

Office of Medicaid BOARD OF HEARINGS

Appellant Name and Address:



Appeal Decision: APPROVED

Appeal Number: 2207801

Decision Date: 11/17/2022

Hearing Date: 11/14/2022

Hearing Officer: Christopher Taffe

Appearance for Appellant:

Appellant, pro se (by phone)

Appearances for Respondent:

Carly Veiga, Administrator; Kate Hazelgard, Social Worker; Leah Kirkpatrick, Administrator-in-Training; and Janet Candido-Bailey, Asst. Director of Nursing, all on behalf of The Brentwood Rehabilitation and Healthcare Center (all by phone)



*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:	Nursing Facility Discharge – Safety of Others
Decision Date:	11/17/2022	Hearing Date:	11/14/2022
Respondent Reps.:	C. Veiga, K. Hazelgard, Lea Kirkpatrick, & J. Candido-Bailey	Appellant's Rep.:	Appellant, pro se
Hearing Location:	HarborSouth Tower, Quincy		

Authority

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

Jurisdiction

On September 26, 2022, The Brentwood Rehabilitation and Healthcare Center, a skilled nursing facility (hereafter “The Brentwood”, “Nursing Facility”, and/or “Respondent”), issued a 30-Day Notice of Intent to Discharge Resident to Appellant, the nursing facility resident, indicating the Brentwood was seeking to discharge Appellant to a Motel 6 at 65 Newbury Street in Danvers, Mass. on October 25, 2022; the grounds for discharge indicated that “*the safety of the individuals in the nursing facility is endangered*”. See Exhibit 1; 130 CMR 456.701; 130 CMR 610.028. Appellant filed a timely appeal of this September 26, 2022 notice and a request for a Fair Hearing with the Board of Hearings on October 20, 2022. See Exhibit 1; 130 CMR 610.015(B)(3). On November 1, 2022, the Board of Hearings scheduled this matter for a non-expedited hearing.¹ See

¹ During the initial part of hearing, a Respondent representative stated that they thought the appeal was over an subsequent and expedited 14-Day Notice of Discharge that the Respondent issued to Appellant, on the same materials grounds of safety with a similar Motel 6 proposed discharge location, on October 27, 2022, which the nursing facility believed the Appellant had appealed, and that this current appeal should be conducted on the expedited time frame. This is not correct. The record reveals that the Board of Hearings did not receive notice of any appeal of the October 27, 2022 discharge notice until Respondent’s submission of materials on November 8, 2022, which was after the appeal had already been scheduled on the non-expedited timetable. See Exhibit 3, pages 2 and 3. Post-hearing, the Board of Hearings’ administrative staff searched to see if there was an early filing between

Exhibit 2.

Nursing facility residents in Massachusetts have the right to appeal any nursing facility-initiated discharge action to the Board of Hearings (BOH). See 130 CMR 610.032(C). If a request for a hearing regarding a discharge or transfer from a nursing facility is received by BOH during the notice period described in 130 CMR 610.015(B)(3), the nursing facility must stay the planned discharge or transfer until 30 days after the decision is rendered. While this stay is in effect, the resident must not be transferred or discharged from the nursing facility. See 130 CMR 610.030(A).

Action Taken by Nursing Facility

Brentwood issued a 30-Day Notice of Intent to Discharge Resident to Appellant, seeking to discharge Appellant to a community setting.

October 27, 2022 and November 8, 2022, and could find no such filing; the Respondent representatives at hearing also offered no other date, other than the November 8, 2022, as the date of any such hypothetical appeal filing challenging the October 27, 2022 notice. It is also legally unclear how it could be expedited, when the Appellant exercised his appeal right on a 30-day notice already on October 20, 2022, and it seems non-intuitive and unfair for the nursing facility's subsequent notice to effectively cure or amend its prior discharge notice during the pendency of this appeal, and convert that earlier appeal into an expedited one without violating due process.

As further background, it is noted that another appeal (BOH # 2207201) over this same issue with the same parties had had been earlier filed on September 26, 2022 in response to an August 26, 2022 attempt to discharge Appellant on safety. The Board of Hearings had attempted to schedule and hold that hearing for Appeal # 2207201 on October 24, 2022, but at the time of hearing on October 24, 2022, the representative from the nursing facility responded to a telephone call from the Hearing Officer and indicated that the representative was not prepared to go forward with the hearing as they did not receive notice of the hearing time and date. The appellant had the same contact information as the nursing facility representative and did not appear at the hearing. At the time of that first scheduled hearing on October 24, 2022, the nursing facility representative stated that they would rescind the Notice of Intent to Discharge. It was likely this played a role in the facility thinking this appeal would cover the November 2022 request for a hearing on the third notice, although it is still unclear how the facility could think the scheduling notice for this appeal could have been issued before the appeal was filed. In addition, the first two discharge notices had the name of and were issued by a different (and likely predecessor) administrator from the nursing facility, and this probably also was a factor in the confusing past chronology.

It is also unclear why the Board of Hearings did not opt to consolidate the October 20, 2022 appeal request into the October 27, 2022 hearing between the same appeal but, as noted, the other appeal did not go forward on substance and, nevertheless, the Hearing Officer's written decision in that other appeal makes no mention of this current October 27, 2022 appeal request. See Exhibit 4, containing an unsigned copy of the administrative dismissal in Appeal # 2207201.

As discussed at hearing, the Hearing Officer in this appeal offered to take jurisdiction over the third discharge notice after Appellant indicated a desire to so appeal that notice and to try to get the parties on the same path going forward. However, the Hearing Officer will not handle this appeal on an expedited basis since no appeal of an expedited notice had ever been separately filed. Additionally, some of this procedural confusion may have been caused by the nursing facility twice issuing repeated notices of discharge when appeals over prior notices of discharge are still pending.

Issue

The appeal issues are (1) whether there are grounds to support the Nursing Facility's basis for discharge and (2) whether the Nursing Facility has properly complied with all requirements prior to discharge.

Summary of Evidence

Appellant is a [REDACTED] male who has been admitted to the Brentwood multiple times. Appellant most recently admitted to the Brentwood on [REDACTED], and he has resided there continuously since then. The Brentwood is a skilled nursing facility, proper licensed by the Commonwealth's Department of Public health, with 149 beds, all of which are dual certified for both Medicare and Medicaid. Appellant is a MassHealth member who has federal SSDI benefits and he has been found to be clinically eligible and screened by MassHealth to stay in the nursing facility, on a short-term basis, through [REDACTED].

Prior to his nursing facility admission in [REDACTED], Appellant previously lived in the community in homeless shelters or Motel 6's. As to some of his prior time at a Motel 6, Appellant testified that he would pay for his stay there, and he was not living in a motel under a state program where the state may assist with payment. He had one prior admission at this Brentwood nursing facility; although neither side could testify specifically as to exactly when this occurred, page 16 of Exhibit 3² suggests it was during the period around December of 2021.

The nursing facility testified that the reason for the discharge was because Appellant had violated the non-smoking policy multiple times with cigarettes, as the facility is a non-smoking campus. Brentwood produced not only its two-page Tobacco-Free Environment Policy, but also a page (from December 21, 2021) where the Appellant had signed it on December 27, 2021. See Exhibit 3, pages 14 through 16. While certain prior residents received legacy status which permitted smoking, the facility indicated that Appellant had no such rights. To comply with the smoking policy, Appellant would have to leave the campus, but that presents its own issues as Appellant is not able to safely go far distances and it may jeopardize his care. Appellant at times uses a roll-aid, or a type of walker with a folding seat option. Appellant has been caught smoking outside multiple times and close to the entrance door of the facility. At one point in the hearing, the facility representatives stated Appellant could permissibly smoke 100 feet away from an entrance but he was often smoking much closer than that, and then later the nursing facility representatives indicated Appellant should

² In response to the scheduling notice, Respondent submitted a 59-page fax to the Board of Hearings on November 8, 2022, which was marked as Exhibit 3. Appellant was late to the hearing, and while the Hearing Officer and Respondent were waiting for the Appellant, the Hearing Officer informed the Respondent that the 59 page submission had only 29 pages (the first 29-pages) related to Appellant and that pages 30-31 appeared to be medical records for a second resident at the facility, and pages 32-59 were for a third resident of the facility. The Respondent apologized and indicated they were aware of this issue and were cautioned to take more care of sending records in the future. The Hearing Officer has only kept pages 1 through 29 in the record as Exhibit 3, and this issue is noted here in case future or judicial review seeks information on why the remainder of the 59-page fax were not made part of the record.

not smoke anywhere on campus. The respondent testified to multiple incidents of outdoor smoking on the facility grounds, including October 17, 2022; October 23, 2022; October 27, 2022; and October 30, 2022, all as documented in the record on Exhibit 3, pages, 17 through 24. There is also a note that The Respondent representatives also testified that he had been smoking this past weekend prior to hearing. The Respondent indicated that cigarettes and lighters could create burn risks, or brush fires, or cause injury to others inside the facility. In addition, the facility talked about multiple issue with Appellant being caught with a lighter which he is not supposed to have inside the facility for health and safety reasons. See id. The facility stated that they have offered him medication alternatives for cessation akin to a nicotine patch but Appellant does not appear interested in that option.

Appellant did not dispute the smoking incidents and indicated that he had a problem because he could not ambulate farther to get his smoke away. Appellant also expressed displeasure with the lighter policy as he thought it was his property.

In terms of discharge planning, social work notes and planning indicate that Appellant is refusing to go to shelter, and that the nursing facility offered to pay the first few nights at a Motel 6. Appellant did make requests to be transferred to two other nursing facilities that had more smoking-friendly policies, but one of those facilities was now closing and was taking no further admissions, and the other had rejected the transfer request.

In response to a question about the medical doctor's written requirement in support of the discharge, the nursing facility eventually pointed to and located a doctor's note from Dr. Patel on October 25, 2022, on pages 18 through 22 of Exhibit 3. The MD notes does not mention or discuss the safety of others in the facility but after an assessment simply says

*“** Patient is stable. Will followup with discharge planning.*

Anticipated Date of Discharge/Disposition: When okay with PT”

See Exhibit 3, pages 21-22. There are no notes in the record or Exhibit 3 involving future discussions with PT, and the Respondent representatives stated Appellant has not done PT in a while.

Findings of Fact

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

1. Appellant was most recently admitted to Brentwood on [REDACTED], and he has resided there continuously since then. (Testimony and Exhibit 3)
 - a. Appellant is on MassHealth, and currently has MassHealth approved benefits covering his nursing facility stay on a short-term basis through November 30, 2022. (Testimony)

2. Since August of 2022, the nursing facility has attempted to issue three notices of discharge based on a contention that Appellant's is endangering the safety of others in the nursing facility by constantly and repeatedly violating the tobacco-free policies of the nursing facility by smoking cigarettes. (Testimony and Exhibits 1, 3 and 4)
3. Brentwood issued an initial 30-day Notice of Discharge on August 26, 2022. Appellant timely appealed that first notice, which led to a hearing scheduled on October 24, 2022. Neither Appellant nor the nursing facility were aware of the scheduled hearing date, and the nursing facility agreed to rescind the appealable action notice. That appeal (BOH # 2207201) was dismissed. (Testimony and Exhibit 4)
4. On September 26, 2022, The Brentwood issued a 30-Day Notice of Intent to Discharge Resident to Appellant indicating the Brentwood was seeking to discharge Appellant to a Motel 6 at 65 Newbury Street in Danvers, Mass. on October 25, 2022; the grounds for discharge indicated that "*the safety of the individuals in the nursing facility is endangered*". (Exhibit 1)
 - a. This notice was timely appealed to the Board of Hearings on October 20, 2022. (Exhibit 1)
 - b. This October 20, 2022 appeal was not the subject of Appeal # 2207201, and is instead the subject of the current appeal. (Testimony and Exhibits 1 and 4)
 - c. The Board of Hearings scheduled the current appeal, #2207801, via a scheduling letter dated November 1, 2022. (Exhibit 2)
5. On October 27, 2022, the nursing facility issued a third discharge notice. This was a 14-day expedited discharge notice. (Testimony and Exhibit 3)
 - a. Appellant desires to appeal this October 27, 2022 notice but there is no filing of an appeal with the Board of Hearings. (Testimony and Exhibit 3)
 - b. The Board of Hearings received no notice of this appeal until after the scheduling letter in this matter, when the nursing facility submitted documents for this hearing and included the third discharge notice. (Testimony and Exhibit 3)
 - c. The Hearing Officer offered, and the parties accepted, to take jurisdiction over this third discharge notice in the current appeal. (Testimony)
6. The nursing facility has a Tobacco-Free policy on its grounds. Under the guidelines, which were seen and signed by Appellant in 2021 during an earlier stay, Appellant is not eligible to smoke on the grounds. (Testimony and Exhibit 3)
7. Appellant has been caught multiple times smoking cigarettes outdoors, but on the grounds of the facility or near the entrances. He also has been caught multiple times with a cigarette lighter, which is not allowed under the nursing facility's policies. (Testimony and Exhibit 3)

8. Prior to his most recent nursing facility admission, Appellant did not have a home or apartment. He has spent time in the last few years in shelters or in hotels. Appellant has paid for some of his stays in hotels. (Testimony)
9. The nursing facility has attempted to engage in finding alternative nursing facilities or places of discharge for the Appellant. (Testimony and Exhibit 3)
10. There is no adequate documentation from a medical doctor in the record in support of the intended discharge action. The only note submitted in Exhibit 3, is a narrative from October 25, 2022 which states the following:

*“** Patient is stable. Will followup with discharge planning.*

Anticipated Date of Discharge/Disposition: When okay with PT”

(Testimony and Exhibit 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. In this Commonwealth, the MassHealth agency 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.³

For the purposes of this decision, the definitions found in 130 CMR 456.002 apply:

“Nursing facility” – a Medicare skilled nursing facility or Medicaid nursing facility licensed by the Department of Public Health to operate in Massachusetts, or a distinct Medicaid- or Medicare-certified unit within a facility.

“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.

Based on the above information, Brentwood is attempting to discharge Appellant to a community or

³ The regulatory language in the MassHealth Nursing Facility Manual at 130 CMR 456 has regulations which are identical (or near-identical and substantively equivalent) to counterpart regulations be found within the Commonwealth’s Fair Hearing Rules at 130 CMR 610.000 as well as corresponding federal government regulations. As an example, the regulations in 130 CMR 610.028 and 42 CFR 483.12(a)(2) are identical to that found in 130 CMR 456.402. Because there is identical or near-identical regulatory language, the remainder of this decision will hereafter only contain cites to the MassHealth Nursing Facility Manual regulations in 130 CMR 456 unless noted.

non-institutional setting via the appealable notice in question. See Exhibit 1 and 130 CMR 456.002.

Some regulatory guidelines that speak to whether and how the Appellant can be so discharged are found in 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 as well as the specific and strict requirements of the relevant notice and supplementary paperwork. If these requirements are not satisfied, the facility must permit the resident to remain in the facility. 130 CMR 456.701 through 130 CMR 456.704 read in relevant part 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 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. s. 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. s. 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.*

456.702: Time Frames for Notices Issued by Nursing Facilities

- (A) The notice of discharge or transfer required under 130 CMR 456.701(C) must be made by the nursing facility at least 30 days prior to the date the resident is to be discharged or transferred, except as provided for under 130 CMR 456.702(B).*
- (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. ...*

456.703: Time Frames for Submission of Requests for Fair Hearings

- (A) Appeals of discharges and transfers will be handled by the Division's Board of Hearings (BOH).*
- (B) Time Limitation on the Right of Appeal. The date of request for a fair hearing is the date on which BOH receives such a request in writing. BOH must receive the request for a fair hearing within the following time limits:*
 - (1) 30 days after a resident receives written notice of a discharge or transfer pursuant to 130 CMR 456.702(A); or*
 - (2) 14 days after a resident receives written notice of an emergency discharge or emergency transfer pursuant to 130 CMR 456.702(B);...*

456.704: Stay of a Transfer or Discharge from a Nursing Facility Pending Appeal

(A) If a request for a hearing regarding a discharge or transfer from a nursing facility is received by the Board of Hearings during the notice period described in 130 CMR 456.703(B)(1), the nursing facility must stay the planned discharge or transfer until 30 days after the decision is rendered. While this stay is in effect, the resident must not be transferred or discharged from the nursing facility.

(B) If a hearing is requested, in accordance with 130 CMR 456.703(B)(2), and the request is received prior to the discharge or transfer, then the nursing facility must stay the planned transfer or discharge until five days after the hearing decision...

(Bolded and underlined emphasis added.)

In addition to the MassHealth-related regulations discussed above, the nursing facility also has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E. One key paragraph of that statute, which is highly relevant to these types of appeals, 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.***

(Bolded emphasis added.)

With the above laws in mind, I come to the following conclusions:

There are certainly substantive grounds to support the discharge action. The record is relatively clear that Appellant has repeatedly violated the non-smoking policies of the Brentwood, and it is an understandable leap to conclude that smoking at or near the facility can present a safety or health risk to others in the facility. The presence of lighters and/or smoking materials, especially inside a medical institution where there may be patients receiving oxygen, and certainly Appellant's behavior appears to be creating a needless risk to the safety and health of those in the nursing facility.

However what is preventing the nursing facility from winning this appeal is the nursing facility did not comply with all its procedural requirements. Namely 130 CMR 456.701(B)(2) requires a physician to document and explain the necessity of the discharge. There is nothing in the record with a physician stating or explaining how Appellant's discharge is necessary. The only thing in the record from a physician has to do with how the Appellant may be required discharged once there is some follow-up with Physical Therapy; there is no mention or documentation by a doctor of the safety risk. While it may seem unnecessary, it is a procedural requirement and the nursing facility did not follow the steps. This appeal must therefore be APPROVED. The nursing facility is not allowed to discharge Appellant per any of the discharge notices issued to date.

In conclusion, Appellant should take note that he only "won" this current appeal on grounds related to inadequate documentation. If the Appellant wants to continue to reside at Brentwood, the facility that has provided him with a roof over his head as well as medical care and other needs for over eight-plus months, then the Appellant is strongly encouraged to fix his behavior immediately and

stop smoking on the premises. This also means he should not have or bring a lighter on to the premises. There is no right to smoke in or near a medical facility. If this habit continues and can't be stopped, the Appellant should expect that the nursing facility will eventually learn and fix its documentation issues and be more successful on any needed future discharge notice, which in turn may likely lead to an adverse result for Appellant. Thus, Appellant is strongly advised, if he can't stop smoking, to make all efforts to work in good faith with the nursing facility on finding an alternative living arrangement that works for both parties.

Order for Nursing Facility/Respondent

Do NOT discharge Appellant per either the September 26, 2022 or October 27, 2022 discharge notices.⁴

⁴ As a general note, the nursing facility is also strongly encouraged in the future to refrain from issuing a discharge notice when an earlier discharge notice is pending. In such a unusual case where it is necessary, the nursing facility should put the rescinding of the prior notice in writing and make sure the resident (and if necessary, the Board of Hearings) is aware that a prior discharge notice has been rescinded and does not need an appeal action.

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, at the address on the first page of this decision.

Christopher Taffe
Hearing Officer
Board of Hearings

cc: Carly Veiga, Administrator
The Brentwood Rehabilitation and
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56 Liberty Street
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