

# Office of Medicaid BOARD OF HEARINGS

**Appellant Name and Address:**



<b>Appeal Decision:</b>	Denied	<b>Appeal Number:</b>	2304583
<b>Decision Date:</b>	7/17/2023	<b>Hearing Date:</b>	07/07/2023
<b>Hearing Officer:</b>	Casey Groff, Esq.		

**Appearance for Appellant:**  
*Pro se*

**Appearances for Nursing Facility:**  
Tom Lynch, Administrator; Medford  
Rehabilitation & Nursing Center;  
Jill Carter, LSW, Medford Rehabilitation &  
Nursing Center;  
Elizabeth Bohen, LSW, Medford Rehabilitation  
& Nursing Center



*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>	Denied	<b>Issue:</b>	Nursing Facility Discharge
<b>Decision Date:</b>	7/17/2023	<b>Hearing Date:</b>	07/07/2023
<b>Nursing Facility Reps.:</b>	Tom Lynch, Administrator; Elizabeth Bohen, LSW; Jill Carter, LSW	<b>Appellant's Rep.:</b>	<i>Pro se</i>
<b>Hearing Location:</b>	Board of Hearings (Remote)	<b>Aid Pending:</b>	No

### 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 [REDACTED] 2023, the Medford Rehabilitation & Nursing Center ("the nursing facility") informed Appellant that it sought to discharge him from the facility because his actions endangered the health and/or safety of other individuals in the facility. See Exhibit 1 p. 3; 130 CMR 610.029(B). On June 5, 2023, Appellant filed a timely appeal of the discharge notice with the Board of Hearings. See Exh. 1, p. 2 and 130 CMR 610.015(B)(4). An attempt to discharge a resident from a nursing facility is valid grounds for appeal. See 130 CMR 610.032(C).

### Action Taken by Nursing Facility

The nursing facility sought to discharge Appellant because it determined that his actions endangered the health and/or safety of other individuals in the facility.

### Issue

The issue on appeal is whether the nursing facility met the statutory and regulatory requirements set forth under 130 CMR §§ 610.028, 610.029 and 42 CFR Ch IV, subpart B, 483.12(a) to discharge Appellant from the nursing facility pursuant to its discharge notice dated [REDACTED] 2023.

## Summary of Evidence

At the hearing, the Respondent, Medford Rehabilitation & Nursing Center (hereinafter “the nursing facility”) was represented by its Administrator and two social workers from the facility. Based on testimony and documentary submissions presented at hearing, the nursing facility offered the following evidence: Appellant is a MassHealth member under the age of 65 and a current resident of the nursing facility. In early 2022, Appellant was admitted to the facility following a hospitalization for cerebral infarction and elevated white blood cell count. See Exh. 3, p. 24. His medical history includes additional diagnoses of insomnia, hypotension, unsteadiness on his feet, cocaine abuse with intoxication, other psychoactive substance abuse, and altered mental status. See id. Appellant ambulates independently, he does not require assistance in performing activities of daily living (ADLs), and he does not have a skilled nursing need. Id.

The Administrator testified that the facility seeks to discharge Appellant because he poses a safety risk to the facility and its residents. Since his admission, Appellant has engaged in ongoing violations of facility policies for smoking, substance/alcohol use, and threatening staff members. Appellant has been caught smoking inside the facility and found to be in possession of cigarettes, lighters, and alcohol. Following each violation, the facility has re-educated Appellant on smoking policies, given warnings about the safety risk posed by his actions, reviewed the consequences of non-compliance, and suspended his smoking privileges. The Administrator explained that the facility has “tried everything,” however, Appellant has made no effort to correct his behavior. When confronted by staff, Appellant typically responds with a comment that “rules are meant to be broken.” He can also become outraged, for example, he has thrown furniture and threatened to punch him (the Administrator) in the face. The Administrator explained that most residents in the facility are elderly, and many use oxygen, thereby exacerbating the safety risk. The Administrator testified that Appellant’s behavior is so unsafe that he can “hardly sleep at night.” He is genuinely scared that Appellant will cause a fire, and someone will get seriously hurt.

The facility submitted into evidence portions of Appellant’s clinical record, including a series of progress notes and social work encounters that span from [REDACTED] 2022 through [REDACTED] 2023. The entries detail the specific instances of Appellant’s non-compliance, sometimes occurring several times per month, including, but not limited to, the following examples:

- August 2022: Appellant was caught stealing cigarettes several times in one day; when confronted, responded that “rules are made to be broken and he doesn’t follow rules.” Id. at 9. On a separate occasion, Appellant lied to staff and attempted to

sneak cigarettes into the facility. Id.

- October of 2022: Appellant was found smoking in the stairway, which is a restricted area and requires door code access to enter. Id. at 8, 13. According to the social worker, Appellant “would not confirm or deny if he knew the code [to the stairwell] or how he would have gotten access to it.” Id. at 13. Around this time, Appellant was found to be in possession of a lighter. Id. The activities director noted that Appellant “does not follow smoking policy, he likes to hide cigarettes and lighters” and that he will “take tools to unscrew windows to try and climb out.” Id. at 8. When informed about rules and safety, Appellant responded that he “doesn’t like rules and has been breaking rules since he was young. Id.

In a separate incident, staff informed Appellant that he could not participate in a smoke break.<sup>1</sup> Appellant “got agitated and started yelling at the staff using [vulgar] language...preceded to pick up a wooden outdoor rocking chair and flung it over the fence” and further noted that the “chair came close to another resident when he flung it.” Id. at 7.

- November 2022: Appellant’s smoking privileges were suspended after he told a staff member that he was planning to find left-over Halloween balloons to cover the security cameras to prevent the Administrator from being able to see him smoke in the stairwell. Id. When sanctioned, Appellant responded that he made the comment in jest, however the facility took the matter seriously given the safety implications.
- February of 2023: Appellant was caught smoking in the shower bathroom with the door locked. Id. at 6. When he finally opened the door per staff’s request, Appellant pulled his pants down to his knees, exposing himself, and staff observed the bathroom filled with smoke and smelling like cigarettes. Id. The activities director reported that Appellant subsequently became very upset, was yelling at her, threatened to call the news and the police, and threatened to punch the Administrator in the head. Id. at 6. A few days later, Appellant was found to be in possession of a pack of cigarettes, two lighters, and alcohol. Id. at 6, 17.

According to the record, Appellant has received ongoing counselling sessions with the licensed social worker. Id. at 11-21. During these sessions he is re-educated about the smoking and substance abuse policy; he is reminded that the consequences of not following policy is

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<sup>1</sup> This was due to the facility smoking policy that prohibits residents from joining smoking groups if they do not have their own cigarette as they are not allowed to borrow cigarettes from other residents. In this case, Appellant did not have any cigarettes of his own and was told he could not participate in the smoking break.

suspension and discharge planning; and given warnings about the safety risks posed by his actions.<sup>2</sup> Id. The social worker also documented concerns regarding Appellant's tendency to leave the facility from access points that require a code, and not communicating with staff when leaving the facility. Id. at 20.

The progress notes and clinical entries also demonstrate that Appellant has frequent contact with family members, primarily his son and daughter. The facility also referred to having communicated with Appellant's son following problematic behaviors and smoking violations. Id. at 7-20.

On [REDACTED] 2022, the facility social worker hand-delivered a notice to Appellant, informing him that the facility sought to discharge him to his son's residence on July 5, 2023 because "the health and/or safety of other individuals in the facility is endangered because of your actions." Id. at 3. The notice specified that the facts leading up to this determination included the "violation of smoking policy." Id. Appellant made a timely request to appeal the intended discharge. Id. at 5.

The facility submitted a letter written by its medical director, Dr. Nelson Aweh, M.D., dated July 5, 2023, opining that Appellant "no longer requires nursing home level of care; [he] is independent with ADLs and very capable of caring for himself in the community." Id. at 24. Additionally, notations in the clinical record, indicate that Appellant chooses to not participate in most facility activities; he ambulates on and off the unit; and he can walk independently without devices (although sometimes uses a walker). Id. at 8. At hearing, the facility representatives reiterated that Appellant is alert, oriented, independent with all aspects of care, and has no health concerns that would limit his ability to be safely discharged into the community or his son's home. The Administrator highlighted the fact that Appellant has had ongoing community privileges, allowing him to leave the facility as he pleases. Appellant frequently uses these privileges, often leaving the facility for long periods of time without apparent issue.

When asked how the facility selected the discharge location, the representatives explained that it was specifically requested by Appellant when discussing discharge plans. The Administrator explained that Appellant has many family members in the area he could choose to stay with, and he specifically requested his son's address. When asked about the level of communication the facility has had with the son, the social worker stated that Appellant refuses to let him call him, but that Appellant is in contact with him. The Administrator added that he has had numerous past communications with the son and found his son to be incredibly receptive, helpful, and involved in Appellant's care. The Administrator noted that the son is well-informed of Appellant's ongoing non-compliance and has been making efforts to secure an apartment for his father. He further noted that last fall, the facility made a similar effort to discharge Appellant to his son's home,<sup>3</sup> but

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<sup>2</sup> The facility submitted copies of its smoking policy signed on several dates by Appellant wherein he agreed to comply with the terms of the policy to have smoking privileges and acknowledged that any violations of the policy would result in potential consequences, including the loss of smoking privileges and discharge planning.

<sup>3</sup> The grounds for discharge involved the same grounds as the instant discharge notice.

ultimately rescinded the notice after being assured Appellant could secure his own apartment. Now, the facility seeks to re-issue the discharge notice as Appellant continues to engage in unsafe behavior. Although the son is actively making efforts to secure Appellant his own apartment, the facility cannot prolong Appellant's stay given the danger he poses to the residents and staff.

Finally, the social worker explained that the facility has explored alternative discharge options. For example, the facility has referred Appellant to MassHealth waiver programs and looked into public housing options. It is unlikely, however, that Appellant will be accepted into these programs due to the behavioral concerns noted by the facility, as well as entries on his criminal record that prevent him from securing public housing programs.

In response, Appellant testified that does not want to stay at the facility but wants to first find his own apartment before he is discharged. Appellant testified that he has spoken with his son about the discharge and his son does not want him to stay with him. His son used to rent apartments and has many contacts to help secure an apartment of his own. Appellant explained that after the hearing, he would be speaking with someone about potential apartment options nearby. Appellant did not refute the facility's testimony that he had been non-compliant with smoking and drinking policies but did say that his behavior as improved since his smoking privileges have been restored. Appellant agreed that he is mostly independent in the nursing facility. He agreed that he does not need to stay at the facility but wishes to have a designated apartment he can go to.

The Administrator refuted Appellant's assertion that his behavior has improved. The administrator explained that if anything, his behavior has gotten worse despite having been previously served with a discharge notice.

## **Findings of Fact**

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

1. Appellant is a MassHealth member under the age of 65 and a current resident of the nursing facility.

2. In early 2022, Appellant was admitted to the facility following a hospitalization for cerebral infarction and elevated white blood cell count.
3. His medical history includes additional diagnoses of insomnia, hypotension, unsteadiness on his feet, cocaine abuse with intoxication, other psychoactive substance abuse, and altered mental status.
4. Appellant ambulates independently, he does not require assistance in performing ADLs and he does not have a skilled nursing need.
5. Since his admission, Appellant has engaged in ongoing violations of facility policies for smoking, substance/alcohol use, and threatening staff members.
6. Appellant has been caught smoking inside the facility including in a locked shower room and stairwell (which is a prohibited area that requires a special access code to enter); he was also found to be in possession of cigarettes, lighters, and alcohol.
7. Following each violation, the facility has re-educated Appellant on smoking policies, given warnings about the safety risk posed by his actions, reviewed the consequences of non-compliance, and suspended his smoking privileges.
8. When confronted by staff, Appellant has become aggressive, threatened staff, and thrown furniture.
9. Most residents in the facility are elderly, and many use oxygen, thereby amplifying the risk Appellant poses by his disregard for smoking policy.
10. Appellant's clinical record includes a series of progress notes and social work encounters that span from January 2022 through April 2023, and which detail each specific instance of non-compliance, efforts made by the facility to correct Appellant's behavior, including re-educating Appellant on safety risks, the facility policies, and consequences of violating such policies.
11. Appellant has frequent contact with family members, primarily his son and daughter.
12. On [REDACTED] 2022, the facility social worker hand-delivered a notice to Appellant, informing him that the facility sought to discharge him to his son's residence on [REDACTED] 2023 because "the health and/or safety of other individuals in the facility is endangered because of your actions" and specifically noted that the facts leading up to this determination included his "violation of smoking policy."

13. During discharge planning, Appellant specifically requested that facility designate his son's address as the discharge location.
14. The facility's medical director, Dr. Nelson Aweh, M.D., wrote a letter, dated [REDACTED] 2023, entered into Appellant's clinical record, opining that Appellant "no longer requires nursing home level of care; [he] is independent with ADLs and very capable of caring for himself in the community."
15. Appellant choses to not participate in most facility activities; he ambulates on and off the unit; and he can walk independently without devices (although sometimes uses a walker); he is alert and oriented; independent with all aspects of care, and has no health concerns that would limit his ability to be safety discharged into the community or his son's home.
16. Appellant has had ongoing community privileges, allowing him to leave the facility as he pleases.
17. Appellant's son has been receptive to communications with the facility regarding his father's behavioral issues; he is involved in Appellant's care; and is actively making efforts to secure an apartment for his father.
18. Appellant does not want to stay at the facility but wants to first find his own apartment before he is discharged. Additionally, he has spoken with his son about the discharge notice and his son has indicated that he does not want him to stay with him.
19. The facility's social worker has explored alternative discharge options, such as public housing and waiver programs, however acceptance in these programs is unlikely due to Appellant's behavioral issues and past criminal history.
20. Last fall, the facility began discharge efforts due to the same behaviors and violations of facility policy; however ultimately rescinded the notice after Appellant and his son offered assurance that they would obtain an apartment for Appellant.

## **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.

MassHealth regulations at 130 CMR 610.028 set forth the requirements that a nursing facility must meet to initiate a transfer or discharge, 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.

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

When the transfer or discharge is sought due to the circumstances specified in (3) or (4) above, as it is here, the resident's clinical record must contain documentation by a physician to explain the transfer or discharge. See 130 CMR 610.028(B)(2). Furthermore, the nursing facility must demonstrate that it has complied with the statutory requirements under M.G.L. c.111, §70E, which states the following:

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.***

Based on the applicable laws and regulations, Appellant failed to demonstrate that the nursing facility inappropriately sought to discharge him to the community pursuant to its [REDACTED] 2023 discharge notice. The facility cited proper grounds for discharging a resident under subsections (3) and (4) of 130 CMR 610.028(A); specifically, that it considers Appellant's behavior to endanger the health and/or safety of the individuals in the nursing facility. The evidence indicates that the Appellant has an ongoing pattern of violating facility smoking policies, including smoking in the facility itself (e.g. bathroom and stairwell); accessing codes to enter restricted areas; possessing cigarettes, lighters, and alcohol, in violation of facility rules. Most residents in the facility are elderly, and many use oxygen, thereby amplifying the risk Appellant poses by his disregard for

smoking policy. When confronted about his actions, Appellant has demonstrated aggressive behavior, including making inappropriate comments, threatening staff members, and throwing furniture. The evidence indicates that Appellant's behavior has persisted despite being given numerous warnings and opportunities for correction. Appellant's clinical record included a summary of each instance of non-compliance, as well as an order by Appellant's physician indicating that Appellant may be discharged to the community and does not have a skilled need to remain at the facility. See Exh. 3, p. 24. The grounds for the intended discharge have been documented in Appellant's clinical record as required under 130 CMR 610.028(B).

In addition, the facility demonstrated that it satisfied the requirements of G.L. c.111, § 70E, above, by discharging Appellant to his son's home. Documentation from Appellant's physician indicated that he no longer requires a skilled level of care and is "very capable" of living in the community independently. Id. Appellant was involved in discharge planning and specifically requested that the facility designate his son's address as the discharge location. Appellant's son has been actively involved in Appellant's care and is making efforts to find an apartment that his father can reside in independently. While Appellant testified that his son does not want Appellant to live with him, the evidence indicates that the son has been in communication with the facility as early as last fall regarding its efforts to discharge him. There is no evidence in the record, nor was there any testimony by Appellant, indicating that he has health concerns that would otherwise prevent him from safely residing at his son's home. While Appellant understandably would prefer to have his own apartment secured before being discharged, there is ultimately no evidence to conclude the facility failed to ensure a safe and orderly discharge to a safe and appropriate location. See M.G.L. c.111, § 70E.

Based on the foregoing, the appeal is DENIED.

## **Order for Nursing Facility**

Continue with the discharge plan as stated in the [REDACTED] 2023 notice and adjust the date of discharge to occur no sooner than 30 days from the date of this decision pursuant to 130 CMR 610.030(A).

## **Notification of Your Right to Appeal to Court**

If you disagree with this decision, you have the right to appeal to Court in accordance with Chapter 30A of the Massachusetts General Laws. To appeal, you must file a complaint with the Superior Court for the county where you reside, or Suffolk County Superior Court, within 30 days of your receipt of this decision.

## **Implementation of this Decision**

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. 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.

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Casey Groff, Esq.  
Hearing Officer  
Board of Hearings

cc:

Respondent: Medford Rehabilitation & Nursing Center, ATTN: Attn: Tom Lynch, Administrator,  
300 Winthrop St., Medford, MA 02155