is denied.

Order for Respondent

Proceed with the discharge as set forth in the notice dated June 9, 2022 after the 30-day stay (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 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.

Cynthia Kopka
Hearing Officer
Board of Hearings

cc:

Fairhaven Healthcare Center, Attn: Administrator, 476 Varnum Avenue, Lowell, MA 01854

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