Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

[redacted]

Appeal Decision:	Approved	**Appeal Number:**	2303783
Decision Date:	5/16/2023	**Hearing Date:**	05/11/2023
Hearing Officer:	Paul C. Moore		

Appellant Representative:
Pro se (by telephone)

Nursing Facility Representatives:
Michelle Clarke, administrator; Barbara Kelliher, R.N., director of nursing; Pilar Silva, director of social services; April Miller, substance abuse counselor; Inas Almasry, M.D., attending physician (all from Southeast Rehabilitation and Nursing Facility, 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:	Approved	**Issue:**	Expedited Nursing Facility Discharge
Decision Date:	5/16/2023	**Hearing Date:**	05/11/2023
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 30-Day Notice of Intent to Discharge Resident ("discharge notice") dated May 8, 2023, Southeast Rehabilitation and Nursing Center ("Southeast Rehab" or "the facility") notified the appellant that it intended to discharge him effective May 8, 2023 to [redacted] because "the safety of the individuals in the nursing facility is endangered due to the clinical or behavioral status of [the appellant]" (130 Code of Massachusetts Regulations (CMR) 610.028; Exhibit 1).[1] The appellant filed a timely appeal with the Board of Hearings (BOH) on May 8, 2023 (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 to the hospital because the safety of the individuals in the nursing facility is endangered.

[1] Although the discharge notice states that it is a 30-day notice, the hearing officer treats the notice as an expedited discharge notice and/or plan not to readmit the appellant following a hospitalization pursuant to 130 CMR 456.702(B) and (C), because it was issued two days following the appellant's involuntary hospital commitment.

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 social service progress notes and nursing progress notes, as well as a copy of a police report (Exh. 4). The facility's director of nursing, Ms. Kelliher, testified by telephone that the facility issued a notice of discharge to the appellant following his involuntary transfer to [redacted] via a Section 12 order on May 6, 2023.[2] She noted that on May 6, 2023, the appellant, who is [redacted], was involved in an altercation with an elderly roommate. She testified that two certified nursing assistants ("CNAs") witnessed the appellant strike his roommate with a closed fist in the torso following an argument. Ms. Kelliher noted that the appellant's roommate is a frail elder with diagnoses of intellectual disability, diabetes, Parkinson's disease, and a history of falls. Following this altercation, the appellant and his elderly roommate were separated, and police were called and responded. The elderly resident was assessed, but had no injuries. However, the elderly resident was shaking and stuttering with fear following the incident (Testimony).

Neither the appellant nor his roommate wished to press charges.

According to Ms. Kelliher, the appellant has a documented history of aggression and verbal outbursts at the facility, directed at both other residents and staff. Also, the appellant, who has a long history of substance abuse, has been found to be in possession of alcohol, marijuana and Kratom on a number of occasions. Further, weapons such as zip-ties and seat-belt rippers have been located in his room (Testimony, Exh. 4).

Ms. Clarke, the facility's administrator, testified that many residents and staff at the facility have

[2] M.G.L. c. 123, section 12(a) states: "Any physician who is licensed pursuant to section 2 of chapter 112 or qualified psychiatric nurse mental health clinical specialist authorized to practice as such under regulations promulgated pursuant to the provisions of section 80B of said chapter 112 or a qualified psychologist licensed pursuant to sections 118 to 129, inclusive, of said chapter 112, or a licensed independent clinical social worker licensed pursuant to sections 130 to 137, inclusive, of chapter 112 who, after examining a person, has reason to believe that failure to hospitalize such person would create a likelihood of serious harm by reason of mental illness may restrain or authorize the restraint of such person and apply for the hospitalization of such person for a 3-day period at a public facility or at a private facility authorized for such purposes by the department."

expressed that they are afraid of the appellant. He has told Ms. Clarke that he "does not like to be interrupted" and that he does not like to repeat himself (Testimony).

The appellant was admitted to the facility in [redacted] for short-term rehabilitation following a hospitalization for rhabdomyolysis and sepsis (Testimony, Exh. 4). His diagnoses, according to Ms. Kelliher and the medical records in evidence, are bipolar disorder, depression, psychotic disorder, attention-deficit hyperactivity disorder, and hypertension. He was initially admitted to the facility on intravenous antibiotics, and he completed physical therapy and occupational therapy at the facility over a year ago. He currently needs no assistance with his activities of daily living (ADLs) (Testimony).

Previously, after being sent out on another Section 12 by the facility, the appellant was prescribed Seroquel, an antipsychotic, at the hospital. He has refused this medication at the facility, and it has been discontinued. In addition, he is prescribed Metoprolol for hypertension, but he also refuses this medication (Testimony).

At the time of his hospitalization in [redacted], the appellant lived in a detox facility, [redacted]. He was found unconscious there, resulting in his hospitalization (Testimony).

Dr. Almasry, the facility's attending physician, stated that the appellant does not believe he has any psychiatric diagnoses. Also, in the past, the appellant has complained of pain, and had been prescribed opioids in the community. Initially, Dr. Almasry prescribed pain medication for him, but that medication has been discontinued. She asserted that the appellant was unsuccessful in getting into a methadone clinic.[3] Dr. Almasry stated the appellant told her he does not wish to live at the facility. The appellant gets one-to-one psychotherapy weekly, and is seen by a psychiatric nurse practitioner at the facility (Testimony).

The appellant testified by telephone that he did not strike his roommate on May 6, 2023. He stated that he has two roommates, and that the elderly roommate whom he is alleged to have struck was swearing at their other roommate. Out of anger, the appellant turned off the elderly resident's TV. He regrets doing so. The elderly resident then shoved the appellant into a wall. The appellant testified that he went to strike the appellant at that point, but realized he should not do so, and he stopped himself before making contact. The only witness to this version of events is the third roommate, whom he did not call to testify at this hearing (Testimony).

The appellant stated that he has struggled with alcohol abuse in the past, but he is in recovery. He denied ever being addicted to opioids. He last worked as a machinist in 2017 and 2018. He would like to get an apartment in the community and return to work, but he feels he is not ready. He has an anxiety disorder, for which he is prescribed Klonopin and Gabapentin. He acknowledged being in a detox/rehab facility for alcohol use for about 1 ½ years. He stated that he fell asleep with his feet on a table in his room while at the rehab facility. This resulted in rhabdomyolysis, according to the appellant, necessitating a hospital admission (Testimony).

[3] The appellant denied ever seeking admission to a methadone clinic, and stated that he has never abused opioids.

Prior to his admission to the detox/rehab facility, he lived with his sister in [redacted]. When the hearing officer asked whether he could return to live with his sister, he stated he cannot.[4] He stated that he would rather reside in a nursing home than to be homeless. He had planned to go with a facility staff member to the Registry of Motor Vehicles to get his Mass ID during the week of May 9, but due to his current hospitalization, that will be delayed (Testimony).

The appellant stated that he currently remains in the Emergency Room at [redacted]. He had a psychiatric consult there, and there are no plans to admit him. Ms. Kelliher, the director of nurses, stated that she spoke with a social worker at [redacted], Wendy, who informed her that the appellant will likely not be admitted there (Testimony).[5]

The appellant testified that he recently signed a no-harm agreement with the facility (in which he agreed to follow facility rules and take his prescribed medications), and gave a signed copy to the nurse unit manager on the unit where he resides. However, the facility representatives testified that they have not receive such a signed agreement.

Ms. Clarke, the facility administrator, stated that she does not expect [redacted] to keep the appellant for thirty days. She stated that corporate policy discourages the facility from designating homeless shelters as discharge locations, so she believed the most prudent course here was to issue a 30-day discharge notice and not to readmit the appellant to the facility. She stated that she hopes the hospital will be able to find an appropriate placement for the appellant (such as a homeless shelter).[6]

B. Content of the discharge notice/patient record

The 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 Board of Hearings, 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 30 days after the hearing officer's decision is received), 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).

[4] At the conclusion of the hearing, the hearing officer asked the appellant to what address the appeal decision in this case should be mailed; he specified that he wants his mother, who has an [redacted] address, to receive a copy of the appeal decision, despite that she is not the designated appeal representative in this case.

[5] Per the medical record provided by the facility (Exh. 4), the discharge notice was faxed to [redacted] on May 8, 2023, two days following the appellant's involuntary commitment to the hospital on May 6, 2023.

[6] Ms. Clarke testified that she did not realize that issuing an "expedited discharge notice" to the appellant was an option for the facility.

The patient record for the appellant (Exhibit 4) does not contain a progress note by Dr. Almasry or another physician explaining the reasons for the appellant's intended discharge.

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 facility, Southeast Rehab, since [redacted] (Testimony, Exh. 4).

2. The appellant's medical diagnoses include bipolar disorder, depression, psychotic disorder, attention-deficit hyperactivity disorder, and hypertension (*Id*.).

3. On May 6, 2023, the appellant, who is [redacted], was involved in an altercation with an elderly roommate witnessed by two certified nursing assistants ("CNAs"), who saw the appellant strike his roommate with a closed fist in the torso following an argument (*Id*.).

4. On May 6, 2023, the facility sent out the appellant on a Section 12 order to [redacted] for a psychiatric evaluation (Testimony, Exh. 4).

5. The appellant was admitted to Southeast Rehab following a hospital stay in June, 2021 for rhabdomyolysis and sepsis (Testimony, Exh. 4).

6. The appellant successfully completed physical therapy and occupational therapy at the facility, and is independent in performing his ADLs (Testimony).

7. Through a discharge notice dated May 8, 2023, the Southeast Rehab notified the appellant that it sought to discharge him effective May 8, 2023 to [redacted] because "the safety of the individuals in the nursing facility is endangered due to the clinical or behavioral status of [the appellant]" (Exh. 1).

8. The appellant filed a timely appeal of this notice with the BOH on September 27, 2021 (Exh. 2).

9. The appellant remains in the Emergency Room at [redacted] (Testimony).

10. The appellant has a documented history of aggression and verbal outbursts at the Southeast Rehab, directed at both other residents and staff (Testimony, Exh. 4).

11. The appellant, who has a long history of substance abuse, has been found to be in possession of alcohol, marijuana and Kratom on a number of occasions at the facility (Testimony, Exh. 4).

12. On other occasions, weapons such as zip-ties and seat-belt rippers have been located in the appellant's room (Testimony, Exh. 4).

13. Residents at the facility have stated that they are afraid of the appellant (Testimony).

14. In early 2021, the appellant resided at a detox/rehab facility, [redacted] (Testimony).

15. The appellant was found unconscious at the detox/rehab facility in 2021, resulting in his hospital admission (Testimony).

16. At Southeast Rehab, the appellant was prescribed Seroquel and Metoprolol, but he refused these medications (Testimony, Exh. 4).

17. The appellant does not believe he has any psychiatric diagnoses (Testimony).

18. The appellant has complained of pain and has sought pain medication in the past (Testimony).

19. Prior to being admitted to a detox/rehab facility, the appellant resided with a sister, but she will not allow him to live with her again (Testimony).

20. The appellant last worked at a job as a machinist in 2017 or 2018 (Testimony).

21. The appellant has anxiety about returning to work (Testimony).

22. Southeast Rehab does not generally designate homeless shelters as discharge locations on notices of discharge issued to residents, per corporate policy (Testimony).

23. There is no evidence that the appellant will be admitted as an inpatient at Good Samaritan (Testimony).

24. When he is discharged from Southeast Rehab, the appellant does not know where he will live (Testimony).

25. Southeast Rehab has provided little discharge planning for the appellant.

26. The discharge notice at issue in this case was faxed to the appellant at the hospital, but no copy of the notice was sent to an immediate family member or legal representative (Exh. 4).

27. The 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 Board of Hearings, 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 30 days after the hearing officer's decision is received), 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).

28. The patient record for the appellant does not contain a progress note by the facility's attending physician (or any other physician) explaining the reasons for the appellant's intended discharge (Exh. 4).

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**" (emphasis added). Similarly, 130 CMR 610.004 defines 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.

(Emphases 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.**

(Emphases 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. The appellant's testimony that he did not strike his elderly roommate on May 6, 2023 is not credible. The appellant's actions and words, as documented in the medical record, reflect a propensity for violence; his behavior toward other residents and staff does not create a therapeutic environment for residents, many of whom are elderly and fragile.

Further, the appellant clearly displays a lack of insight into his mental health and physical diagnoses that will impede his ability to re-enter the world outside of the nursing facility.

I also find that the discharge notice issued by the facility to the appellant meets the regulatory requirements set forth at 130 CMR 456.701(C) and 130 CMR 456.702.

However, the appellant's clinical record in evidence does *not* contain documentation by a physician containing the reasons for his intended discharge. Such documentation is r*equired* by

130 CMR 456.701(B)(2) and 130 CMR 456.702(B)(1), above.

In addition, while the discharge notice was faxed to the appellant at the hospital on May 8, 2023, the regulations at 130 CMR 456.702(C), above, require that when a discharge notice is issued as a result of a nursing facility's failure to readmit a resident following hospitalization or other medical leave of absence, the resident's family member or legal representative must also be provided with a copy of the discharge notice. There is no evidence that a family member of the appellant received a copy of the facility's notice not to readmit the appellant.

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)

Because I have found that the facility did not meet the requirements in the Nursing Facility Manual regulations regarding physician documentation and notice to a family member, I need not decide at this time whether the facility has provided sufficient preparation and orientation to the appellant to ensure his safe and orderly transfer or discharge from the facility to another safe and appropriate place. However, it is worth noting that the facility has provided little discharge planning to the appellant. Further, a hospital emergency room is not a place where the appellant can "live," particularly where the evidence shows that the hospital is not likely to admit him.

Based on the record and the above analysis, this appeal is APPROVED.

Order for Nursing Facility

Rescind notice of May 8, 2023, and readmit the appellant to the first available bed at the facility, if the appellant seeks re-admission.

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.

Paul C. Moore
Hearing Officer
Board of Hearings

cc: Michelle Clarke, Administrator, Southeast Rehabilitation and Nursing Facility, 184 Lincoln Street, North Easton, MA 02356