

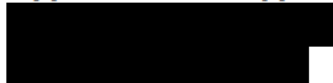
# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2209277
<b>Decision Date:</b>	12/27/2022	<b>Hearing Date:</b>	12/21/2022
<b>Hearing Officer:</b>	Sara E. McGrath		

**Appearances for Appellant:**



**Appearances for Nursing Facility:**

Deborah Joseph, Administrator  
Sheila Allsop, LCSW



*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

<b>Appeal Decision:</b>	Approved	<b>Issue:</b>	Nursing Facility Discharge
<b>Decision Date:</b>	12/27/2022	<b>Hearing Date:</b>	12/21/2022
<b>Nursing Facility's Reps:</b>	Deborah Joseph; Sheila Allsop	<b>Appellant's Rep:</b>	██████████
<b>Hearing Location:</b>	Board of Hearings		

### Authority

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

### Jurisdiction

Through a notice dated December 5, 2022, the skilled nursing facility, South Shore Rehab & SCC ("the facility"), informed the appellant of the facility's intent to discharge him to "Father Bill's Place, 38 Broad Street, Quincy, MA" on December 19, 2022 (Exhibit 1). The appellant filed a timely appeal with the Board of Hearings on December 16, 2022 (130 CMR 610.015(B); 130 CMR 456.703; and Exhibit 1). Challenging a notice of transfer or discharge initiated by a nursing facility is a valid ground for appeal to the Board of Hearings (130 CMR 610.032(C)).

### Action Taken by Nursing Facility

The facility notified the appellant of its expedited intent to discharge him to a local shelter.

### Issue

The appeal issue is whether the facility can appropriately discharge the appellant to the location on its notice.

## Summary of Evidence

The nursing facility representatives appeared at hearing by phone and testified, in summary, to the following chronology: The appellant, a male in his late 50s, was admitted to the facility in 2020 for short-term rehabilitation after a hospital admission. Although he currently has no skilled needs, he remains at the facility because he is still on a waiting list for housing. The appellant has diagnoses including chronic obstructive pulmonary disease, cirrhosis of the liver without ascites, hypothyroidism, GERD, chronic atrial fibrillation, major depressive disorder, anxiety disorder, alcohol dependence, muscle weakness, and a history of falls. Nursing staff currently assists the appellant with medication administration.

The nursing facility representatives explained that the appellant has not been compliant with the facility's smoking or alcohol policy. Because of these non-compliance issues, the facility issued an expedited discharge notice to the appellant in October 2022, indicating that the discharge was necessary because the safety of individuals in the nursing facility was endangered. The parties attended a fair hearing in late October. The nursing facility ultimately agreed to rescind the discharge notice when the appellant agreed to thereafter comply with the facility's policies regarding smoking and alcohol. The representatives testified that the appellant has not maintained compliance, and thus on December 5, 2022, the facility issued a second expedited discharge notice for the same reason (Exhibit 1).

The facility social worker explained that the facility does not permit any alcohol on the premises, and the appellant has a history of using alcohol in the facility. Most recently, on December 5, facility staff searched the appellant's room after "hearing a report" that the appellant was seen passing a nip to another resident. Facility staff searched the appellant's room and found three empty nip bottles (Exhibit 3, p. 3). Further, the facility allows smoking in designated areas and at designated times, but does not permit residents to keep smoking materials on them. Smoking materials are to be left with the facility's smoking attendant. Because the appellant has been witnessed smoking outside, without first having retrieved his smoking materials from the smoking attendant, the facility concludes that the appellant keeps smoking materials on his person, violating the facility policy. Other residents have become aware of this, and are angry that they are not allowed to keep their smoking materials with them. Further, the appellant refused to sign the facility's "new" smoking policy. The facility representatives feels that all of these issues have endangered the safety of the appellant and the other residents.

The appellant and his ombudsman appeared at hearing by phone. The appellant conceded that he has in the past been noncompliant with the facility's smoking and alcohol policies. Since the October fair hearing, however, he maintains that he has been compliant. He denied sharing a nip with another resident, and stated that the nip bottles found in his room were consumed off the premises. He stated that he has been compliant with the smoking policy. He would like to move out of the facility, but is waiting for housing. The appellant explained that he did not sign the smoking policy because he was told that he had to sign it and that it was not a choice.

The facility social worker explained that the discharge location, a local shelter, requires residents to

leave during the day. In the evening, beds are available on a first come, first served basis. She noted that because the appellant has been in the nursing facility for two years, he would likely find it difficult to fend for himself during the day. She stated that the appellant has siblings, and the facility reached out to a sister to ask if the appellant could live with her, even if only on a short-term basis. The sister declined. The social worker suggested that perhaps the sister could provide support to the appellant during the day when he is not permitted to be at the shelter.

### **Findings of Fact**

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

1. The appellant, a male in his late 50s, was admitted to the facility in 2020 for short-term rehabilitation after a hospital admission.
2. The appellant currently has no skilled needs; nursing staff currently assists the appellant with medication administration.
3. The appellant has diagnoses including chronic obstructive pulmonary disease, cirrhosis of the liver without ascites, hypothyroidism, GERD, chronic atrial fibrillation, major depressive disorder, anxiety disorder, alcohol dependence, muscle weakness, and a history of falls.
4. In October, 2022, the facility issued an expedited discharge notice to the appellant, indicating that the discharge was necessary because the safety of individuals in the nursing facility was endangered.
5. The parties attended a fair hearing in late October and discussed the appellant's noncompliance with the facility's smoking and alcohol policies. The nursing facility ultimately agreed to rescind the discharge notice after the appellant agreed to thereafter comply with the facility's policies regarding smoking and alcohol.
6. On December 5, 2022, the issued a second expedited discharge notice for the same reason.
7. On December 16, 2022, the appellant timely appealed this discharge notice.

### **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 mirror the federal requirements concerning a resident's right to appeal a transfer or discharge, and the relevant MassHealth regulations may be found in the Nursing Facility Manual regulations at 130 CMR 456.000 *et seq.* and in the Fair Hearing Rules at 130 CMR 610.000 *et seq.*

130 CMR 610.028 sets forth the notice requirements for transfers and discharges initiated by a

nursing facility, and provides in part as follows:

(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 610.028(A)(1) through (5), the resident's clinical record must be documented. The documentation must be made by

- (1) the resident's physician when a transfer or discharge is necessary under 130 CMR 610.028(A)(1) or (2); and
- (2) a physician when the transfer or discharge is necessary under 130 CMR 610.028(A)(4).<sup>1</sup>

In this case, the facility initiated discharge proceedings because it determined that the appellant's behavior has endangered the safety of individuals at the facility. The record does not adequately support the discharge. Though the appellant claims that he has been compliant with the nursing facility's policies since October, the record suggests that this may not be the case. While the appellant disputes consuming alcohol on the premises and claims he did not share alcohol with another resident, he concedes that he has refused to sign the facility's smoking policy (Exhibit 3, p. 3). This refusal suggests that the appellant will not agree to comply with the facility's smoking policy.

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<sup>1</sup> 130 CMR 456.701(B) almost mirrors 130 CMR 610.028(B), but provides the additional italicized clarification:

(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).

Notwithstanding these likely ongoing compliance issues, the facility has not satisfied its obligation under the applicable laws and regulations. First, per 130 CMR 456.701, the record must contain documentation from a physician that explains the discharge. The record here contains no such documentation. The record includes several physician progress notes, but none contains physician documentation detailing how the appellant's actions are endangering himself or others (Exhibit 3).

In addition, the nursing facility also has an obligation to comply with all other applicable state laws, including M.G.L. c.111, §70E. The key paragraph of that statute provides 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.

In this case, the discharge location is to a local shelter. The facility social worker conceded that the appellant would have a "difficult time" at a shelter that he needs to vacate during the day. The social worker noted that the appellant is on a waiting list for housing, and when asked about discharge planning, stated only that she asked the appellant's sister if he could move in with her. There is no evidence that another nursing facility placement was discussed or investigated. There is no evidence that the appellant has a safe place to be, with family or otherwise, during the day when the shelter is closed, or at night if he is unable to secure a bed. Without more, the facility has not met its burden to show that the discharge location is a safe or appropriate place for the appellant at this time. The facility has thus not satisfied the requirements of M.G.L. c.111, §70E.

The appellant's appeal is approved.

### **Order for the Nursing Facility**

Do not discharge the appellant under this notice of intent to discharge.

### **Implementation**

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.

## **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.

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Sara E. McGrath  
Hearing Officer  
Board of Hearings

cc: South Shore Rehab & SCC  
Attn: Deborah Joseph  
115 North Avenue  
Rockland, MA 02370

