

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Approved	<b>Appeal Number:</b>	2300647
<b>Decision Date:</b>	2/3/2023	<b>Hearing Date:</b>	02/01/2023
<b>Hearing Officer:</b>	Christopher Jones		

**Appearance for Appellant:**  
Pro se

**Appearance for Skilled Nursing Facility:**  
Mark Nugent (Administrator)  
Jessica Prescott (Social Worker)



*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>	Expedited NF Discharge
<b>Decision Date:</b>	2/3/2023	<b>Hearing Date:</b>	02/01/2023
<b>Nursing Facility's Reps.:</b>	Mark Nugent; Jessica Prescott	<b>Appellant's Rep.:</b>	Pro se
<b>Hearing Location:</b>	Remote	<b>Aid Pending:</b>	No

## Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapters 30A, 111, and 118E, and the rules and regulations promulgated thereunder.

## Jurisdiction

Through a Notice of Intent to Discharge with Less Than 30 Days' Notice (Expedited Appeal), dated January 26, 2023, the respondent-nursing facility informed the appellant that he would be discharged to a specific address in the same city as the facility on February 9, 2023. (Exhibit 2.) The appellant filed this timely appeal on January 27, 2023. (Exhibit 2; 130 CMR 610.015(B).) Nursing facility residents have the right to appeal any nursing facility-initiated transfer or discharge. (130 CMR 610.032(C).)

## Action Taken by the Nursing Facility

The nursing facility seeks to discharge the appellant to a homeless shelter because: "your own welfare and your needs cannot be met within the facility"; "[t]he safety of the individuals [*sic*] in the nursing facility is endangered due to your clinical or behavioral status"; and "[t]he health of the individuals in the nursing facility would otherwise be endangered." (Exhibit 2.)

## Issue

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 pursuant to MGL Ch. 111, § 70E.

## Summary of Evidence

This is the second attempt by the nursing facility to discharge the appellant within 30 days, and the third discharge appeal since he was admitted in the Spring of 2018. (See Appeal No. 2209604 (Jan. 10, 2023); and Appeal No. 2178890 (Dec. 8, 2021).) The appellant was admitted following a hospitalization for stroke. His medical diagnoses include alcoholic cirrhosis of the liver with ascites, encephalopathy, alcohol dependence in remission, thrombocytopenia, type 2 diabetes, acute kidney failure, essential hypertension, obesity, muscle wasting and atrophy, attention and concentration deficit following cerebrovascular disease, anxiety, and depression. The appellant continues to receive physical and occupational therapies as well as psychological counseling at the facility. He is independent with his activities of daily living, though he often relies upon a wheelchair. (Exhibit 3, pp. 8, 12, 17.) The appellant is authorized for many medications, but of particular relevance are: “Norco Tablet 5-325 MG (HYDROcodone-Acetaminophen) Give 1 tablet by mouth three times a day for pain”; “Prazosin HCl Capsule ... for night terrors”; and “MELATONIN TAB 3MG ... for insomnia.” (Exhibit 3, pp. 20-21.)

The December 2021 appeal arose from two incidents in the second half of 2021 in which the appellant was intoxicated at the nursing facility. The facility issued an expedited discharge notice because the safety of individuals in the nursing facility was endangered. The hearing officer found that the facility had valid grounds to discharge the appellant as his behavior was a potential danger to other residents, and the notice issued was technically sufficient. (See Appeal No. 2178890, p. 9.) However, when the ground for discharge is that others are at risk, a physician must document the risk to others in the resident’s clinical record. The hearing officer found this critical piece of documentation was missing and approved the appeal. Further, the hearing officer was unconvinced a shelter that required the appellant to leave during the day was a safe and appropriate location for him.

The immediately preceding appeal arose after the appellant was found “singing in slurred way and saying words that did not make sense ... .” Because of his history of alcohol dependence, his room was searched, and he became belligerent. The police were called, and he was brought to the hospital due to his belligerence. During the room search, they found a bottle with the label removed with approximately 10 ml of clear liquid that smelled like alcohol. (Exhibit 3, p. 12.) The appellant was supposed to have been tested for alcohol in the hospital, but due to some administrative confusion he was administered a drug screen. This drug screen came back clean, despite the appellant being prescribed oxycodone. The appellant explained to the hearing officer that nothing showed up in his drug screen because he did not receive his medications while he was in the hospital. Further, he explained that the doors do not lock in the facility and he returned to find his room in disarray, so he believed someone else had brought the bottle into his room. (Appeal No. 2209604, pp. 3, 5.) The hearing officer noted that there was no evidence that the appellant had broken the facility’s rules regarding consuming alcohol and that there was no evidence that he was physically threatening to staff or other residents. Further, the prior incidents of alcohol consumption were both infrequent and remote from the current discharge attempt. Therefore, the appeal was approved. (Appeal No. 2209604, p. 8.)

On or around January 25, 2023, the nursing facility decided to start performing random room searches of the appellant due to “inappropriate behavior and suspicion of alcohol use and environmental disruption.” During a room search, they found “39 white, oval tablets ... [with no] markings or scoring ... present on the pill[s].” (Exhibit 3, pp. 9-10.) The room search was performed due to “suspicion of [the appellant] being under the influence of alcohol. No alcohol was found. [The appellant] was belligerent, accusatory, and verbally abusive towards staff conduct[ing] search.” (Exhibit 3, p. 10.)

A letter from Dr. Shiao-Ang Shih was submitted. It reviews the appellant’s incident history, including the following:

On January 25, 2023, a room search was conducted due to [the appellant] having a change in mental status and slurred speech. During the room search, 39 white, oval pills were found. [The appellant] reported the pills were Melatonin. On January 26, 2023, [the appellant] was given a 14-day notice to discharge due to this event.

[The appellant] ambulates around the facility using his wheelchair.

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

(Exhibit 3, p. 8.)

The facility’s representatives testified they felt the appellant’s needs could no longer be safely met in the facility. Furthermore, they felt he was a significant threat to the safety of other residents in the facility, many of whom are also recovering from drug or alcohol dependency. They did not believe the pills found in the appellant’s room were melatonin because the melatonin handed out at the facility is pressed or marked so that it can be identified. Therefore, they suspected that the pills had their markings removed or were illegal street drugs. They called the police but were told to simply destroy the pills. They were not tested. The nursing facility administrator testified that the pills were in multiple, small plastic baggies as if they were being packaged for sale.

When asked why the appellant was not also being discharged because he had improved sufficiently that he no longer required nursing facility level of care, the facility’s representatives acknowledged that he still qualifies for nursing facility level of care. However, they felt that he could safely receive therapy and nursing services in the community. The discharge address on the notice is a homeless shelter that does not require residents to leave during the day during the winter.<sup>1</sup> Therefore, he would be able to schedule his therapies at the shelter. They acknowledged that they could not reserve a bed for the appellant, but they testified that they would not discharge until a bed were secured at a shelter that did not require the appellant to leave during the day.

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<sup>1</sup> The address on the discharge notice actually includes two typographical errors. First, a digit is left off of the property number and the street name is misspelled. The appellant did not allege, however, that he had any confusion regarding where the nursing facility sought to send him.

The discharge notice otherwise included 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, 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. (Exhibit 2.)

The appellant did not believe he was physically or mentally healthy enough to live in a shelter. He believed that he would return to using alcohol again if he were discharged to a shelter, and that he would die as a result. He testified that he is never threatening, and he gets along well with almost everyone at the facility. He acknowledged that he had been intoxicated twice in the past, but this has not been the case since the two incidents in 2021. He also admitted that he became upset when he came back to his room to find it was in disarray. He believed there was one particular staff member who was determined to get him kicked out for a misunderstanding from several years ago. He is given his oxycodone at the nurses' station and he takes it in front of them. He also testified that there was only a single bag and that it had nine pills in it, not 39. He testified that they were sleep supplements because he has night terrors. He recalled buying them at a CVS across the street from a community health center after an appointment there while he was waiting for a ride back to the nursing facility. The nursing facility representatives testified that their travel logs show that the appellant has not been brought to any outside medical appointments since Spring 2020 except for his recent hospitalization.

## Findings of Fact

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

1. The appellant has resided at the nursing-facility since the Spring of 2018, where he was transferred from the hospital following a stroke. (Testimony by the appellant; Exhibit 3, p. 8.)
2. The appellant's medical diagnoses include alcoholic cirrhosis of the liver with ascites, encephalopathy, alcohol dependence in remission, thrombocytopenia, type 2 diabetes, acute kidney failure, essential hypertension, obesity, muscle wasting and atrophy, attention and concentration deficit following cerebrovascular disease, anxiety, and depression. (Exhibit 3, p. 12.)
3. The appellant continues to receive physical and occupational therapies as well as psychological counseling at the facility. He is independent with his activities of daily living, though he often relies upon a wheelchair. (Exhibit 3, pp. 8, 17; testimony by the appellant.)
4. The appellant is authorized for: "Norco Tablet 5-325 MG (HYDROcodone-Acetaminophen) Give 1 tablet by mouth three times a day for pain"; "Prazosin HCl Capsule ... for night terrors"; and "MELATONIN TAB 3MG ... for insomnia." (Exhibit 3, pp. 20-21.)

5. The appellant was recently hospitalized after he appeared intoxicated. During his hospitalization, they did not test his blood-alcohol level, but they did test him for drugs. No oxycodone was found in his system. (Testimony by the respondent's representatives; Appeal No. 2209604, p. 5.)
6. On January 25, 2023, the nursing facility conducted a search of the appellant's room due to "inappropriate behavior and suspicion of alcohol use and environmental disruption." During a room search, they found "39 white, oval tablets ... [with no] markings or scoring ... ." (Exhibit 3, pp. 9-10.)
7. The room search was performed due to "suspicion of [the appellant] being under the influence of alcohol. No alcohol was found. [The appellant] was belligerent, accusatory, and verbally abusive towards staff conduct[ing] search." (Exhibit 3, p. 10.)
8. The discharge notice included the discharge location (albeit with typographical errors), 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, 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. (Exhibit 2.)
9. The only documentation from a physician regarding this discharge is:

On January 25, 2023, a room search was conducted due to [the appellant] having a change in mental status and slurred speech. During the room search, 39 white, oval pills were found. [The appellant] reported the pills were Melatonin. On January 26, 2023, [the appellant] was given a 14-day notice to discharge due to this event.

[The appellant] ambulates around the facility using his wheelchair.

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

(Exhibit 3, p. 8.)

## **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 both at 130 CMR 456.000 and 130 CMR 610.000.

A “discharge” is “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.” (130 CMR 456.002; see also 130 CMR 610.004.)

The requirements for a nursing facility discharge or transfer are:

(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 MassHealth agency 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;

(130 CMR 610.028(A)-(C) (emphasis added); see also 130 CMR 456.701(A).)

Typically, a nursing-facility must provide 30-days-notice of its intent to discharge. 130 CMR 610.029(A). An emergency discharge may proceed “as soon as practicable” in one of the following circumstances:

- (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 lived in the nursing facility for 30 days immediately before receipt of the notice.

(130 CMR 610.029(B) (emphasis added); see also 130 CMR 610.015(B)(4) (allowing 14 days to appeal emergency discharge notice).)

A nursing-facility resident who requests a hearing to dispute her discharge “pursuant to section 48 of chapter 118E, shall not be discharged or transferred from a nursing facility ... 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.”<sup>2</sup> (MGL Ch. 111, § 70E.)

This appeal must be APPROVED. Ultimately, Dr. Shih’s documentation in the appellant’s clinical record is insufficient to justify his discharge. In an expedited discharge notice, a physician must document that the resident is a danger to the health or safety of individuals in the nursing facility.<sup>3</sup>

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<sup>2</sup> The term “referee” in the statute refers to a Board of Hearings hearing officer.

<sup>3</sup> The documentation requirements differ slightly between 130 CMR 610.028(A)-(B) and 130 CMR 610.029(B). The language in 610.029(B) clearly requires that a physician document that the health and safety of individuals in the facility are endangered in order to proceed with an expedited discharge. The documentation requirements for a 30-day discharge notice could be interpreted to allow risk to others to be inferred, but this decision reserves judgment on that language.

Dr. Shih's documents that 39 white, oval pills were found in the appellant's room and that the appellant reported these to be melatonin. No mention is made of risk regarding others at the nursing facility, and there is also a lack of evidence regarding the risk posed by these pills. Even in the absence of testing being performed on these pills to identify if they were oxycodone, the nursing facility did not opine that they appeared similar to the oxycodone that they provided to the appellant. Their only testimony was that the melatonin handed out by the nursing facility was stamped, therefore the appellant could not have gotten this melatonin from the facility.

Furthermore, I have lingering concerns regarding the nursing facility's discharge planning. The facility's representatives explained that the appellant still qualifies for nursing-facility level of care, and that is why they are not discharging him under 130 CMR 610.028(A)(2). The facility did aver that they would not discharge unless a bed was available in a shelter in which the appellant would be able to receive visiting therapy services, and that the facility would not discharge until they had the necessary medical services in place for the member. However, it is unclear how well the nursing facility would be able to "provide[] sufficient preparation and orientation to the resident to ensure safe and orderly ... discharge" to a homeless shelter during an expedited discharge timeline. This decision makes no finding on this issue.

## **Order for the Nursing Facility**

Rescind the January 26, 2023 discharge notice. Do not discharge the appellant under this discharge 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.

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Christopher Jones  
Hearing Officer  
Board of Hearings

cc: Mark Nugent, Administrator, The Oxford Rehabilitation and Nursing Care Center, 689 Main Street, Haverhill, MA 01830

